No. 24-1142

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 A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pacific Legal Foundation (PLF) respectfully seeks leave of this Court to file an amicus curiae brief in support of the Petitioner. PLF informed counsel of record for the parties of its intent to file the brief on May 28, nine days before the brief was due. Because Supreme Court Rule 37.2 requires ten days' notice, this notice was not timely under this Court's rules. Counsel regrets and apologizes for the error. After discovering the mistake, counsel wrote to the parties to explain what had happened. Petitioner consented to the filing of the brief, but Respondents did not respond to the message.

PLF frequently appears before this Court as counsel and amicus curiae in cases involving the Constitution, individual rights, and equal protection. It writes in support of Petitioner here because the questions presented raise issues of national importance in terms of ensuring that the right to equal protection under the laws is protected. Amicus PLF draws on its experience litigating similar cases to highlight to this Court the importance of incentives to make sure that constitutional equal protection is adequately enforced.

Because the delay in notice was modest and not prejudicial to the parties, and because of the unique perspective that Amicus would bring regarding the national importance of this Petition, PLF respectfully

asks this Court to grant it leave to file this amicus brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1) May the federal government rely on its litigation conduct to establish that its position is "substantially justified" under EAJA, when its pre-litigation conduct was objectively unreasonable?

2) Did the Sixth Circuit err in holding that the government's position was substantially justified, given the strict scrutiny standard applicable to race discrimination?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is the leading public interest legal foundation seeking to vindicate the principles of individualism, equal protection under the law, property rights, and separation of powers. PLF attorneys have participated as lead counsel in various cases before this Court. *See, e.g.*, *Tyler v. Hennepin County*, 598 U.S. 631 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Knick v. Township of Scott*, 588 U.S. 180 (2019). PLF lawyers also represented plaintiffs around the country in challenges to Section 1005 of the American Rescue Plan Act of 2021, the underlying subject of the litigation in this case. *See Wynn v. Vilsack*, No. 3:21-cv-514 (M.D. Fla.); *Kent v. Vilsack*, No. 3:21-cv-540 (S.D. Ill.); *McKinney v. Vilsack*, No. 2:21-cv-212 (E.D. Tex.); *Dunlap v. Vilsack*, No. 2:21-cv-942 (D. Or.); *Tiegs v. Vilsack*, No. 3:21-cv-147 (D.N.D.). As a nonprofit legal organization, PLF has an interest in the standards that are applied to the award of attorney fees under the Equal Access to Justice Act (EAJA).

SUMMARY OF ARGUMENT

This Court should grant the Petition to advance the public interest in ending race discrimination. This case involves a federal program that denied loans to farmers solely based on race. The Constitution squarely forbids such discrimination. But

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[1] Counsel of record for all parties received nine days' notice of Amicus's intent to file this brief. Sup. Ct. R. 37.2. No person or entity, other than Amicus and its counsel, authored the brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

the constitutional guarantee of equal protection is not self-executing. If Americans' rights to equal treatment are to be protected against governmental incursion, those discriminated against must be willing to sue, and there must be lawyers willing to represent them. The EAJA was enacted to make sure that lawyers who bring meritorious cases against the government can receive attorney fees when the government's position is not substantially justified. Its purpose is thus to align lawyers' private and clients' private interests with the public interest in protecting constitutional rights—such as ensuring equal protection under the laws. The decision below is at odds with the EAJA's text and history and also undermines incentives for the protection of core constitutional rights. This Court should grant the Petition to ensure the EAJA is correctly interpreted and enforced.

REASONS FOR GRANTING THE PETITION

I. This Petition would advance the public interest in eliminating "all" racial discrimination.

The constitutional guarantee that individuals should be treated as individuals and not on the basis of their membership in racial groups is a cornerstone of American law. To its proponents, the Equal Protection Clause of the Fourteenth Amendment represented a "foundational principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws." Cong. Globe, 39th Cong., 1st Sess., 431 (1866) (statement of Rep. Bingham). This Court has recognized that the principle of equality before the law embodied in the

Equal Protection Clause also applies against the federal government and its agencies through the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

The principle of equality before the law resounds through more recent Supreme Court decisions: *Palmore v. Sidoti*, for example, holds that the "core purpose" of equal protection is to "do away with all governmentally imposed discrimination based on race." 466 U.S. 429, 432 (1984) (footnote omitted). "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) (Roberts, C.J., concurring). "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). Most recently, this Court struck down race preferential admissions schemes at Harvard University and the University of North Carolina, emphasizing that the Constitution's goal of "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023).

Despite the importance of this "foundational principle," this case arose out of the federal government's attempt to implement overt race discrimination. Petitioner Holman brought a constitutional challenge to Section 1005 of the American Rescue Plan Act of 2021, which would have provided debt relief to "socially disadvantaged" farmers. Pub. L. No. 117-2, § 1005(a)(2), 135 Stat. 4 (2021). The Act defined "socially disadvantaged" farmers as those who were members of a group that has been "subjected to racial and ethnic prejudice." 7

U.S.C. § 2279(a)(5)-(6) (incorporated by Pub. L. No. 117-2, § 1005(b)(3)). The USDA came up with a list of racial groups that qualified as socially disadvantaged, which did not include Holman's group. In other words, Holman was ineligible for debt relief under this law solely because of his race, whereas farmers that fell into preferred racial groups were offered debt relief.

Such blatant race discrimination is squarely forbidden by the Constitution, and indeed every court to consider the merits (under the likelihood-of-success preliminary injunction standard) recognized that Section 1005 was likely unconstitutional and involved obvious racial discrimination without the kind of justification and narrow tailoring necessary to survive strict scrutiny. *See Holman v. Vilsack*, No. 21-cv-1085, 2021 WL 2877915 (W.D. Tenn. July 8, 2021); *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1276 (M.D. Fla. 2021); *Miller v. Vilsack*, No. 4:21-cv-595, 2021 WL 11115194 (N.D. Tex. July 1, 2021); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 478 (E.D. Wis. 2021). Put simply, Section 1005's unconstitutionality was not a particularly close call, and Congress' eventual repeal was unsurprising, given the tide of decisions against it. *See* Inflation Reduction Act of 2022, § 22008, Pub. L. No. 117-169, 136 Stat. 1818. Yet that repeal should not overshadow the lack of any substantial justification for enacting and defending Section 1005 in the first place.

Unlawful attempts at race discrimination by the federal government are unfortunately too commonplace. In addition to representing many

farmers in challenges to Section 1005,[2] Amicus PLF also represents a service-disabled veteran in a challenge to a race-preferential program administered by the Small Business Administration. *See* Compl., *Hierholzer v. Guzman*, No. 2:33-cv-00024 (E.D. Va. Jan. 18, 2023).[3] The American Rescue Plan Act of 2021 not only created the racially discriminatory debt relief program in Section 1005, but also created the Restaurant Revitalization Fund, which used racially discriminatory prioritization for COVID funding relief. *See Vitolo v. Guzman*, 999 F.3d 353, 360-66 (6th Cir. 2021) (granting a preliminary injunction). And the Inflation Reduction Act of 2022—which repealed Section 1005—itself created the Minority Business Development Agency (MBDA), which implemented an unconstitutional race-based presumption of social disadvantage. *See Nuziard v. Minority Business Dev. Agency*, 721 F. Supp. 3d 431, 509 (N.D. Tex. 2024) (permanently enjoining MBDA's use of racial and ethnic classifications).

In yet other instances, the federal government unlawfully pressures others into engaging in race discrimination. In February 2024, the Federal Communications Commission revived a rule that requires broadcasters with five or more employees to annually collect and publicly report information about their employees' race. *See In re Review of the*

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[2] *See Wynn v. Vilsack*, No. 3:21-cv-514 (M.D. Fla.); *Kent v. Vilsack*, No. 3:21-cv-540 (S.D. Ill.); *McKinney v. Vilsack*, No. 2:21-cv-212 (E.D. Tex.); *Dunlap v. Vilsack*, No. 2:21-cv-942 (D. Or.); *Tiegs v. Vilsack*, No. 3:21-cv-147 (D.N.D.)

[3] Another district court has already concluded that SBA's program violates equal protection. *See Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 2:20-cv-00041, 2023 WL 4633481 (E.D. Tenn. July 19, 2023).

Commission's Broadcast & Cable Equal Employment Opportunity Rules and Policies, FCC 24-18, 2024 WL 770889 (rel. Feb. 22, 2024). This rule is a thinly veiled attempt to do indirectly what the FCC cannot do directly: pressure stations into race-based hiring practices. *See, e.g.*, *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001) (holding that FCC racial diversity/balancing mandate violated equal protection). PLF represents a media company in a challenge to that rule. *See theDove Media, Inc. v. FCC*, No. 24-60407 (5th Cir.).

Scholars have documented the ubiquity of race-preferential programs at the federal level. Michael Rosman has identified race preferential programs in the Small Business Administration, the Department of Agriculture, the Minority Business Development Agency, the Environmental Protection Agency, and the Department of Transportation.[4] Professor George LaNoue has documented racial discrimination in federal programs at the Departments of Agriculture and Transportation.[5] And reports prepared by the Wisconsin Institute for Law and Liberty have identified numerous federal programs and initiatives that provide benefits or preferences based on race.[6]

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[4] Michael E. Rosman, *The Language of Race and Sex Preferences in Government Contracting and Benefits* (Nov. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5026705.

[5] George R. LaNoue, *The Demise of Procurement Disparity Studies?* (Oct. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4984098.

[6] Wisc. Inst. for Law & Liberty, *Roadmap to Equality*, https://will-law.org/wp-content/uploads/2025/02/Equality-Agenda_pdf-2.7.25.pdf (last visited June 4, 2025); Wisc. Inst. for Law & Liberty, *Roadmap to Equality: Healthcare* (2025),

While the current presidential administration has taken executive actions to halt some instances of race discrimination, any president with a different policy agenda could easily undo those actions. Given the unfortunate prevalence of racially discriminatory actions by the federal government, the public interest in granting this case to deter the federal government from enacting and enforcing discriminatory laws remains significant.

II. Public interest lawyers play a key role in promoting equal protection

The Constitution's guarantee of equal protection is not self-executing. Realizing its full promise requires the effort of lawyers and the clients they represent.

> Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances. . . . For such a group, association for litigation may be the most effective form of political association.

NAACP v. Button, 371 U.S. 415, 429-31 (1963).

As a practical matter, a would-be plaintiff or defendant will often take action to vindicate or defend those rights only if he does not have to bear the full cost himself. As early as 1920, the American Civil Liberties Union took pro bono clients to defend and preserve constitutional rights such as due process, equal protection, and free speech. Twenty years later, the

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https://will-law.org/wp-content/uploads/2025/04/NEW_FINAL_WILLs-Roadmap-to-Equality-—-55-RB-HHS-Federal-Funding-Initiatives-Final.pdf.

NAACP Legal Defense Fund was founded to fight for civil rights. Indeed, it led the litigation campaign that culminated in *Brown v. Board of Education*. *See* Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 Law & Soc. Inquiry 62, 64 (2014). These two organizations' successes inspired others to found similar organizations, like PLF, to litigate for causes important to them and their donors. *Id.*

Despite their differing views on law and policy, all these organizations recognize the problem of people who have suffered violations of their constitutional rights being unable to afford to pay for legal representation. Nonprofit public interest law firms address this problem by providing free counsel to persons with meritorious constitutional claims.

Justice Ruth Bader Ginsburg, a well-known progressive, hailed the rise of conservative and libertarian public interest firms: "Competition can be a healthy thing in the pro bono sphere," she said in a 2001 speech at the University of the District of Columbia.[7] She acknowledged that organizations of different ideological orientations prioritize enforcement of constitutional rights differently: "If an ACLU lawyer thinks first of the privilege against self-incrimination when one mentions the Fifth Amendment, so the Pacific Legal Foundation lawyer may think first of that Amendment's declaration that private property shall

[7] Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers Who Care*, Joseph L. Rauh Lecture, Apr. 9, 2001, supremecourt.gov/publicinfo/speeches/sp_04-09-01a.html.

not be taken for public use without just compensation."[8] Ginsburg praised this diversity within the public interest world as vital for ensuring the full range of constitutional rights are protected: "Our system of justice works best when opposing positions are well represented and fully aired. I therefore greet the expansion of responsible public-interest lawyering on the conservative side as something good for the system, and hardly a development to be deplored."[9]

Ginsburg's predecessor on the Court, Justice Thurgood Marshall, similarly recognized the social importance of public interest lawyering but saw lack of funding as a major obstacle to its ultimate success. He observed:

> Although public interest law has grown and has gained wider acceptance, it still faces an uncertain future. The major problem is funding. Even though public interest lawyers usually will accept far lower salaries than they could earn representing well-to-do clients, substantial funds are necessary to make a highly professional public interest practice possible. Yet almost by definition, public interest lawyers represent persons or groups who cannot easily compete in the ordinary market for legal services. . . . If our society believes, as I believe, that all viewpoints should have access to the legal process, then we must search for ways to assure

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[8] *Id.*

[9] *Id.*

that public interest law develops a secure financial base.[10]

III. The EAJA provides important incentives to ensure rights are protected against federal government intrusion.

The Equal Access to Justice Act was enacted to "diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees." App. 124a-125a. As Senator Dennis DeConcini (D-Arizona) said when introducing the Act:

> 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.

App. 150a-151a.

The first version of the EAJA had a sunset provision, requiring Congress to repromulgate the same statute three years later. During the 1984 hearings

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[10] Foreword *in* The Ford Foundation, *Public Interest Law: Five Years Later* 7-8 (1976), https://files.eric.ed.gov/fulltext/ED124473.pdf.

about whether to renew the EAJA, members of Congress spoke about the statute's purpose in similar terms. Senator Chuck Grassley (R-Iowa) said that "the primary purpose of the EAJA" was to create proper incentives:

> [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.

App. 155a. Further, in enacting the EAJA, "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." App. 156a (cleaned up).

The Petition addresses the EAJA's substantial justification exception, under which a court may not award fees to a prevailing party in a civil action against the United States if it "finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). This Court has held that the government is substantially justified only when its "position" is "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Correctly interpreting and applying that exception is exceptionally important, since whether attorney fees are available in a case affects the incentives of government agencies, affected parties, and their lawyers.

As discussed in the Petition, the Courts of Appeals are split on the question of whether the federal government may rely on its litigation conduct to establish that its position is substantially justified under the EAJA, when its pre-litigation conduct was objectively unreasonable. Petition at 14-22.

Not only are the circuits split on the issue, but the decision below likely took the wrong side of the split. Senator Grassley addressed this very issue during congressional hearings on the 1984 EAJA enactment, interpreting EAJA much as Petitioner does. In his view,

> 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 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.

App. 156a. As Senator Grassley noted, there are "numerous gross examples of the results that obtain from consideration of only the government's 'litigation' position." App. 156a.

Likewise, as the dissenting Sixth Circuit judges below recognized, establishing proper incentives is important to deter federal agencies from discriminating in the future. "[I]f 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." App. 12a-13a

(Thapar, J., dissenting). "Shaping federal agencies' incentive structures when they consider whether to racially discriminate is exceptionally important." *Id.*

Equally important, an overbroad interpretation of "substantial justification" will deter victims of government discrimination from attempting to vindicate their rights. As attorneys for Amicus PLF have learned through our own work, being a client in an equal protection case can be challenging. Our clients can face anxiety-provoking uncertainty about how their case will be resolved. Many lack the funds to pay for private counsel to litigate a discrimination claim, which can take years to resolve as it wends its way through the trial and appellate courts. Some face adverse publicity. The gratuitous and frequently personal hostility directed at Abigail Fisher, the plaintiff in one of the most prominent discrimination cases of the last quarter century, would give anyone pause about filing a similar claim. *See Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016); *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013). A robust interpretation of the EAJA's substantial justification exception may not ultimately solve these problems. But it does make bringing an equal protection case against the federal government more of a realistic possibility and thus mitigates these challenges.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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