

# WHY COURTS ERRED WITH ARPA SECTION 1005, AND WAYS TO IMPROVE ACCESS TO CREDIT FOR SOCIOALLY DISADVANTAGED FARMERS AND RANCHERS GOING FORWARD

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#### ABSTRACT

*Discrimination against SDFRs in agricultural lending has occurred over many decades and is well-documented. From administrative delay tactics to outright refusal to grant loans, intentional discrimination in agricultural lending held SDFRs back from owning and operating farms. While the federal government created and expanded lending programs to benefit farmers, SDFRs were denied access to financing, and were left behind.*

*The lasting effects of past discrimination are still felt by SDFRs today. Various studies and analyses indicate the existence of significant disparities. SDFRs are denied loans far more often than white borrowers, even under modern underwriting standards. SDFRs face higher interest rates and longer processing times. SDFRs struggle with higher delinquency, lower credit scores, and collateral complications. These disparities are not the result of chance, but are the direct result of years of discriminatory lending practices compounding over time.*

*This Note discusses three ways to support SDFRs with contemporary challenges. First, courts erred in finding that Section 1005 of the American Rescue Plan Act violated the Equal Protection Clause. Courts should correct this error by acknowledging that using debt forgiveness to help correct well-documented discrimination by the government toward SDFRs that occurred over many years constitutes a compelling government interest. Second, the CFPB's interim final rule implementing Section 1071 of Dodd-Frank should not be repealed. Through enhanced demographic data collection, this rule would help to better identify, track, and correct racial disparities in the agricultural lending space. Third, lawmakers should reintroduce key parts of the Justice for Black Farmers Act of 2023 dealing with heirs' property, FSA loan eligibility, and preventing future discrimination.*

*Finally, this Note serves as a rebuke of the notion that past discrimination against SDFRs is "too attenuated from any present-day lingering effects," and is a call to continue pursuing justice for past discrimination.*

## I. INTRODUCTION

Since the infamous broken promise of “forty acres and a mule” in 1865,<sup>1</sup> Socially Disadvantaged Farmers and Ranchers (SDFRs) have faced an unlevel playing field where discrimination has restricted their economic advancement.

Discrimination in agricultural lending has been particularly impactful in holding back SDFRs. As the federal government created and expanded agricultural lending programs to benefit farmers over the course of the twentieth century, SDFRs were consistently—and often intentionally—denied full use of these lending programs, reducing their ability to obtain capital to grow and maintain their farming operations.<sup>2</sup> Meanwhile, white farmers were provided with the advantage of unimpeded access to credit from the federal government.<sup>3</sup>

The effects of this unequal treatment have carried through the decades and persist to this day. Overall SDFR farm ownership declined significantly over the years, and is currently miniscule compared to years past.<sup>4</sup> The farms they do own tend to be much smaller in size compared to non-SDFRs.<sup>5</sup> SDFRs also continue to be denied agricultural loans at higher rates than white borrowers, while being approved for loans far less often.<sup>6</sup> SDFRs struggle more with repayment and default compared to non-SDFRs.<sup>7</sup> These disparities in agricultural lending and credit do not exist by chance; they are the direct consequence of past discriminatory practices, and SDFRs are still trying to catch up.<sup>8</sup>

In recent years, new obstacles have arisen for SDFRs involving agricultural credit. Most notably, courts rejected debt forgiveness targeted at SDFRs,

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1. Nadra Kareem Nittle, *The Short-Lived Promise of ‘40 Acres and a Mule’*, HISTORY (Jan. 31, 2025), <https://www.history.com/articles/40-acres-mule-promise> [<https://perma.cc/8XV4-YJ5J>].

2. See discussion *infra* Section II.B.

3. See discussion *infra* Section II.B.

4. U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-539, AGRICULTURAL LENDING: INFORMATION ON CREDIT AND OUTREACH TO SOCIALLY DISADVANTAGED FARMERS AND RANCHERS IS LIMITED 24–26 (2019).

5. *Id.*

6. See Ximena Bustillo, *In 2022, Black Farmers Were Persistently Left Behind from the USDA’s Loan System*, NPR (Feb. 19, 2023, at 10:36 ET), <https://www.npr.org/2023/02/19/1156851675/in-2022-black-farmers-were-persistently-left-behind-from-the-usdas-loan-system> [<https://perma.cc/2CZ2-DXSV>].

7. See Marie-Cécile Vekemans, *Loan Survival: Are Socially Disadvantaged Farmers More Likely to Default or Pay in Full?* 64 (Dec. 2022) (M.S. thesis, University of Arkansas) (on file with ScholarWorks, University of Arkansas), <https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=6299&context=etd> [<https://perma.cc/4R3L-V9JG>].

8. *Id.*

concluding it violated equal protection rights of white farmers.<sup>9</sup> These decisions call into question the future viability of credit programs targeting SDFRs.<sup>10</sup> Additionally, other attempts by Congress to provide assistance to SDFRs have stalled repeatedly, leaving the status quo in place.<sup>11</sup>

In this Note, I argue that three approaches should be taken to further support SDFRs in dealing with contemporary challenges faced in agricultural lending. First, courts should acknowledge that debt forgiveness targeting SDFRs serves a compelling governmental interest in rectifying past wrongs, satisfying strict scrutiny. Second, in order to improve demographic data collection in agricultural lending, the Consumer Financial Protection Bureau's (CFPB) interim final rule implementing Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) should not be repealed, but instead should be fully implemented in its current form. This would allow for data collection and reporting for private loans to small businesses, including farm loans.<sup>12</sup> The availability of data will be useful to enhance tracking and research of existing disparities related to SDFRs obtaining agricultural loans and any progress going forward. Finally, lawmakers should reintroduce portions of the Justice for Black Farmers Act of 2023, and be willing to isolate the most impactful policy proposals and separate them out if necessary.

## II. SDFRS: DEFINITION AND BACKGROUND WITH AGRICULTURAL LENDING

### *A. Definition of SDFRs*

SDFRs are defined in two different sections of United States Code.<sup>13</sup> First, 7 U.S.C. § 2279 defines SDFRs as “a farmer or rancher who is a member of a socially disadvantaged group,” and defines a socially disadvantaged group 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.”<sup>14</sup> The second definition, in 7 U.S.C. § 2003, includes gender in its definition of a socially disadvantaged group.<sup>15</sup>

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9. *See* *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1282 (M.D. Fla. 2021).

10. *Id.* at 1286.

11. *See generally* Justice for Black Farmers Act of 2023, S. 96, 118th Cong. (2023).

12. *See* discussion *infra* Section IV.B.

13. 7 U.S.C. § 2279(5)–(6); 7 U.S.C. § 2003(e).

14. 7 U.S.C. § 2279(5)–(6).

15. *Id.* § 2003.

The USDA considers its own definition of SDFRs.<sup>16</sup> According to the USDA, SDFRs include “African Americans, American Indians, Alaskan Natives, Asians, Hispanics, Pacific Islanders, refugees, immigrants, and groups as determined by the Secretary of Agriculture.”<sup>17</sup> Notably, this USDA definition does not include gender, but women are included under some USDA programs.<sup>18</sup>

### *B. Brief Background of SDFRs and Agricultural Lending*

Discrimination against SDFRs through agricultural lending has occurred in various forms over many decades. This history of discrimination toward groups such as Black, Asian, Latino, and Native American farmers is well-documented.<sup>19</sup> Much of it is overt, such as denying loan applications or offering worse loan terms based on race.<sup>20</sup> Such discrimination in lending occurred both in the private sector and within government agencies.<sup>21</sup>

More subtle forms of discrimination occurred as well. Administrative discriminatory tactics were common within the USDA, such as “delaying loans until the end of the planting season, approving only a fraction of loan requests, [and] denying crop disaster payments that white farmers got routinely.”<sup>22</sup> Other methods used by Farm Service Agency (FSA) county officers included claiming

16. RENÉE JOHNSON, CONG. RSCH. SERV., R46727, *DEFINING A SOCIALLY DISADVANTAGED FARMER OR RANCHER (SDFR)*: IN BRIEF 2 (2021).

17. *Id.*

18. *Id.*

19. *See generally* PETE DANIEL, *DISPOSSESSION: DISCRIMINATION AGAINST BLACK FARMERS IN THE AGE OF CIVIL RIGHTS* (2013) (extensively discussing various forms of discrimination against black farmers during the civil rights era); *see also* ALYSSA R. CASEY, CONG. RSCH. SERV., R46969, *RACIAL EQUITY IN U.S. FARMING: BACKGROUND IN BRIEF 7–8* (2021) (describing how historical literature shows many examples of explicit discrimination in agricultural lending).

20. *See* DANIEL, *supra* note 19, at 17–18.

21. *See* Abril Castro & Caius Z. Willingham, *Progressive Governance Can Turn the Tide for Black Farmers*, CTR. FOR AM. PROGRESS (Apr. 3, 2019), <https://www.americanprogress.org/article/progressive-governance-can-turn-tide-black-farmers/> [<https://perma.cc/G3FP-DZJL>] (describing the history of discrimination from private and government lenders); *see also* U.S. COMM’N ON CIV. RTS., *THE DECLINE OF BLACK FARMING IN AMERICA 8–10* (1982), <https://www.usccr.gov/files/historical/1982/82-018.pdf> [<https://perma.cc/F5W8-M33J>] (describing past discrimination by the USDA in agricultural lending).

22. Roger Thurow, *Black Farmers Plow the Path to Washington Seeking Paydirt*, WALL ST. J. (May 1, 1998), <https://www.wsj.com/articles/SB893900013990577500>; Wade Goodwyn, *Hispanic Farmers Fight to Sue USDA*, NPR (Oct. 12, 2009, at 11:58 ET), <https://www.npr.org/2009/10/12/113730694/hispanic-farmers-fight-to-sue-usda> [<https://perma.cc/5EN4-83S3>].

there was no program funding, refusing to help minority farmers complete applications, claiming they never received an application, or failing to process loan applications.<sup>23</sup> The various delay tactics were especially damaging to SDFRs because if loans were delayed until after planting season, farmers would miss their planting windows, which negatively impacted their yields and revenues.<sup>24</sup>

By the mid-1960s, it was clear that white farmers in the South were making meaningful advances thanks in part to the availability of federal loans.<sup>25</sup> A 1965 report from the United States Commission on Civil Rights presented data indicating that white farmers had increased their incomes, expanded their farm sizes, and improved their farm housing.<sup>26</sup> However, at the same time, “[a] quarter of a million Negro farmers [stood] as a glaring exception to this picture of progress.”<sup>27</sup> The Commission on Civil Rights analyzed loan data from the Farmers Home Administration (a discontinued federal agency that was transferred into the current Farm Service Agency), and found that the average loan amount granted to white farmers was significantly higher than the average loan amount to Black farmers of the same net worth.<sup>28</sup> While federal loan programs were helping to lift white farmers from poverty in the South, minority farmers were denied the same access to capital, and were left behind as a result.

Despite heightened awareness of unequal access to credit back in 1965, such racial disparities remained present in agricultural lending programs into the 1990s. The USDA released a civil rights report in 1997 that identified continued discrimination within its lending programs.<sup>29</sup> The report referenced studies finding lower participation by minorities in FSA programs, and lower loan approval rates for minorities compared to white farmers.<sup>30</sup> Several states showed longer processing times for minority applications, some as high as three times longer than

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23. See CASEY, CONG. RSCH. SERV., *supra* note 19, at 7.

24. *Id.*

25. See U.S. COMM’N ON CIV. RTS., EQUAL OPPORTUNITY IN FARM PROGRAMS: AN APPRAISAL OF SERVICES RENDERED BY AGENCIES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 16 (1965), <https://files.eric.ed.gov/fulltext/ED068206.pdf> [<https://perma.cc/89CV-2QKW>].

26. *Id.*

27. *Id.*

28. *Id.* at 77–78.

29. U.S. DEP’T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE: A REPORT BY THE CIVIL RIGHTS ACTION TEAM 21 (1997), <https://acresofancestry.org/wp-content/uploads/2021/01/CRAT-Report-.pdf> [<https://perma.cc/W7AL-ZKL3>].

30. *Id.*

white applicants.<sup>31</sup> The report also presented content from several listening sessions held by USDA, where minority farmers overwhelmingly voiced frustration about rampant discriminatory practices.<sup>32</sup> Distrust in the USDA among minority farmers had become so bad that many respondents blamed the government for the severe decline in minority farm ownership.<sup>33</sup>

Not only did discrimination over the years directly prevent SDFRs from obtaining adequate credit, but the knowledge of discrimination itself became a deterrent, causing many SDFRs to refrain from seeking loans through the USDA altogether.<sup>34</sup> The reluctance to seek credit from government agencies only worsened the situation for SDFRs.

All of this reached an inflection point in the late 1990s with a series of class action lawsuits. In *Pigford v. Glickman*, the Black plaintiffs alleged the USDA had violated the Equal Credit Opportunity Act (ECOA) by engaging in discriminatory lending practices such as denying loan applications, delaying the processing of applications, and failing to address complaints regarding such conduct.<sup>35</sup> The resulting consent decree provided for direct payments and debt relief estimated to be at least \$2.25 billion, the largest civil rights settlement in United States history at the time.<sup>36</sup> In 2010, the federal government announced a settlement of \$1.25 billion in claims known as *Pigford II* after multiple claims were consolidated into one case in *In re Black Farmers Discrimination Litigation*.<sup>37</sup>

Following *Pigford*, Native American farmers sued in 1999, alleging the USDA had engaged in a pattern of discrimination against Native Americans, granting them fewer loans than white farmers, and including “onerous terms that were not imposed on white farmers.”<sup>38</sup> This led to a long-running series of *Keepseagle* cases that culminated in a settlement agreement in 2011.<sup>39</sup> In 2000 and

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31. *Id.*

32. *Id.*

33. *Id.* at 14.

34. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-539, *supra* note 4, at 29.

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

36. *Id.* at 95.

37. *In re Black Farmers Discrimination Litigation*, 856 F. Supp. 2d 1, 13–14 (D.D.C. 2011); TADLOCK COWAN & JODY FEDER, CONG. RSCH. SERV., RS20430, *THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS* 7 (2013).

38. Seventh Amended Class Action Complaint, *Keepseagle v. Johanns*, 236 F.R.D. 1, (D.D.C. 2006) (No. 1:99CV03119), 2006 WL 4507537.

39. *NCAI Calls Keepseagle Settlement between American Indian Farmers and USDA “Long Awaited Justice”*, NAT’L CONG. OF AM. INDIANS (Oct. 19, 2010), <https://www.ncai.org/news/ncai-calls-keepseagle-settlement-between-american-indian-farmers-and-usda-long-awaited-justice> [<https://perma.cc/WR5P-7ZC7>].

2001, the USDA again faced lawsuits from farmers and ranchers over discriminatory lending practices, this time by Hispanic and women farmers, respectively.<sup>40</sup> These groups were unsuccessful in their attempts to obtain class status in *Garcia v. Vilsack* and *Love v. Veneman*, and settlement agreements ensued.<sup>41</sup>

It is important to note that even though these lawsuits resulted in substantial settlements, many members of the classes never received settlement payments.<sup>42</sup> Moreover, the reality is the effect of past discriminatory practices could never be truly rectified by these settlements.<sup>43</sup> Many SDFRs that experienced such discrimination may have previously passed away, exited farming altogether, or suffered generational economic setbacks that could not be undone by the settlement amount.<sup>44</sup>

### C. Current Challenges Facing SDFRs in Agricultural Lending

Despite years of progress in identifying discriminatory effects on SDFRs and working to reverse and improve these negative effects, the persisting impact of past discrimination continues to create hurdles for SDFRs in obtaining credit and repaying loans.

#### 1. Lack of Data

To start, a lack of data from private lenders due to the current configuration of Regulation B makes it difficult to measure any progress—or lack thereof—related to SDFRs.<sup>45</sup> Regulation B, which enforces the ECOA, protects loan applicants from discrimination during the lending process.<sup>46</sup> Under Regulation B, collecting demographic information from loan applicants is generally prohibited, with some exceptions such as credit secured by real estate (*e.g.*, home purchase

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40. See Stephen Carpenter, *The USDA Discrimination Cases: Pigford, In re Black Farmers, Keepseagle, Garcia, and Love*, 17 DRAKE J. AGRIC. L. 1, 32 (2012).

41. *Id.* at 32–33.

42. See Maia Foster & P.J. Austin, *Rattlesnakes, Debt, and ARPA § 1005: The Existential Crisis of American Black Farmers*, 71 DUKE L.J. ONLINE 159, 166 (2022) (describing how a significant percentage of claimants were denied compensation from the *Pigford* settlement); see also COWAN & FEDER, CONG. RSCH. SERV., *supra* note 37, at 5 (detailing the issues many farmers experienced involving ineffective notice).

43. See DANIEL, *supra* note 19, at 4; Foster & Austin, *supra* note 42, at 166–67.

44. DANIEL, *supra* note 19, at 4.

45. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-539, *supra* note 4, at 11.

46. 12 C.F.R. § 1002.5 (2025).

loans or home refinancing).<sup>47</sup> Therefore, private lenders often do not collect and report information on race, color, or national origin.

For this reason, Farm Credit System (FCS) lenders and commercial banks, which together provide roughly 80% of total farm credit in the United States, are generally not required to collect and report racial and ethnic demographic information.<sup>48</sup> FSA, a government agency, collects demographic information to track the amount of lending to SDFRs and beginning farmers, making it one of the few sources of data available for demographic analysis; however, as a “lender of last resort,” FSA only provides a small percentage of total farm credit.<sup>49</sup> As a result, very limited racial and ethnic demographic data exist about agricultural loan origination.

## *2. Credit Risk and Loan Approval*

Delinquency and repayment continue to be issues for SDFRs compared to white borrowers. Recent studies of FSA data indicate Black, Hispanic, and Native American borrowers have higher delinquency rates and lower rates of repayment than white borrowers.<sup>50</sup>

But even before these credit risk issues arise, available data suggest SDFRs still struggle with getting loans approved in the first place.<sup>51</sup> According to 2022 USDA data, Black and Asian American farmers had significantly lower approval rates of FSA direct loans than white farmers.<sup>52</sup> Black applicants were approved only 36% of the time and Asian American applicants were approved 38% of the

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47. *Id.*; BD. OF GOVERNORS OF THE FED. RESRV., *Federal Fair Lending Regulations and Statutes Equal Credit Opportunity (Regulation B)*, in CONSUMER COMPLIANCE HANDBOOK 1 (2016), [https://www.federalreserve.gov/boarddocs/supmanual/cch/fair\\_lend\\_reg\\_b.pdf](https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_reg_b.pdf) [<https://perma.cc/85WK-UMWM>].

48. DARRYL E. GETTER, ANTHONY A. CILLUFFO & JIM MONKE, CONG. RSCH SERV., R47788, SECTION 1071: SMALL BUSINESS LENDING DATA COLLECTION AND REPORTING 12 (2023).

49. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-539, *supra* note 4, at 11; JIM MONKE, CONG. RSCH. SERV., R46768, AGRICULTURE CREDIT: INSTITUTIONS AND ISSUES 1, 4 (2022) (describing how FSA is considered a “lender of last resort,” and how FSA has a small market share of total farm debt).

50. Vekemans, *supra* note 7, at 64; April Simpson, ‘*Black Farmers and Ranchers, it’s a Dying Deal.*’, THE CTR. FOR PUB. INTEGRITY (Oct. 3, 2023), <https://publicintegrity.org/inequality-poverty-opportunity/the-heist/black-farmers-ranchers-dying-deal/> [<https://perma.cc/M7ML-GJNX>].

51. See Bustillo, *supra* note 6.

52. *Id.*

time; meanwhile, white applicants had an approval rate of 72%.<sup>53</sup> Additionally, Asian American applicants were three times as likely to be denied as white applicants, and Black applicants were four times as likely to be denied as white applicants.<sup>54</sup> Loan withdrawal rates for Black and Asian applicants were double that of white applicants, a potential indicator of slower processing times and low confidence that the loan would ultimately be approved.<sup>55</sup>

When FSA direct loans are approved for minority borrowers, they face longer wait times and higher pricing compared to white borrowers.<sup>56</sup> One study examining FSA direct loan data from 2009-2021 found that on average, farm ownership loans for Black farmers took two days longer to be processed.<sup>57</sup> Beyond FSA loans, the Government Accountability Office (GAO) estimated that “[f]rom 2015 to 2017, SDFRs represented 17% of farmers but accounted for 8% of agricultural debt.”<sup>58</sup>

Such disparities remaining today serve as a difficult reminder of how the effects of widespread discriminatory practices of the past have compounded over time, making it such that SDFRs are disadvantaged today even in a neutral underwriting process.<sup>59</sup> For instance, SDFRs tend to have smaller farm sizes and revenue, worse credit history and lower credit scores when compared to non-SDFR borrowers, making it more difficult to obtain loans, and leading to less favorable terms for the loans that are obtained.<sup>60</sup> Adding to these challenges is the tendency for SDFRs to have complications related to collateral.<sup>61</sup> Many SDFRs do not have clear title due to heirs’ property, particularly in the South.<sup>62</sup> Native Americans may

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53. *Id.*

54. *Id.*

55. *Id.*

56. See Ashok K. Mishra, Gianna Short & Charles B. Dodson, *Racial Disparities in Farm Loan Application Processing: Are Black Farmers Disadvantaged?*, 46 APPLIED ECON. PERSP. AND POL’Y 111, 133 (2024) (finding FSA operating loans for Black farmers took an average of 2 days longer to process); see also Cesar L. Escalante et al., *Looking Beyond Farm Loan Approval Decisions: Loan Pricing and Nonpricing Terms for Socially Disadvantaged Farm Borrowers*, 50 J. OF AGRIC. AND APPLIED ECON. 129, 145 (2018) (finding that minority groups are charged significantly higher interest rates than white borrowers for FSA loans).

57. Mishra, Short & Dodson, *supra* note 56, at 133.

58. GETTER, CILLUFFO & MONKE, CONG. RSCH. SERV., *supra* note 48, at 13 (noting that while this disparity was estimated by GAO, it is difficult to explain due limited data on SDFR lending).

59. Escalante et al., *supra* note 56, at 145 (noting that nonwhite farmer applicants have a relatively higher credit risk profile on average).

60. U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-539, *supra* note 4, at 24–26.

61. *Id.* at 27.

62. *Id.*

have problems with collateral on tribal lands, and lenders may not make loans out of fear they will be unable to foreclose.<sup>63</sup> These collateral issues make it more difficult to get a loan approved.

Ultimately, despite the increased awareness of the effects of discrimination toward SDFRs, along with policies and programs intended to address these issues, a disparate impact remains.

### III. RECENT FAILED ATTEMPTS TO ASSIST SDFRS THROUGH LENDING AND CREDIT PROGRAMS

Over the years, there have been many efforts to improve access to credit for SDFRs. For instance, the USDA now targets a portion of funding for direct loans for both farm ownership and operations to SDFRs and provides down payment assistance for SDFRs.<sup>64</sup> Studies have shown this program has helped slow the decline of SDFRs.<sup>65</sup>

Some USDA programs, such as the recent heirs' property relending program, are not explicitly targeted toward SDFRs, but are intended to get at root causes of struggles experienced by SDFRs.<sup>66</sup> The heirs property relending program does not provide direct loans to individuals but instead provides up to \$5 million to eligible community development financial institutions (CDFIs) who in turn make loans to borrowers.<sup>67</sup>

Even with these programs leading to positive outcomes, other recent attempts to assist SDFRs more directly have not succeeded. Two notable examples include the failure of Section 1005 of the American Rescue Plan Act (ARPA) in

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63. *Id.* at 28.

64. 7 U.S.C. § 2003; FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., LOANS FOR SOCIALLY DISADVANTAGED FARMERS AND RANCHERS 1–2 (2019) [hereinafter LOANS FOR SOCIALLY DISADVANTAGED FARMERS AND RANCHERS], [https://www.fsa.usda.gov/sites/default/files/documents/sda\\_loans-fact\\_sheet-aug\\_2019.pdf](https://www.fsa.usda.gov/sites/default/files/documents/sda_loans-fact_sheet-aug_2019.pdf) [<https://perma.cc/32CL-YN24>].

65. Jae Young-Ko, *An Examination of Socially Disadvantaged Farmers and Ranchers Program on Black Farmers in the United States*, 8 INT'L J. OF AGRIC. RSCH., SUSTAINABILITY, & FOOD SUFFICIENCY 502, 512 (2021).

66. See Dania Davy & Elsa Calderon, *Closing the Equity and Inclusion Gap: An Analysis of the Implementation of Heirs' Policy in the 2018 Farm Bill and Its Impact on Increasing Eligibility and Fair Access to USDA Programs Among Socially Disadvantaged Farmer and Ranchers*, S. RURAL DEV. CTR. (2024), [https://srdc.msstate.edu/sites/default/files/2024-10/Davy\\_Final.pdf](https://srdc.msstate.edu/sites/default/files/2024-10/Davy_Final.pdf) [<https://perma.cc/E39V-GGSM>].

67. FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., BECOME AN FSA RE-LENDER FOR THE HEIRS' PROPERTY RELENDING PROGRAM 1–2 (2024), <https://www.farmers.gov/sites/default/files/documents/fsa-heirs-lending-factsheet.pdf> [<https://perma.cc/389D-S875>].

federal court, and Congress's unwillingness to advance the comprehensive Justice for Black Farmers Act through committee.

*A. Constitutionality of Targeted Debt Forgiveness in the American Rescue Plan Act*

In 2021, Congress passed ARPA, which included a provision for farm loan forgiveness for SDFRs.<sup>68</sup> Section 1005 of ARPA provided for payments of up to 120% of each SDFR's outstanding debt for direct and guaranteed loans from FSA.<sup>69</sup> Importantly, Section 1005 defined SDFR and "socially disadvantaged group" in the same way as 7 U.S.C. § 2279(a): "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."<sup>70</sup>

Congress's attempt in ARPA to offer farm loan forgiveness based on SDFR status failed in federal court.<sup>71</sup> Courts held the loan forgiveness program violated the Equal Protection Clause and failed strict scrutiny.<sup>72</sup>

In *Wynn v. Vilsack*, the Middle District of Florida applied strict scrutiny, and found that Section 1005 of ARPA was not narrowly tailored.<sup>73</sup> The court stated that "the debt relief provision applies strictly on racial grounds irrespective of any other factor."<sup>74</sup> Further, the court found that the provision is both overinclusive, in that it provides debt relief to SDFRs who have never experienced discrimination or pandemic-related hardship, and underinclusive in that it does not provide relief to those who were unable to get a loan in the first place due to discrimination.<sup>75</sup> The court granted a preliminary injunction prohibiting enforcement of Section 1005 of ARPA.<sup>76</sup>

In *Faust v. Vilsack*, the Eastern District of Wisconsin also applied strict scrutiny to Section 1005, and held that the provision does not have a compelling interest and is not narrowly tailored.<sup>77</sup> The court noted that "[d]efendants have not

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68. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005, 135 Stat. 4, 12–13, *repealed by* Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22008, 136 Stat. 1818, 2023.

69. *Id.*

70. *Id.*; 7 U.S.C. § 2279(a)(6).

71. *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1282 (M.D. Fla. 2021).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1285.

76. *Id.* at 1295.

77. *Faust v. Vilsack*, 519 F. Supp. 3d 470, 475–76 (E.D. Wis. 2021).

established that the loan-forgiveness program targets a specific episode of past or present discrimination.”<sup>78</sup> The same conclusion was reached in *Holman v. Vilsack*, where the Western District of Tennessee granted preliminary injunction citing the reasoning in *Faust* and *Wynn*.<sup>79</sup> Like those cases, the court noted there was a substantial likelihood that the plaintiff would prevail in showing Section 1005 violated his equal protection rights; “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.”<sup>80</sup>

Perhaps the most concerning language for proponents of programs targeting SDFRs came from the Northern District of Texas in *Miller v. Vilsack*, another case where the court granted a preliminary injunction halting debt forgiveness to SDFRs included in ARPA.<sup>81</sup> In walking through a strict scrutiny application, the court stated:

[T]he Government puts forward no evidence of intentional discrimination by the USDA in at least the past decade . . . In sum, the Government’s evidence falls short of demonstrating a compelling interest, as any past discrimination is too attenuated from any present-day lingering effects to justify race-based remedial action by Congress.<sup>82</sup>

The court’s conclusion, that there is no compelling governmental interest because discrimination against SDFRs and its effects are too distant in the past, raises questions about the viability of any program targeted toward SDFRs going forward.<sup>83</sup>

Courts clearly rejected ARPA’s loan forgiveness targeted toward SDFRs based on race and ethnicity.<sup>84</sup> Congress proceeded to make another attempt at farm loan forgiveness via the Inflation Reduction Act of 2022 (IRA).<sup>85</sup> This time, Congress used the criteria of “distressed borrowers” and targeted borrowers “whose agricultural operations are at financial risk” rather than using any criteria

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78. *Id.* at 475.

79. *Holman v. Vilsack*, No. 21-1085-STA-JAY, 2021 WL 2877915, at \*5 (W.D. Tenn. July 8, 2021).

80. *Id.* at \*13.

81. *See Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 11115194, at \*12 (N.D. Tex. July 1, 2021).

82. *Id.* at 9.

83. *Id.*

84. *Id.*

85. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22006, 136 Stat. 1818, 2021 (codified as amended in scattered sections of 7 U.S.C.).

invoking race and ethnicity.<sup>86</sup> This language sidestepped the equal protection issues from ARPA, but only captures a portion of SDFRs, and does nothing to help SDFRs that have been affected by past discrimination but do not qualify as economically distressed.

Outside of the context of debt forgiveness through ARPA, other recent federal cases pose problems with different kinds of programs targeting SDFRs. In *Strickland v. United States Department of Agriculture*, the court granted a preliminary injunction blocking a disaster relief program for SDFRs.<sup>87</sup> The language in the opinion presents challenges going forward for government programs that direct relief to SDFRs, including lending programs. The Court noted the following:

[T]he USDA’s justifications for ‘socially disadvantaged’ benefits programs consistently fail when challenged in court . . . In these cases, courts have found that the USDA ‘put[ ] forward no evidence of intentional discrimination . . . in at least the past decade’ . . . Only the opposite has occurred since then.<sup>88</sup>

The court held that the USDA could not demonstrate a compelling government interest, and that the program was both over- and under-inclusive; thus, the program was not narrowly tailored.<sup>89</sup> The court stated, “The challenged Programs, therefore, are likely to violate the Fifth Amendment on the merits.”<sup>90</sup> Like the ARPA cases, this decision is yet another hurdle for those proposing future programs of any kind targeted toward SDFRs.

These recent federal court decisions significantly limit potential credit solutions to SDFRs going forward, such as targeted loan forgiveness or a future grant program through FCS.<sup>91</sup>

### *B. Failure to Advance the Justice for Black Farmers Act*

The Justice for Black Farmers Act was first introduced in 2020 and proposed a comprehensive public policy strategy aimed at amending past injustices and leveling the playing field for Black farmers going forward.<sup>92</sup>

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86. *Id.*

87. *See Strickland v. U.S. Dep’t of Agric.*, 736 F. Supp. 3d 469, 487 (N.D. Tex. 2024).

88. *Id.* at 482.

89. *Id.*

90. *Id.* at 483.

91. U.S. GOV’T ACCOUNTABILITY OFF., GAO-24-106646, FARM CREDIT SYSTEM: POLICY CONSIDERATIONS FOR A POTENTIAL GRANT PROGRAM FOR SOCIALLY DISADVANTAGED FARMERS AND RANCHERS 11 (2023).

92. Justice for Black Farmers Act of 2020, S. 4929, 116th Cong. (2020).

The bill was reintroduced in 2021 and included provisions for debt relief and land grant programs to Black farmers.<sup>93</sup> Although it had more support in the House, the bill was not enacted into law.<sup>94</sup> In 2023, the bill was introduced again in the Senate as the Justice for Black Farmers Act of 2023.<sup>95</sup> This time, a counterpart was also introduced in the House of Representatives.<sup>96</sup>

The 2023 version included various provisions to assist SDFRs, such as the establishment of a bank specifically for SDFRs, and additional credit assistance programs for SDFRs.<sup>97</sup> It also proposed an equity commission be established within the USDA.<sup>98</sup> This commission would ensure representation within USDA and provide a mechanism for examining discrimination by the agency and recommending action steps.<sup>99</sup>

Ultimately, the bill was read twice and referred to the Senate Committee on Agriculture, Nutrition, and Forestry, but did not advance further.<sup>100</sup>

#### IV. IMPROVING ACCESS TO CREDIT AND ALLEVIATING CREDIT RISK FOR SDFRS MOVING FORWARD

In light of recent failures to enact public policy focused on helping SDFRs through agricultural lending, it is imperative that the effort to assist SDFRs continues. Our country must right the wrongs of the past and alleviate the disparate impacts that remain present today. Of the myriad options to assist SDFRs, I will discuss three different proposals with varying levels of impact. First, courts should allow credit programs targeted at SDFRs by acknowledging the compelling government interest in giving redress to SDFRs who have been discriminated against for generations. Second, to improve data collection on SDFRs in the private lending space, the CFPB's interim final rule for compliance with Section 1071 of the ECOA should be fully implemented as proposed. Third, portions of the Justice for Black Farmers Act should be reintroduced in new legislation to enact practical mechanisms for incremental progress.

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93. Justice for Black Farmers Act of 2021, H.R. 1393, 117th Cong. (2021).

94. *Id.*

95. Justice for Black Farmers Act of 2023, S. 96, 118th Cong. (2023).

96. Justice for Black Farmers Act of 2023, H.R. 1167, 118th Cong. (2023).

97. *Id.* §§ 402–03.

98. *Id.* § 103.

99. DANIELLE BROWNE, FROM SLAVERY TO SOVEREIGNTY: THE ECONOMIC IMPORTANCE OF THE JUSTICE FOR BLACK FARMERS ACT 6 (2024), [https://www.cbefinc.org/wp-content/uploads/2024/08/NREI-Capstone\\_Justice-for-Black-Farmers-Act\\_D.Browne1.pdf](https://www.cbefinc.org/wp-content/uploads/2024/08/NREI-Capstone_Justice-for-Black-Farmers-Act_D.Browne1.pdf) [<https://perma.cc/4BE6-46XF>].

100. Justice for Black Farmers Act of 2023, S. 96, 118th Cong. (2023).

*A. Courts Should Find Credit Programs Targeting SDFRs are Constitutional*

Courts should find credit programs targeting SDFRs that are fashioned in a way such as debt forgiveness in ARPA survive strict scrutiny and are constitutional.

To start, some have argued the definition of SDFR used in ARPA is race neutral.<sup>101</sup> The statutory definition of SDFR under 7 U.S.C. §2279, as referenced in Section 1005 of ARPA, does not identify a specific race, but rather defines SDFR 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.”<sup>102</sup> Although the Notice of Funding Availability lists examples of disadvantaged groups that include race-based groups, no racial group is excluded by this definition.<sup>103</sup> In fact, the definition states that “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.”<sup>104</sup> Thus, any group could fall within this definition if they can show they have experienced substantial past discrimination. The definition does not confer a benefit based on race, but instead based on disadvantages; “the focus is not on who is included in the law but on why the remedy is available.”<sup>105</sup> According to this reasoning, credit programs targeting SDFRs based on this definition need not be subjected to strict scrutiny because they do not distribute a benefit based on a person belonging to a suspect class, but rather based on a given group’s life experiences and disadvantages.

However, given the type of discrimination that is part of criteria in determining SDFRs must be racial or ethnic, this argument is not a strong one because race is inherently part of the decision. In the ARPA cases, the government did not attempt such an argument, and by arguing that Section 1005 should survive strict scrutiny, implicitly conceded that the law was race conscious.

Upon determining that Section 1005 is race conscious—that it distributes a benefit based on race—courts applied strict scrutiny.<sup>106</sup> Still, there are several

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101. Gray Norton, *Debt-Relief for Socially Disadvantaged Farmers and Ranchers on Hold*, HARV. L. SCH. CTR. FOR HEALTH POL’Y AND INNOVATION (Aug. 3, 2021), <https://chlp.org/news-and-events/news-and-commentary/commentary/debt-relief-for-socially-disadvantaged-farmers-and-ranchers-on-hold/> [https://perma.cc/DJ3W-2E4L].

102. 7 U.S.C. § 2279(a)(6).

103. Norton, *supra* note 101.

104. Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28329, 28330 (May 26, 2021).

105. Norton, *supra* note 101.

106. See discussion *supra* Section III.A.

reasons to be critical of the strict scrutiny analysis in the ARPA debt forgiveness cases.

*1. Section 1005 Debt Forgiveness Constituted a Compelling Interest*

First, the conclusion that the program lacks a compelling government interest has been heavily criticized.<sup>107</sup> For race-conscious laws, a government interest is compelling if the government action is meant to correct past discrimination by the government, or its participation in such discrimination.<sup>108</sup> In *Faust*, the government pointed to *United States v. Paradise*, where the Court stated that “[t]he Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor.”<sup>109</sup> The government’s interest in forgiving debt of SDFRs was undoubtedly to provide relief to groups that had suffered past discrimination at the hands of the federal government.<sup>110</sup>

A troubling aspect of the compelling interest analysis in the ARPA cases was the language used by the courts indicating that the government had not cited a “specific episode” of past discrimination.<sup>111</sup> The past discrimination meant to be remedied by ARPA was not abstract “societal discrimination,”<sup>112</sup> but extensively documented discrimination by a federal government agency, as evidenced by the Civil Rights Commission report, *Pigford* cases and many other reports.<sup>113</sup> In the ARPA cases, the government cited numerous specific instances of past discrimination within USDA, along with the lingering impact of past discrimination.<sup>114</sup> Such discrimination was not “too attenuated from any present-

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107. See William J. Gaspard Jr., *Plowing Beyond Prejudice: Where Faust Fumbled Black Farmer Debt Relief*, 51 S.U. L. REV. 241, 258 (2024); Kathryn Fitzgerald, *Remnants of Caste: Black Farmers, White Farmers, Congress, and the USDA*, 23 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 81, 102–03 (2023).

108. APRIL J. ANDERSON, CONG. RSCH. SERV., IF12391, EQUAL PROTECTION: STRICT SCRUTINY OF RACIAL CLASSIFICATIONS (2023).

109. Defendants’ Opposition to Plaintiffs’ Motion for a Temporary Restraining Order at 16, *Faust v. Vilsack*, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (No. 21-CV-548-WCG), 2021 WL 9203854; *United States v. Paradise*, 480 U.S. 149, 167 (1987).

110. See Defendants’ Opposition to Plaintiffs’ Motion for a Temporary Restraining Order, *supra* note 109, at 16–17.

111. Joy Milligan, *Animus and Its Distortion of the Past*, 74 ALA. L. REV. 725, 733–34 (2023).

112. See *id.* at 737.

113. See Gaspard, *supra* note 107, at 252–58.

114. See Defendants’ Response in Opposition to Plaintiff’s Motion for Preliminary Injunction, *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1282 (M.D. Fla. 2021) (No. 3:21-CV-00514-MMH-JRK), 2021 WL 6884486.

day lingering effects,”<sup>115</sup> but is perhaps the single most important throughline resulting in the present-day effects. Just because discrimination may not be occurring at this very moment does not disqualify the interest in correcting past wrongs from being a compelling interest. Thus, race-based remedial action was being used to rectify specific past discrimination by the government, which certainly constitutes a compelling governmental interest.

In the backdrop of this particular analysis of a compelling interest is the reality that courts seem to be chipping away at what constitutes a compelling interest when it comes to race-based remedies. Critics have noted a selective use of the language “specific instance” and “specific episode” by courts when describing the requirements for what kind of discrimination must be shown.<sup>116</sup> This muddles and restricts what is necessary to satisfy the compelling interest requirement.<sup>117</sup> Further, the Supreme Court’s decision in *Students for Fair Admissions v. President and Fellows of Harvard College* eliminates another avenue for race-based remedies.<sup>118</sup> Although the context of that case was narrow in that it involved affirmative action in college admissions, some are concerned that the logic underpinning the case may be applied beyond higher education.<sup>119</sup>

## 2. Section 1005 Debt Forgiveness was Narrowly Tailored

Second, the conclusion that debt forgiveness through ARPA was not narrowly tailored has been assessed as weak.<sup>120</sup> For race-conscious action such as Section 1005 of ARPA, factors courts have used to determine whether a program is narrowly tailored include: the necessity for relief and efficacy of race-neutral alternative remedies; the flexibility and duration of relief; the relationship between the degree of preference and effects of past discrimination; the severity of any

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115. *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 11115194, at \*9 (N.D. Tex. July 1, 2021).

116. *Milligan*, *supra* note 111, at 734–35.

117. *Id.*

118. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 226–30 (2023).

119. James Stephen Azadian, *Dean Erwin Chemerinsky Reviews the Civil Cases of the Supreme Court’s October 2022 Term*, AM. BAR ASS’N (Feb. 13, 2024), <https://www.americanbar.org/groups/judicial/resources/appellate-issues/2024-winter/chemerinsky-reviews-civil-cases-supreme-courts-october-2022-term/> (describing Erwin Chemerinsky’s view that, while the *Students for Fair Admissions* decision should be confined to higher education, the Supreme Court is likely to apply similar reasoning to the area of employment law in the future).

120. *See Gaspard*, *supra* note 107, at 259–60.

burden placed upon third parties; and whether the remedy is overinclusive or underinclusive.<sup>121</sup>

In *Wynn*, the government emphasized the necessity of relief to address past USDA discrimination, and explored whether a variety of previous efforts had addressed the harm caused by past discrimination by the federal government in agricultural lending.<sup>122</sup> The government noted that despite these prior attempts, significant disparities remain.<sup>123</sup> In some instances, much of the funding that was allocated did not reach minority farmers.<sup>124</sup> In other words, alternative policies have not adequately addressed the alleged harm.<sup>125</sup>

While debt forgiveness in Section 1005 conferred a benefit to SDFRs, it did not place a burden on other non-SDFR third parties.<sup>126</sup> Moreover, the debt-forgiveness program was not limited to certain groups; the Secretary would consider the eligibility of other groups on a “case-by-case basis.”<sup>127</sup> The program was also time limited, as it was a one-time forgiveness.<sup>128</sup>

The courts relied on the reasoning that Section 1005 was both overinclusive and underinclusive.<sup>129</sup> The argument that debt-forgiveness was overinclusive because it provides debt relief to SDFRs who may never have been discriminated against<sup>130</sup> is intentionally obtuse; belonging to an SDFR group inherently means that one is affected by past discrimination towards SDFRs in some capacity. The argument that Section 1005 was underinclusive is likewise weak. It is impossible for any race-conscious solution to retribute every person in a group that experienced discrimination by the government, but here, the group itself—SDFR borrowers—was fully covered under Section 1005. This is distinguishable from a case like *Vitolo v. Guzman*, where the court found grants to minority business

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121. APRIL J. ANDERSON, CONG. RSCH. SERV., R47471, *THE CONSTITUTION AND RACE-CONSCIOUS GOVERNMENT ACTION: NARROW TAILORING REQUIREMENTS* 4–5 (2023) [hereinafter *NARROW TAILORING REQUIREMENTS*].

122. *See* Defendants’ Response in Opposition to Plaintiff’s Motion for Preliminary Injunction, *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1282 (M.D. Fla. 2021) (No. 3:21-CV-00514-MMH-JRk), 2021 WL 6884486.

123. *Id.*

124. *Id.*

125. *Id.*

126. Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28329, 28329–30 (May 26, 2021).

127. *Id.* at 28330.

128. *Id.* at 28331.

129. *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1285 (M.D. Fla. 2021); *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 11115194, at \*9 (N.D. Tex. July 1, 2021).

130. *Wynn*, 545 F. Supp. 3d at 1285.

owners were underinclusive because business owners could not receive the grant unless their business was at least 51% owned by minorities.<sup>131</sup> In *Vitolo*, the intended group, minority business owners, was only partially covered by the program; “[T]he Sixth Circuit observed that the racial preference left out businesses with 49% or less minority ownership[,]” which “seemed arbitrary” given owners with small shares could have experienced discrimination.<sup>132</sup> Conversely, the intended group in Section 1005, SDFR borrowers, was fully covered by the program; no portion of the group was arbitrarily omitted.<sup>133</sup> While race-conscious legislation cannot provide redress to every individual affected by discrimination, the group covered by Section 1005 should have been enough to avoid failing for being underinclusive.

In a legal environment where it is getting more difficult for programs that positively consider race to survive strict scrutiny, coupled with a political environment where diversity programs are being demonized and dismantled, it appears unlikely that programs such as ARPA’s loan forgiveness will be found constitutional in the near future. Given this reality, other types of policy proposals must be considered to address existing disparities in agricultural credit.

*B. Congress Should Not Repeal CFPB’s Interim Final Rule for Compliance with Section 1071 of Dodd-Frank*

Congress should abandon its efforts to repeal the CFPB’s interim final rule for compliance with Section 1071 of Dodd-Frank and instead should allow the rule to go into effect. Allowing the implementation of the final rule will benefit SDFRs by improving data collection from FCS and private commercial lenders, thereby providing additional insight on where and how SDFRs need assistance.

Dodd-Frank, which was passed in 2010, amended the ECOA to require financial institutions that lend to small businesses to collect, maintain, and report information on minority-owned and women-owned businesses.<sup>134</sup> The intent was

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131. Milligan, *supra* note 111, at 732; *Vitolo v. Guzman*, 999 F.3d 353, 363 (6th Cir. 2021).

132. *Vitolo*, 999 F.3d at 357; NARROW TAILORING REQUIREMENTS, *supra* note 121, at 12.

133. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005, 135 Stat. 4, 12, *repealed by* Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22008, 136 Stat. 1818, 2023.

134. GETTER, CILLUFFO & MONKE, CONG. RSCH. SERV., *supra* note 48, at 2; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

to collect data to better address lending gaps related to minority and women small business owners.<sup>135</sup>

The CFPB initially introduced a notice of proposed rulemaking on September 1, 2021, and invited comments from the public.<sup>136</sup> The proposed rule amends Regulation B to implement requirements that were set forth in Section 1071 of Dodd-Frank that have yet to be enforced from when the law was passed in 2010.<sup>137</sup> The original purpose of Section 1071 was to “facilitate enforcement of fair lending laws and to enable the identification of business and community development needs and opportunities for women-owned, minority-owned, and small businesses.”<sup>138</sup> To achieve this purpose, the rule requires financial institutions covered under the rule to collect and report certain demographic information.<sup>139</sup> The rule also puts forth recordkeeping requirements, establishes enforcement mechanisms, requires demographic data be shielded from underwriters, and sets effective dates for compliance.<sup>140</sup> The CFPB issued the final version of the rule in March of 2023, but subsequently extended the compliance dates due to ongoing litigation.<sup>141</sup>

The proposed final rule would require three areas of data collection and reporting.<sup>142</sup> First, certain information that financial institutions would normally generate or provide must be reported.<sup>143</sup> This includes items such as unique identifiers for applications, application dates, method of application, the individual who received the application, action taken by the financial institution, and denial reasons for any denied applications.<sup>144</sup> Second, certain data points provided by the applicant are required by the rule.<sup>145</sup> These include information about the loan such

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135. GETTER, CILLUFFO & MONKE, CONG. RSCH. SERV., *supra* note 48, at 2.

136. CONSUMER FIN. PROT. BUREAU, SUMMARY OF PROPOSED RULEMAKING: SEPTEMBER 2021 PROPOSAL REGARDING SMALL BUSINESS LENDING DATA COLLECTION 1 (2021) [hereinafter SUMMARY OF PROPOSED RULEMAKING], [https://files.consumerfinance.gov/f/documents/cfpb\\_section-1071-nprm\\_summary\\_2021-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_section-1071-nprm_summary_2021-09.pdf) [<https://perma.cc/24H4-ZAQS>].

137. *Id.*

138. *Id.*

139. *Id.*

140. *Small Business Lending Under the Equal Credit Opportunity Act (Regulation B)*, CONSUMER FIN. PROT. BUREAU (May 30, 2025, at 9:04 CT), <https://www.consumerfinance.gov/rules-policy/final-rules/small-business-lending-under-the-equal-credit-opportunity-act-regulation-b/> [<https://perma.cc/7MQ2-MU2Q>].

141. *Id.*

142. SUMMARY OF PROPOSED RULEMAKING, *supra* note 136, at 4–5.

143. *Id.* at 4.

144. *Id.*

145. *Id.*

as the amount being applied for, the purpose of the loan, and the type of credit, along with information relating to the applicant's business such as NAICS code, gross annual revenue for the previous year, number of workers, length of time in business, and principal owners.<sup>146</sup> Third, and especially important for SDFRs, is demographic data.<sup>147</sup> Financial institutions will be required to ask applicants to provide demographic data such as "minority-owned business status, women-owned business status, and the ethnicity, race, and sex of the applicant's principal owners."<sup>148</sup> Applicants may decline to provide this information, and if they do so, financial institutions must record race and ethnicity information based on observation.<sup>149</sup> This is a similar process for obtaining demographic information as is used for other loan applications such as home mortgages.<sup>150</sup>

Financial institutions and their advocacy groups have unsurprisingly pushed back against the proposed final rule.<sup>151</sup> The American Bankers Association publicly opposed the rule, calling it "too far-reaching" and claiming it will "put small businesses' privacy at risk and will discourage bank lending to small businesses given the cost to collect this data."<sup>152</sup> The Texas Bankers Association and American Bankers Association sued over the CFPB's implementation of the rule in 2023, challenging the rule's validity and seeking an injunction.<sup>153</sup> Several other parties intervened.<sup>154</sup> The court in *Texas Bankers Association v. Consumer Financial Protection Bureau* granted the motion for preliminary injunction in part, but denied the request for nationwide injunctive relief.<sup>155</sup> After ordering a

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146. *Id.* at 4–5.

147. *Id.* at 5.

148. *Id.*

149. *Id.*

150. Aaron Thompson, *Government Monitoring Information Requirements Under the HMDA and the ECOA*, CONSUMER COMPLIANCE OUTLOOK (May 30, 2025, at 9:03 CT), <https://www.consumercomplianceoutlook.org/2013/fourth-quarter/government-monitoring-information-requirements-under-hmda-ecoa/> [<https://perma.cc/5RA7-JBSP>].

151. *See generally* Section 1071 Rulemaking, AM. BANKERS ASS'N (May 30, 2025, at 9:02 CT), <https://www.aba.com/advocacy/our-issues/section-1071-rulemaking> [<https://perma.cc/2BPP-AJ6K>].

152. *Id.*

153. *See* *Tex. Bankers Ass'n v. Consumer Fin. Prot. Bureau*, 685 F. Supp. 3d 445, 450 (S.D. Tex. 2023).

154. Press Release, Farm Credit, Farm Credit Joins Other Lenders to Halt Costly Implementation of CFPB Rule (Sep. 8, 2023), <https://farmcredit.com/news/farm-credit-joins-other-lenders-to-halt-costly-implementation-of-cfpb-rule/> [<https://perma.cc/6WSL-RZST>].

155. *See* *Tex. Bankers Ass'n*, 685 F. Supp. 3d at 458.

temporary stay of CFPB's compliance deadlines, the court granted CFPB's motion for summary judgment, allowing the compliance deadlines to proceed.<sup>156</sup>

However, the results of the 2024 election cycle have created uncertainty about the future of the final rule.<sup>157</sup> Under the Trump Administration, the CFPB swiftly dropped its opposition to the appeal by the bankers associations, resulting in the Fifth Circuit granting a motion to stay the compliance deadlines for the final rule.<sup>158</sup> The Republican-controlled Congress appears eager to repeal the rule, and the Trump Administration has been vocal about its disdain for the CFPB in general.<sup>159</sup>

Despite the industry pushback, court challenge, and the threat of repeal by Congress, the rule should be implemented in its current form. The implementation of Section 1071 will benefit SDFRs through data compilation that will give clarity to any existing disparities, identify current and future trends, and help follow progress made over time.

While institutions will have additional costs associated with data collection, they are already engaged in significant data collection during loan processing and underwriting. Collecting demographic information is not new to financial institutions, particularly for mid-sized to large financial institutions affected by the final rule, as they are already required to do so for certain loans.<sup>160</sup> For instance, Regulation B currently requires that financial institutions request demographic information for certain residential mortgage applications.<sup>161</sup> Regulation C, which implements the Home Mortgage Disclosure Act (HMDA), also requires lenders to ask borrowers to self-identify their race and ethnicity on certain residential mortgage applications.<sup>162</sup> What's more, the proposed rule would allow for

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156. See *Tex. Bankers Ass'n v. Consumer Fin. Prot. Bureau*, No. 7:23-CV-144, 2024 WL 3939598, at \*14 (S.D. Tex. Aug. 26, 2024).

157. See *Tex. Bankers Ass'n v. Consumer Fin. Prot. Bureau*, No. 24-40705, 2025 WL 429913, at \*1 (5th Cir. Feb. 7, 2025) ("A new President was inaugurated January 20, 2025. . . The morning of oral argument, CFPB notified the court that '[c]ounsel for the CFPB has been instructed' by new leadership 'not to make any appearances in litigation except to seek a pause in proceedings.'").

158. *Id.*

159. See 1071 Repeal to Protect Small Business Lending Act, H.R. 976, 119th Cong. § 3(b) (2025); Joe Hernandez, *The Trump Administration Has Stopped Work at the CFPB. Here's What the Agency Does*, NPR (Feb. 10, 2025, at 16:35 ET), <https://www.npr.org/2025/02/10/nx-s1-5292123/the-trump-administration-has-stopped-work-at-the-cfpb-heres-what-the-agency-does> [<https://perma.cc/N3PT-NJE3>].

160. See Thompson, *supra* note 150.

161. *Id.*

162. *Id.*

financial institutions to reuse previously collected data in some circumstances.<sup>163</sup> The relatively few data points required by Rule 1071 are minor compared to what is already being collected on small business loan applications, and obtaining this information will have major upside for SDFRs.

The final rule also provides a broader solution than some narrower proposals from the past. For instance, H.R. 2423, which was introduced in the United States House of Representatives in 2023, would have required FCS lenders to collect demographic data on loans to “small farmers” and report it to FCA, who then would have been required to collect such information and make it available to the public each year.<sup>164</sup> Because the CFPB final rule applies to both the FCS and private financial institutions, particularly commercial banks that provide nearly a third of all agriculture real estate loans and over 40% of non-real estate agriculture loans, it would increase the availability of demographic data more than other proposals.<sup>165</sup>

Even if the final rule is implemented, demographic data reporting will not be required from all lenders.<sup>166</sup> Only covered lenders, defined as lenders that originate “at least 100 covered small business loans in each of the two preceding calendar years,” are required to collect and report the required information.<sup>167</sup> Of the loans generated by those covered lenders, only loans to small businesses would be subject to this requirement, and the final rule defines small businesses as those with “\$5 million or less in gross annual revenue for its preceding fiscal year.”<sup>168</sup> The CFPB previously estimated that FCS would have 72 lenders eligible to report under the proposed rule based on 2019 data, and that was before minimum loan origination was raised from 25 to 100.<sup>169</sup>

In short, while this rule would expand the pool of demographic data available from agricultural loans, its scope only goes so far. Even so, implementing Section 1071 is important because the final rule provides a broader source of data than what is currently being obtained. Bringing in information from FCS and financial institutions, which together make up the overwhelming majority of the agricultural

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163. See SUMMARY OF PROPOSED RULEMAKING, *supra* note 136, at 6.

164. Farm Credit Administration Independent Authority Act, H.R. 2423, 118th Cong. § 4.20 (2023).

165. DIPAK SUBEDI & ANIL K. GIRI, ECON. RSCH. SERV., U.S. DEP’T OF AGRIC., DEBT USE BY U.S. FARM BUSINESSES, 2012–2021 at 8 (2024), [https://ers.usda.gov/sites/default/files/\\_laserfiche/publications/109412/EIB-273.pdf](https://ers.usda.gov/sites/default/files/_laserfiche/publications/109412/EIB-273.pdf) [<https://perma.cc/GZ89-6WQM>].

166. GETTER, CILLUFFO & MONKE, CONG. RSCH. SERV., *supra* note 48, at 5.

167. *Id.*

168. *Id.*

169. *Id.* at 5, 13.

lending market, enhances the ability to collect and review demographic data, and would be highly beneficial in identifying and assessing disparities that impact SDFRs.

*C. Reintroduce Portions of the Justice for Black Farmers Act of 2023*

Policymakers should review the Justice for Black Farmers Act of 2023 and reintroduce portions of the bill involving credit assistance that can be implemented without raising the equal protection issues from the ARPA cases. Because both the House and Senate versions of this comprehensive bill never gained enough momentum to make it out of committee, a more prudent strategy in the coming years would be to select impactful components of the bill and advance them separately or as part of other bills. Three beneficial parts to reintroduce include: (1) removing obstacles related to heirs' property; (2) loosening eligibility requirements for FSA loans; and (3) addressing past discrimination in the USDA through the creation of an equity commission.

*I. Removing Obstacles Related to Heirs' Property*

Making tenants in common eligible for direct or guaranteed farm ownership and operating loans, as proposed in Section 403(e), will help alleviate borrowing obstacles associated with heirs' property.<sup>170</sup> This will help reduce barriers that have impacted SDFRs, especially Black farmers in the South.<sup>171</sup>

When a land owner dies without a will or trust and their property is passed down through intestate succession without clear title, the land is referred to as heirs' property.<sup>172</sup> The default is often an intestacy statute under which the heirs of the property become tenants in common.<sup>173</sup> "Tenants in common share undivided fractional interests in property[.]" meaning that "[e]ach heir has the right to possess the entire parcel of property . . . but their ownership interests are only 'fractional' shares of a whole parcel of land."<sup>174</sup> As generations go by, "the number of tenants

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170. See Justice for Black Farmers Act of 2023, S. 96, 118th Cong. § 403(e) (2023).

171. See Will Breland, *Acre of Distrust: Heirs Property, the Law's Role in Sowing Suspicion Among Americans and How Lawyers Can Help Curb Black Land Loss*, 28 GEO. J. ON POVERTY L. & POL'Y 377, 383 (2021).

172. Breland, *supra* note 171, at 388; DREW MITCHELL & RUSTY RUMLEY, NAT'L AGRIC. L. CTR., *INTESTATE SUCCESSION AND AGRICULTURE 1* (2020), [https://nationalaglawcenter.org/wp-content/uploads/assets/articles/MitchellRumley\\_heirproperty.pdf](https://nationalaglawcenter.org/wp-content/uploads/assets/articles/MitchellRumley_heirproperty.pdf) [<https://perma.cc/NRB9-2R5Y>].

173. Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 3 (2007).

174. *Id.* at 2.

in common for a single property can increase significantly[,]”<sup>175</sup> which complicates the ownership and can restrict how it is used.<sup>176</sup>

Numerous problems for SDFRs resulting from heirs’ property have been documented extensively,<sup>177</sup> but one negative consequence important to agricultural lending is that the occupier of the land may not have clear title to the land.<sup>178</sup> Tenants in common in such situations are disadvantaged as borrowers because without clear title, it may be difficult or impossible to use the land as collateral.<sup>179</sup>

In recent years, progress has been made to assist farmers in this situation. In 2021 the USDA’s Heirs Property Relending Program (HPRP) was created, as authorized by the 2018 Farm Bill.<sup>180</sup> The HPRP provides a path for those without clear title to apply for loans through intermediary lenders.<sup>181</sup> Under the program, intermediary lenders such as credit unions or nonprofits can apply for loans from the USDA if they meet certain criteria.<sup>182</sup> Then, these intermediary lenders loan funds to heirs who apply.<sup>183</sup> However, these loans can only be used for the narrow

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175. *Resources for Underserved Communities: Highlight on Heirs Property and Estate Planning*, NAT’L AGRIC. L. CTR. (May 30, 2025, at 8:59 CT), <https://nationalaglawcenter.org/resources-for-underserved-communities-highlight-on-heirs-property-and-estate-planning/> [<https://perma.cc/25ST-SKXA>].

176. See Breland, *supra* note 171, at 388–89.

177. See Rivers, *supra* note 173, at 6–7; see also Lizzie Presser, *Their Family Bought Land One Generation After Slavery. The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It.*, PROPUBLICA (July 15, 2019), <https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south/> [<https://perma.cc/D6ZV-AJ2F>] (describing the long-term impact of heirs’ property on Southern Black landowners).

178. See Leah Rothstein, *Keeping Wealth in the Family: The Role of ‘Heirs Property’ in Eroding Black Families’ Wealth*, ECON. POL’Y INST.: WORKING ECON. BLOG (July 6, 2023, at 11:22 CT), <https://www.epi.org/blog/heirs-property/> [<https://perma.cc/TW8D-V8GE>].

179. Jennifer Harrington, *The Problem with Heirs’ Property*, IOWA STATE UNIV. CTR. FOR AGRIC. L. AND TAX’N (Feb. 27, 2022), <https://www.calt.iastate.edu/article/problem-heirs-property> [<https://perma.cc/WEM4-EGWJ>]; see CASEY, CONG. RSCH. SERV., *supra* note 19, at 9.

180. Heirs’ Property Relending Program (HPRP), Improving Farm Loan Program Delivery, and Streamlining Oversight Activities, 86 Fed. Reg. 43381, 43381 (Aug. 9, 2021) (to be codified at 7 C.F.R. pts. 761–62, 764–66, 769).

181. *Heirs’ Property Relending Program*, U.S. DEP’T OF AGRIC. (May 30, 2025, at 8:50 CT), <https://www.farmers.gov/working-with-us/heirs-property-eligibility/relending#program> [<https://perma.cc/AV7C-ZGCR>].

182. News Release, U.S. Dep’t of Agric., Biden Administration to Invest \$67 Million to Help Heirs Resolve Land Ownership and Succession Issues (Aug. 12, 2021), <https://www.fsa.usda.gov/news-events/news/08-12-2021/biden-administration-invest-67-million-help-heirs-resolve-land> [<https://perma.cc/N44P-92UM>].

183. *Heirs’ Property Relending Program*, *supra* note 181.

purpose of resolving title issues, in other words, the buying or consolidating of property interests.<sup>184</sup> HPRP loans cannot be used to finance operations, improve land, repair buildings, or myriad other purposes for which farmers may need financing.<sup>185</sup> In short, this program is a tool to help fix the root cause of partition issues, but is limited to that function.

Section 403(e) of the Justice for Black Farmers Act offers a different method to help solve heirs' property problems.<sup>186</sup> Under this section, tenants in common would be eligible for direct or guaranteed FSA farm ownership loans, farm operating loans, and emergency loans.<sup>187</sup> The eligibility would be contingent on the submission of an agreement meeting the criteria listed in Section 403(e).<sup>188</sup> This is a more direct solution for farmers without clear title to access FSA loans for ownership or operation.

## *2. Eligibility Requirements for FSA Loans*

Section 403 for additional credit assistance included provisions that would help relieve credit risk for SDFRs by loosening some existing eligibility restrictions.<sup>189</sup>

First, Section 403(a) would allow for both FSA direct farm ownership loans and FSA operating loans to become eligible for refinancing.<sup>190</sup> Because direct loans from FSA are eligible for the use of funds targeted for SDFRs, allowing these direct loans to be used to refinance farm debt would make another refinancing option available to SDFRs.<sup>191</sup>

Second, by removing some existing prohibitions on eligibility for FSA direct operating loans, the Bill would allow SDFRs with past write-downs or other losses to be eligible for FSA direct loans.<sup>192</sup> Section 403(b) allows farmers with past repayment issues who have rehabilitated their credit history to at least remain

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184. *Id.*

185. *Id.*

186. Justice for Black Farmers Act, S. 96, 118th Cong. § 403(e) (2023).

187. *Id.*

188. *Id.*

189. *Id.* § 403.

190. *Id.* § 403(a).

191. See LOANS FOR SOCIALLY DISADVANTAGED FARMERS AND RANCHERS, *supra* note 64, at 1–2.

192. *Id.* § 403(b).

eligible for farm ownership and operating loans.<sup>193</sup> This would be beneficial to SDFRs given the credit risk issues discussed earlier.<sup>194</sup>

### 3. Addressing Discrimination and Promoting Equity

The Bill also included practical ways to address fighting discrimination and promoting racial equity within the USDA.

Section 103 would establish an equity commission within the USDA.<sup>195</sup> This nine-member commission would be tasked with studying historical and continued discrimination within the USDA and recommending actions to end disparate treatment of Black farmers and ranchers.<sup>196</sup>

Section 402(b) would give the CFPB authority to investigate claims of discrimination within FCS.<sup>197</sup> This is important for a few reasons. First, it provides a clear procedural path for borrowers to use if they experience discrimination within FCS. Second, if paired with the reporting requirements discussed previously,<sup>198</sup> CFPB could have quantitative information to supplement discrimination claims. Finally, by giving the CFPB authority, it ensures some independence in any investigation of discrimination against FCS.

These sections of the Bill deserve reconsideration to give government agencies the ability to identify discrimination and promote racial equity. This is especially important during a time where diversity and equity are being demonized, and programs and policies within the federal government that address these issues are being discontinued.<sup>199</sup>

## V. CONCLUSION

Courts erred in finding ARPA debt forgiveness targeting SDFRs was unconstitutional. Future policy proposals face the reality of these court decisions, meaning that targeted lending and credit programs using SDFRs as a classification are unlikely to succeed at this time.

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193. *Id.*

194. *See* discussion *supra* Section II.C.2.

195. *See* Justice for Black Farmers Act, S. 96, 118th Cong. § 103 (2023).

196. *Id.* § 103(a).

197. *Id.* § 402(b).

198. *See* discussion *supra* Section IV.B.

199. Erica L. Green, *U.S. Orders Federal D.E.I. Efforts to Shut Down by Wednesday Night*, N.Y. TIMES (Jan. 22, 2025), <https://www.nytimes.com/2025/01/22/us/politics/trump-dei-diversity-officials-orders.html>.

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Despite this, meaningful steps can be taken to continue the public policy goal of mending past injustices toward SDFRs through lending and credit programs. Implementation of CFPB's final rule on section 1071 of Dodd-Frank will be useful for creating datasets that will benefit SDFRs in the long term. Reintroducing elements of the Justice for Black Farmers Act of 2023 can allow for assistance to SDFRs while avoiding equal protection issues that arose in the ARPA cases.

Finally, at a time where attacks on diversity and racial equity are ramping up, it is exceedingly important to continue pursuing the goals of righting the wrongs of past discrimination toward SDFRs and tackling continuing disparities with access to credit and credit risk. Although much of the harm done is irreversible for past generations, we can improve the future for this generation of SDFRs, and those to come.