IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

RUSTY STRICKLAND, *et al.*,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*,

Defendants.

Case No. 2:24-cv-60-Z

PLAINTIFFS' RENEWED MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

For years, Defendants (USDA) discriminated based on race and sex in the administration of emergency disaster relief funds. This case deals with eight such programs in which USDA paid substantially more to non-white and female farmers than it did to Plaintiffs.[1] This Court enjoined USDA from continuing that race and sex discrimination. In 2025, to its credit, USDA admitted that those programs were unconstitutional. Given USDA's admission, the parties jointly agreed to allow the agency to revise the programs to remedy their constitutional infirmities and make Plaintiffs financially whole. At the time of the remand, the only remaining dispute surrounded whether USDA had to make whole the non-plaintiff farmers that it also discriminated against. The parties agreed to resolve that question later if the dispute remained after the remand. But to be clear, contrary to their current position, USDA has repeatedly acknowledged to this Court that Plaintiffs' injuries are financially remediable, and that USDA needed to remedy them if its discrimination was unconstitutional.

Stated plainly, USDA volunteered for remand and induced both Plaintiffs and this Court into agreeing to that course with clear statements that USDA could act to remedy Plaintiffs' injuries, including their financial component. But all USDA did on remand was remove the

[1] *See* Notice of Funds Availability; Emergency Livestock Relief Program (ELRP) (ELRP 2021 Phase 1), 87 Fed. Reg. 19465, 19467 (Apr. 4, 2022); Notice of Funds Availability; 2021 Emergency Livestock Relief Program (ELRP) Phase 2 (ELRP 2021 Phase 2), 88 Fed. Reg. 66366, 66369 (Sept. 27, 2023); Notice of Funds Availability; Emergency Relief Program (ERP) (ERP 2021 Phase 1), 87 Fed. Reg. 30164, 30166 (May 18, 2022); Pandemic Assistance Programs and Agricultural Disaster Assistance Programs, Subpart S—Emergency Relief Program Phase 2 (ERP 2021 Phase 2), 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901); Subpart D—Pandemic Assistance Revenue Program (PARP), *id.* at 1879 (codified at 7 C.F.R. § 9.302); Subpart A—Coronavirus Food Assistance Program 2 (CFAP 2), *id.* at 1877 (codified at 7 C.F.R. § 9.201); Notice of Funds Availability; Emergency Livestock Relief Program (ELRP) 2022 (ELRP 2022), 88 Fed. Reg. 66361, 66363 (Sept. 27, 2023); Notice of Funds Availability; Emergency Relief Program 2022 (ERP 2022), 88 Fed. Reg. 74404, 74408 (Oct. 31, 2023).

"socially disadvantaged" definition from the programs. It did nothing about its prior unlawful agency action, not even with respect to Plaintiffs.[2] Ignoring its prior promises to both Plaintiffs and this Court, USDA now asks this Court to declare that the case is over, based on a new and different promise: that it will not discriminate anymore. This Court should reject these arguments.

Initially, apart from the merits of its arguments, USDA is precluded by the doctrine of judicial estoppel from arguing that it does not need to financially compensate Plaintiffs. USDA convinced both Plaintiffs and this Court to agree to a voluntary remand by promising to at least remedy Plaintiffs' injuries. USDA cannot renege on that deal. The Court should not permit USDA to reap the benefit of luring Plaintiffs into a voluntary remand with the expectation that USDA would do what it told Plaintiffs and the Court it would do—repeatedly—only to then turn and argue that the Court can no longer help.

Next, even if the Court allows USDA to argue that it does not need to fix the financial disparities it created, the government is wrong on the law because a live controversy still exists. Plaintiffs' equal protection claims are not moot because they remain injured. Rusty Strickland was still paid one-tenth of what his wife was, based only on his sex. His concrete equal protection injury did not vanish because USDA promised not to discriminate going forward. Nor did USDA do anything to address its arbitrary and capricious implementation of progressive factoring in Emergency Relief Program (ERP) 2022. Although this Court declined to preliminarily enjoin progressive factoring, the complete administrative record was submitted after that ruling. A review of the full record reveals USDA's racially discriminatory intent when adopting progressive

[2] The Federal Register publications concerning the programs submitted on remand only include the revisions made to them, and so this brief will cite to the original versions throughout except when noting the removal of the "socially disadvantaged" designation. *See* App. 973–82 (containing revisions made to programs following remand).

factoring. The full record also shows that the agency made last-minute, unexplained changes to the progressive factoring payment structure. Progressive factoring is unlawful and USDA should be required to reconsider it.

And last, sovereign immunity does not bar this Court from ordering a remedy. The Administrative Procedure Act waives sovereign immunity for claims that do not seek money damages. And Plaintiffs do not seek money damages. They seek what they were always entitled to under the law: equal protection. Remand with an instruction to treat them equally is an equitable remedy that will provide that. It is up to USDA whether it wants to compensate Plaintiffs, claw back payments made based on race and sex, or implement a novel alternative solution. Any of those options results in the same thing for Plaintiffs—equal protection.

This Court should grant summary judgment in Plaintiffs' favor and remand the challenged programs again with an instruction to USDA to fully cure Plaintiffs' injuries.

BACKGROUND

Plaintiffs commenced this action on March 29, 2024, challenging USDA's unlawful agency actions related to eight separate disaster relief programs from 2020 through the present. All eight programs discriminated based on race and sex through the use of the "socially disadvantaged" designation. Now, both this Court and the parties have agreed that USDA's race and sex discrimination was unlawful. *See, e.g.*, Mem. Op. and Order, ECF No. 26 (granting Plaintiffs' motion for a preliminary injunction in part); Resp. to the Ct.'s Jan. 27, 2025 Order (Feb. 10, 2025), ECF No. 52 (including Defendants acknowledging that "the Department of Justice has determined that the [USDA] programs at issue in this case are unconstitutional to the extent they include preferences based on race and sex").[3] The only remaining issues are whether USDA needs

[3] Citations to court documents will be to only the ECF number after initial citation.

to remedy the financial disparities it created through its race and sex discrimination in disaster relief programs and whether progressive factoring, a form of relief used in ERP 2022, is lawful.

I. The parties negotiated a remand.

One week after filing this case, Plaintiffs filed a motion for a preliminary injunction, seeking to enjoin USDA's ongoing discrimination nationwide. *See* Pls.' Br. in Supp. of Mot. for Prelim. Inj. at 24, ECF No. 11. On June 7, 2024, the Court granted in part Plaintiffs' motion. *See* ECF No. 26. Following that, the parties fully briefed Motions for Summary Judgment, *see* ECF Nos. 32, 38, 43, 44, 45, and then entered negotiations following the revocation of the Executive Order titled Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, *see* Order (Jan. 27, 2025), ECF No. 49 (ordering joint briefing on the effect of the executive order). Following that executive order, USDA no longer defends the constitutionality of the race and sex discrimination in the programs at issue in this case. ECF No. 52.

Given that USDA had conceded the most significant issues in the case—that it had unlawfully discriminated based on race and sex in all eight of the challenged programs and that it could compensate Plaintiffs—the parties elected to negotiate a resolution to the pending cross-motions for summary judgment. USDA had already explained that it both had the funds available to compensate Plaintiffs, and that the Court could order it to do so. USDA has never wavered, until now, on the fact that it could remedy an injury on remand by paying Plaintiffs the race- and sex-based shortfalls.

Here is a sampling of times when USDA told the Court that Plaintiffs' financial injuries were fully remediable:

- **Defendants' Opposition to Preliminary Injunction—**USDA's primary reason for resisting the preliminary injunction was that "the alleged underpayments can be remedied

by providing Plaintiffs adjusted benefits at the conclusion of this case given the level of program funds that are anticipated to be available at that time."[4] ECF No. 21 at 2; *id*. at 9 (stating Plaintiffs' past injuries "consist of monetary harms that can be remedied at the conclusion of this action");[5] *id.* at 12 (injuries can be remedied "by a retroactive finding that the standards USDA used to process the application were unlawful"); *id.* at 14 (stating that "adjusted benefits can be provided to Plaintiffs if they prevail at the conclusion of this case" and citing the sworn declaration of Farm Service Agency Administrator Zachary Ducheneaux for support); *id*. (explaining that "barring unexpected and unprecedented developments, USDA will have funding available to provide Plaintiffs 'adjusted benefit payments' for *each* of the applications they claim were improperly processed 'if they obtain a favorable decision at the conclusion of this case'"); *id.* at 15–16 (stating that "'should Plaintiffs ultimately prevail on the merits of their suit, they have recourse . . . to recover the' payments they believe were erroneously withheld from them" (quoting *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279–80 (5th Cir. 2012))); *id*. at 18 (arguing that, "as here, there are mechanisms to compensate a plaintiff at the conclusion of a case"); *id*. at 18–19 (claiming Plaintiffs' harms "can be obviated by monetary relief").

- **Declaration of Zachary Ducheneaux (supporting USDA's Preliminary Injunction Response)**—"FSA could make the following adjusted benefits payments to Plaintiffs if they obtained a favorable decision at the conclusion of this case." Ducheneaux Decl., App. 1006–12, ¶¶ 89–93 (detailing precise adjusted amounts Defendants planned to pay to Plaintiffs if Plaintiffs prevailed).

- **Defendants' Motion for Summary Judgment—**"Plaintiffs' asserted monetary injuries can be remedied through 'adjusted benefit payments' for each of the applications they claim were improperly processed." ECF No. 38 at 32 (quoting Ducheneaux Decl., App. 1006–12, ¶¶ 89–93); *id*. at 32–33 (conceding that the Court can issue a remand order "directing the agency to recalculate Plaintiffs' payment amounts without the use of any classifications that the Court may find inappropriate"); *id.* at 33 (arguing for narrow relief if Plaintiffs prevail "because funds to adjust their payments remain available"); *id*.

[4] USDA also assured the Court that sufficient funds would remain available, even for expired programs, "to make adjusted benefit payments." ECF No. 21 at 5; *see also id.* at 10 (stating that "funds remain available to make those payments should Plaintiffs prevail"); *id*. at 14 ("Crucially, the declaration [of Mr. Ducheneaux] makes clear that—even for the closed programs—funding remains available . . . ."); *id.* at 14 ("Mr. Ducheneaux explains—based on the information currently available to FSA—how much additional payments Plaintiffs could obtain if they prevail on their claims and USDA re-processes their applications."); *id.* at 15 (stating that "based on current estimates, there is enough money in each of the programs to pay Plaintiffs should they prevail"); *see also* Ducheneaux Decl., App. 1002–06, ¶¶ 74–88 (detailing funds available for each program).

[5] USDA's argument was that financial adjustments would fully remedy Plaintiffs' injuries. That argument failed to persuade the Court to deny a preliminary injunction because ongoing discriminatory payments *continued* to inflict a stigmatic harm, not because the Court determined that financial adjustments were not an available remedy. *See Strickland v. U.S. Dep't of Agric.*, 736 F. Supp. 3d 469, 485 (N.D. Tex. 2024). USDA now claims that the remedy that it assured the Court would be available is not.

(assuring the Court that "a full and adequate remedy" exists through a remand order); *id.* at 35 (arguing that "an increase of payments to Plaintiffs will remedy their asserted financial and (largely unasserted) stigmatic injury").

- **Defendants' Reply Brief in Support of Motion for Summary Judgment—**USDA asked the Court to limit relief to only "a remand directing USDA to recalculate their payments for the specific challenged programs would remedy [Plaintiffs'] financial losses." ECF No. 44 at 12; *id*. at 13 (arguing that a "financial remedy would definitionally remove the very source of unequal treatment" that inflicted an injury); *id.* (faulting Plaintiffs for failing to "demonstrate that money cannot make Plaintiffs whole"); *id*. (arguing Plaintiffs' "injury is, indeed, capable of financial compensation"); *id*. at 15 (endorsing a "remand directing the agency to merely recalculate Plaintiffs' payments" instead of vacatur).

Relying on USDA's position that it had the money to compensate Plaintiffs, that the Court could order it to do so, and that USDA was no longer defending the constitutionality of the programs, the parties' negotiation culminated in a joint motion for voluntary remand, which the Court granted. Joint Mot. for Voluntary Remand, ECF No. 65; Order (May 15, 2025), ECF No. 66. When discussing voluntary remand, the only contested point was whether USDA's chosen remedy would exclude non-party farmers injured by the discrimination. Joint Status Report (April 10, 2025), ECF No. 61 at 4 ("USDA is committed to resolving this matter and providing *full relief* to the six Plaintiffs in this case related to their claims regarding the 'socially disadvantaged' designation." (emphasis added)); *id*. (explaining that "USDA is willing to provide relief to the six Plaintiffs in this case" but is "unable to commit" to providing relief to non-parties).

In the joint motion, the parties explained that "the only remaining disagreement between the parties is about what results USDA will reach on remand." ECF No. 65 at 1. Specifically, "the parties disagree whether the remedy to USDA's constitutional violation should be limited to the six plaintiffs in this case." *Id.* at 1–2. Plaintiffs included a footnote explaining their view that any remand result by USDA that did not undo its prior discrimination would be insufficient under the APA. *Id.* at 2 n.1.

USDA has now returned the underlying programs from voluntary remand, having removed the "socially disadvantaged" designation. Defs.' Notice of Completion of Remand, ECF No. 69. USDA took no other action during the remand other than to remove all references to the "socially disadvantaged" designation. *See* App. 973–82 (remand results). USDA did not adjust any discriminatory payments that it already made. *See id.*

On December 2, 2025, the parties filed a joint status report expressing differing positions on how to proceed, with USDA arguing that Plaintiffs' equal protection claims had been mooted by the remand, despite USDA making no financial adjustments, and Plaintiffs arguing that the entire case remains a live controversy. Joint Status Report (Dec. 2, 2025), ECF No. 77. The parties agree that Plaintiffs' claim that progressive factoring is arbitrary and capricious was not mooted. *Id.* at 12. The Court ordered the parties to submit cross-motions for summary judgment. Order (Dec. 5, 2025), ECF No. 78; Scheduling Order (Dec. 23, 2025), ECF No. 82.

II. USDA switched from flat to progressive factoring.

In ERP 2022, USDA instituted what it called "progressive factoring," a novel system that paid the farmers hit hardest by disasters the smallest portion of their losses. *See* ERP 2022, 88 Fed. Reg. at 74410; *see also* App. 982 (leaving intact progressive factoring after remand). In prior years, USDA distributed funds directly proportionately to losses using what it calls a "flat factor." *See, e.g.*, ELRP 2021 Phase 1, 87 Fed. Reg. at 19466 (paying a flat 90 percent of losses to socially disadvantaged farmers and a flat 75 percent of losses to farmers like Plaintiffs). ERP 2022 marked a sudden departure from that—a farmer whose calculated loss was $2,000 would receive $1,500, or 75%, but a farmer whose calculated loss was $200,000 would receive $18,000, or 9%. *See* 88 Fed. Reg. at 74410.

Plaintiffs challenged progressive factoring as discriminatory and as arbitrary and capricious. In its opinion enjoining ERP 2022, this Court explained that progressive factoring as part of ERP 2022 discriminated based on race because it "hurt[] farmers claiming large losses, and then exempt[ed] certain races from the adverse consequences." ECF No. 26 at 12. On remand, USDA agreed to "revise the challenged programs to cure the race and sex discrimination" in the challenged programs, including ERP 2022. USDA removed the "socially disadvantaged" language from ERP 2022. But USDA continues to employ progressive factoring, despite it having been intended to discriminate based on race and sex and despite its discriminatory impact. *See* App. 982.

A. USDA intended for progressive factoring to benefit "socially disadvantaged" farmers at the expense of other farmers.

USDA designed progressive factoring with the explicit intent of benefiting certain races and sexes at the expense of others.

USDA's stated justification for its use of progressive factoring is in a brief footnote:

> Progressive factoring is a mechanism that ensures the limited available funding is distributed in a manner benefitting the majority of producers rather than a few. Additionally, progressive factoring increases emergency relief payments to most participants while reducing larger potential payments which *increases the proportion of funding provided to smaller producers.*

88 Fed. Reg. at 74410 n.14 (emphasis added). Although USDA refers to producer size in this single footnote, the administrative record reveals that USDA frequently used "smaller producers" to refer to underserved producers.[6] *See id* at 74410 n.15. USDA, for example, stated its belief that steering funds to those farmers with "smaller operations" that "lack financial reserves" would "support[]

[6] At the time this was written, "underserved producers" included "socially disadvantaged" farmers, the classification USDA now admits unconstitutionally discriminated based on race and sex. *See, e.g.*, 88 Fed. Reg. at 74408.

the *equitable* administration of FSA programs by targeting limited resources to support *underserved farmers and ranchers*." *Id.* (emphases added). In other words, progressive factoring resulted in smaller farmers receiving more money at the expense of comparatively larger farmers and USDA stated that it knew smaller farmers were more likely to be producers of its preferred races and sex. *See id.* at 74410 nn.14–15.

Beyond the Federal Register, USDA's other record statements show that USDA provided additional benefits to underserved producers. For example, when faced with options for how to apply progressive factoring for ERP "Track 2" alongside the underserved producer "top-up benefit" (USDA's internal term for the additional 15% payment increase denied to some farmers based on their race and sex, *see* App. 868), USDA used a methodology that "maximizes available assistance to all small-scale operations while supporting the additional [underserved producer] top-up benefit for non-traditional operations and participants." App. 868. USDA directly linked the smaller size of a producer to underserved producer status.

The full administrative record also discusses USDA's intent to create "the highest benefit for the [underserved producer]" by exempting refunds of premiums and fees from progressive factoring and prioritizing them. App. 862. In an internal memorandum finalizing the ERP 2022 structure for Track 1, USDA laid out the formula it was using. First, it calculated the gross ERP payment, then multiplied it by the producer's share, and then applied progressive factoring to it. App. 862. Only then did USDA refund premiums and fees for underserved producers. App. 862. As USDA explained, "This calculation substantiates the highest benefit for the underserved producers by adding the premiums/fees after factoring." App. 862. Likewise, USDA explained that with only $3 billion to cover more than $10 billion in uncovered losses, App. 870, USDA was prioritizing $432 million to premium and fee refunds for underserved producers, App. 873.

Throughout the record, USDA pursued a single-minded goal of prioritizing relief to farmers of its preferred races and sex over other farmers.

B. The administrative record lacks key information on why USDA implemented progressive factoring how it did.

The full administrative record does not include any discussion about (1) where USDA eventually set the progressive factoring payment thresholds and why; (2) why USDA chose to steer funds to smaller operations and shallower losses; or (3) why USDA calculated it on a per-producer basis. *See* ERP 2022, 88 Fed. Reg. at 74410–14.

First, USDA made decisions about payment thresholds and then changed them without explanation. In the final version of ERP 2022, published October 31, 2023, there are six payment thresholds: up to $2,000; up to $4,000; up to $6,000; up to $8,000; up to $10,000; and over $10,000. *Id.* at 74410, 74414. The first $2,000 in losses is paid to the farmer in full, and each $2,000 after is paid less, decreasing by 20 percent at each $2,000 threshold until reaching $10,000. *Id.* at 74410, 74414. Any loss exceeding $10,000 is paid at 10 cents on the dollar. *Id.* at 74410, 74414. These same payment thresholds appear in the full administrative record in USDA's presentation to the OMB given on July 21, 2023. App. 869–86. But in the memorandum published on May 19, 2023, marked "2022 EMERGENCY RELIEF DECISIONS" that begins by stating that "[t]his memo provides the final decisions for the following key items pertaining to ERP 2022 . . . ERP Track 1 Payment Calculation using Progressive Factoring," the thresholds are different, without explanation. App. 862. Rather than change every $2,000, the thresholds changed every $5,000. App. 862. Rather than decrease by 20 percent, the thresholds decreased by 25 percent. App. 862. Rather than end at 10 percent, the thresholds ended at 25 percent. App. 862. The record does not explain this change.

Second, USDA did not explain why it steered additional funds toward smaller operations and shallower losses. USDA repeats throughout the record that progressive factoring targets payments towards smaller operations and shallower losses. *See* ERP 2022, 88 Fed. Reg. at 74410, 74414. But USDA does not explain why it targeted funds this way. And as discussed above, USDA used references to "smaller" producers to refer to underserved producers, a race- and sex-discriminatory classification. *See, e.g.*, *id.* at 74410 n.15.

Third, USDA does not explain why it calculated progressive factoring on a per-producer basis, as opposed to an entity basis. This means that if a single-owner farm, or a corporate-entity farm, loses $10,000 of crops, that will be progressively factored down to $6,000.[7] But if a dual-owner farm of the same size loses $10,000 of crops, that will be progressively factored down to a total of $8,400. The record does not reflect any recognition by USDA of this policy decision. It is only discussed in the Emergency Relief Decisions memo, and the memo only notes that this "[r]esults in higher payment to primary policy holder and all [beneficiaries]." App. 862. The record does not reflect any realization by USDA that the switch from a flat factor to a progressive factor caused this to become a significant policy decision.

STANDARD OF REVIEW

When the record establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," summary judgment is appropriate. Fed. R. Civ. P. 56(a). "Summary judgment is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency." 10B Adam N. Steinman & Mary Kay Kane, Federal Practice and Procedure § 2733 (4th ed.). That is because "the focal point

[7] Example numbers provided in this section use the Federal Register formulas rather than the Emergency Relief Decisions memo formulas. *Compare* ERP 2022, 88 Fed. Reg. at 74410, 74414, *with* App. 862.

for judicial review" is "the administrative record already in existence." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To prevail under the APA, a plaintiff must: (1) identify final agency action; (2) "show that he has suffered legal wrong because of the challenged agency action, or is adversely affected or aggrieved by that action within the meaning of a relevant statute," *BNSF Ry. v. EEOC*, 385 F. Supp. 3d 512, 519 (N.D. Tex. 2018) (cleaned up); and (3) show that the agency action was (i) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," (ii) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or (iii) "contrary to constitutional right, power, privilege, or immunity," 5 U.S.C. §§ 706(2)(A)–(C).

Determining whether an agency action is "contrary to constitutional right" requires *de novo* review of the challenged action. *Tex. Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 419 n.34 (5th Cir. 1999) (citing 5 U.S.C. § 706). An agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983). Under *State Farm*, "[t]he agency must articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 434 (5th Cir. 2023) (quotation marks omitted). This is because agencies "are required to engage in 'reasoned decisionmaking.'" *Sierra Club v. EPA*, 939 F.3d 649, 664 (5th Cir. 2019) (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)). As such,

agency action cannot be sustained where "the agency's path" cannot "reasonably be discerned" from the administrative record before the reviewing court. *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

ARGUMENT

I. USDA is estopped from contradicting prior promises made to induce Plaintiffs and the Court to agree to a remand.

The parties, and the Court, agreed to voluntary remand on the premise that USDA would cure Plaintiffs' financial equal protection injury, and judicial estoppel bars USDA from changing positions now. Although the doctrine is flexible, *see New Hampshire v. Maine*, 532 U.S. 742, 751 (2001), judicial estoppel has two "necessary" elements: (1) the estopped party's position must be "clearly inconsistent with its previous one," and (2) "that party must have convinced the court to accept that previous position." *Browning Mfg. v. Mims*, 179 F.3d 197, 206 (5th Cir. 1999) (citing *U.S. ex rel. v. Am. Bank C.I.T. Constr. Inc.*, 944 F.2d 253, 258 (5th Cir. 1991)).

Judicial estoppel generally prevents a party from "attempt[ing] to contradict [its] own sworn statements . . . ." *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988). A party who maintains a position successfully may not assume a contrary position "simply because [its] interests have changed," especially when it prejudices the opposing party. *Davis v. Wakelee*, 156 U.S. 680, 689 (1895); *see United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (explaining judicial estoppel prevents litigants from "'playing fast and loose' with the courts" (quoting Rand G. Boyers, Comment, *Precluding Inconsistent Statements: the Doctrine of Judicial Estoppel*, 80 Nw. Univ. L. Rev. 1244, 1245 (1986))). Judicial estoppel promotes "laudable policy goals," *Ergo Sci. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996), because it protects the "integrity of the judicial process" by preventing a party from abandoning a prior position it successfully maintained. *Am. Bank C.I.T. Constr. Inc.*, 944 F.2d at 258–59. As such, judicial estoppel is particularly appropriate

where a party obtains "an unfair advantage," and allowing that would "impose an unfair detriment on the opposing party if not estopped." *See New Hampshire*, 532 U.S. at 751. The forcefulness with which USDA insisted it could—and would—make payments to Plaintiffs if they prevailed in their equal protection claim fairly brings judicial estoppel into play. *See Ergo Sci.*, 73 F.3d at 598 (recognizing judicial estoppel). USDA's new position is clearly inconsistent with its previous one and the Court accepted its previous position when it granted the voluntary remand. USDA is judicially estopped from refusing to rectify Plaintiffs' financial equal protection injury.

From the beginning, Plaintiffs have been consistent about the nature of their injuries and the relief they requested. USDA treated them unequally based on their race and sex. USDA not only discriminated by providing Plaintiffs less financial assistance than similarly situated farmers; it also continued to issue unequal payments based on race and sex. Plaintiffs requested that the Court declare the programs unconstitutional, set them aside, and remand them for USDA to address its discriminatory actions—past, present, and future. Compl., ECF No. 1, ¶¶ 174, 193, 212, ¶ F (requesting the agency action be "vacate[]d and set aside . . . and remand[ed] . . . to USDA to remedy the Fifth Amendment violations"); *see also* Rusty Strickland Decl., App. 972, ¶ 23; Alan West Decl., App. 959, ¶ 22; Bryan Baker Decl., App. 967, ¶ 22.

To fully redress Plaintiffs' injuries, USDA always needed to (1) address the prior financial shortfalls and (2) discontinue the use of race or sex in disaster relief payments. That is black letter equal protection law. *See, e.g.*, *Louisiana v. United States*, 380 U.S. 145, 154 (1965) ("We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."); *Califano v. Westcott*, 443 U.S. 76, 90 (1979) (affirming district court extension of

benefits unlawfully denied based on sex and listing six separate cases in which the Supreme Court had affirmed a lower court decision extending benefits to a group unlawfully excluded from them).

The elements of judicial estoppel are met here. First, USDA's current position is inconsistent with its previous one. *See Am. Bank C.I.T. Constr. Inc.*, 944 F.2d at 258. USDA currently claims that it "cured" Plaintiffs' injuries through a remand that did nothing to treat Plaintiffs equally to similarly situated farmers who previously received preferential treatment based on their race or sex. ECF No. 77 at 9. And USDA now insists that the Court cannot order it to provide more money to Plaintiffs without implicating sovereign immunity. *Id.* at 10. These claims directly contradict USDA's prior representation that it would provide "full relief" to Plaintiffs now that it agreed the payments were unconstitutional. ECF No. 61 at 4. And USDA was also unequivocal about the Court's ability to direct it to pay Plaintiffs more money. It stated—over and over—that the Court could order a remand "directing the agency to recalculate Plaintiffs' payments." ECF No. 44 at 15; *see infra* at 4–6 (listing specific statements). The Farm Service Administrator even swore that "FSA could make the following adjusted benefit payments to the Plaintiffs if they obtain a favorable decision at the conclusion of this case." Ducheneaux Decl., App. 1006, ¶ 89; *see also Hall v. GE Plastic Pac. PTE, Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (noting judicial estoppel does not require a sworn statement). It cannot be simultaneously true that the Court can order USDA to direct enhanced payments to Plaintiffs and that the Court cannot.

USDA itself stated that the appropriate remedy would be a remand "directing the agency to recalculate Plaintiffs' payments amounts" should they prevail. *See* ECF No. 38 at 41; *see also* ECF No. 44 at 16 (arguing same). USDA agreed that the only issue left that the parties disagreed about before the Court granted a voluntary remand was whether the scope of relief could be limited to exclude non-party farmers. *See* ECF No. 61 at 4. These positions were not mistakes, or

inadvertent, *see New Hampshire*, 532 U.S. at 753, but rather the product of deliberate litigation choices. They do not square with what USDA now argues after getting the remand it sought.

This is a paradigmatic example of a party shifting positions "simply because [its] interest[s] have changed." *Davis*, 156 U.S. at 689. USDA's interests were opposite when trying to head off a preliminary injunction or a set-aside order, *see* 5 U.S.C. § 706, or to convince the Court (and Plaintiffs) to agree to a voluntary remand with no instructions to the agency. USDA's prior goal was to persuade the Court that it could compel USDA to grant Plaintiffs additional funds and, after USDA abandoned its defense on the merits, that it would deliver to Plaintiffs "full relief" on a remand. ECF No. 61 at 4. Now that the Court permitted USDA to act though a voluntary remand with no instructions, USDA maintains that simply removing the discriminatory classifications moots the case and that the Court "cannot" direct it to award Plaintiffs any additional dollars. ECF No. 77 at 9. Although USDA's interests have changed, this remains the same case.

The second necessary element of judicial estoppel is met because the Court accepted USDA's prior position and acted based on it. *See Am. Bank C.I.T. Constr. Inc.*, 944 F.2d at 258. The prior success element of judicial estoppel does not require success on the merits. *Hall*, 327 F.3d at 398–99; *see also, e.g.*, *Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 836 (5th Cir. 2000) (noting prior court's reliance on a party's position when ordering remand to state court); *Ergo Sci.*, 73 F.3d at 600 (holding judicial estoppel applies to "statements made by counsel in open court relinquishing a specific claim"). The doctrine of judicial estoppel applies any time a party makes an argument "with the explicit intent to induce the district court's reliance." *Hall*, 327 F.3d at 399 (quoting *Hidden Oaks v. City of Austin*, 138 F.3d 1036, 1047 (5th Cir. 1998)). "When a court 'necessarily accepted, and relied on' a party's position in making a determination, then the prior success requirement is satisfied*." Id.* (quoting *Ahrens*, 205 F.3d at 836).

This Court relied on USDA's representation that "the *only* remaining disagreement between the parties is . . . whether the remedy to USDA's constitutional violation should be limited to the six plaintiffs in this case," ECF No. 65 at 1–2 (emphasis added), when it ordered a voluntary remand to allow USDA to correct its mistakes, ECF No. 66 at 1. USDA had said repeatedly that the Court could order it to recalculate payments. The Court trusted that the remand would cure Plaintiffs' financial shortfalls and that it could order recalculation if it did not. A remand would only promote "the interest of efficient resolution," ECF No. 66 at 2 (quoting ECF No. 65 at 2–3), if the Court would still later be able to order USDA to recalculate payment amounts. Had USDA argued previously that the Court lacked the power to order recalculation—as it argues now—and that it would be delivering less than full relief, the Court could have issued instructions "directing" USDA "to recalculate Plaintiffs' payment amounts." ECF No. 38 at 32. Because the Court "necessarily accepted, and relied on," *Ahrens*, 205 F.3d at 836, USDA's position when granting the voluntary remand—a *joint* motion that Plaintiffs would *never* have supported had they known that they would still have to litigate to receive equal protection—the prior success requirement is satisfied.

An additional factor favors judicial estoppel. *See New Hampshire*, 532 U.S. at 750 (explaining that the elements are "non-exclusive"). USDA obtained "an unfair advantage," and allowing that would "impose an unfair detriment on the opposing party if not estopped." *Id*. at 751. After all, the motion for voluntary remand was filed *jointly*. Plaintiffs joined the motion with every expectation that USDA would address the financial disparities—a necessary component of remedying Plaintiffs' equal protection injury. Had USDA said in May 2025 that it would do nothing to remedy the financial disparity and then argue that sovereign immunity barred Plaintiffs from asking for it later, Plaintiffs would have opposed a remand without instructions and the Court

could have addressed the question then. Instead, Plaintiffs—who are struggling to financially recover from natural disasters—agreed to the remand and waited for the payments to be corrected somehow. Rather than fix the financial disparity, USDA reversed position after the remand, finding itself now in a better litigation posture. It seized the chance to remove classifications in order to declare the case moot and claim the Court cannot order it to recalculate payments. *See* ECF No. 77 at 9, 11. USDA's shifting position operates to the detriment of Plaintiffs by allowing USDA to maneuver itself into a position to challenge this Court's Article III jurisdiction. *Id.* at 11. USDA should be estopped.

No estoppel considerations weigh in USDA's favor. In some instances, the interest of public policy may allow governments a "change of positions that might seem inappropriate as a matter of merely private interests." *New Hampshire*, 532 U.S. at 755. But here, estoppel would not "compromise a governmental interest in enforcing the law." *Id*. If the Court held USDA to its initial position, it would not be "unable to enforce the law because [of] the conduct of its agents." *Id.* (quoting *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984)). Equality is (and has long been) the law. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 230 (2023) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.") (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Nor is USDA's change in position on treating Plaintiffs equally "the result of a change in public policy." *New Hampshire*, 532 U.S. at 755 (quoting *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995)). Although the change in public policy that occurred in this case is notable, the new administration did not forbid its officials from addressing recent illegal discrimination—it encouraged them to. *See* Executive Order 14173*, Ending Illegal Discrimination and Restoring Merit-Based Opportunity,* 90 Fed. Reg. 8633 (Jan. 21, 2025). The balance of

equities weighs in favor of judicial estoppel, and USDA should be estopped from arguing that it remedied Plaintiffs' injuries when it did nothing to resolve the ongoing financial disparity it created and claimed it would fix.

II. USDA did not fully remedy Plaintiffs' equal protection injuries and thus did not moot Plaintiffs' equal protection claims.

Plaintiffs' equal protections injuries have not been remedied—the same financial disparity based solely on their race and sex exists now as existed at the outset of the case. A case is mooted only when an intervening event occurs such that the plaintiff obtains "all" that he may have gotten from the lawsuit. *See FBI v. Fikre*, 601 U.S. 234, 240 (2024). And so a case is not moot when a court "granting a present determination of the issues offered . . . will have some effect in the real world." *Kan. Jud. Rev. v. Stout*, 562 F.3d 1240, 1246 (10th Cir. 2009) (quotation omitted). The party claiming mootness has a "formidable burden." *Fikre*, 601 U.S. at 241 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC)*, 528 U.S. 167, 189 (2000)). And courts do not hold the government to a special, more deferential mootness standard. *Id.* at 241 ("That much holds for governmental defendants no less than for private ones."). Unless USDA can carry its burden, the Court's "virtually unflagging obligation" to hear the case remains. *See id*. at 240 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

Nor may the government take refuge by arguing that it has voluntarily ceased treating Plaintiffs unconstitutionally. To carry that burden requires showing both that the alleged violation will not recur and that "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added) (citing *DeFunis v. Odegaard*, 416 U.S. 312 (1974), and *Ind. Emp. Sec. Div. v. Burney*, 409 U.S. 540 (1973)). No one appears to dispute that USDA's discriminatory payments to Plaintiffs remain unaddressed. That leaves a live controversy before the Court because Plaintiffs

were still paid unequally based on their race and sex. *Davis*, 440 U.S. at 631 (requiring the "complete[] and irrevocabl[e] eradicate[ion of] the effects of the alleged violation"); *see also Western Nuclear, Inc. v. Huffman*, 825 F.2d 1430, 1434 (10th Cir. 1987), *rev'd on other grounds*, 486 U.S. 663 (1998) (rejecting mootness argument where a new agency rulemaking process did not address an injury allegedly caused by prior rulemaking).

Moreover, "a defendant's corrective actions that do not fully comport with the relief sought are also insufficient." *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 881 (10th Cir. 2019) (cleaned up). In its preliminary injunction order, the Court explained why Plaintiffs' stigmatic injury was ongoing and irreparable. *See Strickland*, 736 F. Supp. 3d at 485. This Court did not hold that halting future payments would remedy all of Plaintiffs' injuries, just that Plaintiffs needed preliminary relief to stop additional injury from accruing. *Id.* All USDA has done is halt additional discriminatory payments, not remedy the wrongs it already perpetrated. Only when a party can show both that the alleged violation will not recur and that it has "completely and irrevocably eradicated the effects of the alleged violation . . . it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." *Davis*, 440 U.S. at 631.

USDA's arguments amount to assertions that various forms of relief would be barred for one reason or another, such as sovereign immunity. But whether remedies may be difficult, or even impossible, is irrelevant. Such issues are not truly mootness questions. *Chafin v. Chafin*, 568 U.S. 165, 174 (2013) ("[An] argument—which goes to . . . the legal availability of a certain kind of relief—confuses mootness with the merits."). Put simply, there remains work for this Court to do. USDA has not remedied its unconstitutional actions—the only question for mootness purposes.

Plaintiffs have an outstanding equal protection injury caused by USDA's unlawful implementation of the programs.

III. Progressive factoring remains unlawful.

This Court initially held that USDA's decision to institute progressive factoring to reduce payments to farmers was not arbitrary and capricious and did not discriminate based on race and sex (outside of the larger ERP 2022 scheme that included discriminatory refunds of insurance premiums). *Strickland*, 736 F. Supp. 3d at 479, 481. With the benefit of the full administrative record—the hundreds of pages documenting USDA's internal process—Plaintiffs respectfully submit that USDA's use of progressive factoring is unlawful and seek a second remand of ERP 2022 for reconsideration of progressive factoring. Progressive factoring is unlawful because it was designed with an invidious discriminatory intent and has a discriminatory effect. It is also unlawful because USDA acted arbitrarily and capriciously in designing it by failing to consider key aspects of the problem and failing to engage in reasoned decisionmaking.

A. Progressive factoring was designed with an unlawful discriminatory intent and has a discriminatory effect.

USDA intended progressive factoring to discriminate based on race and sex, and it succeeded. Unlawful discrimination exists where the record contains evidence that "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *See Pers. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). "The challengers bear the burden to show that racial discrimination was a substantial or motivating factor behind enactment of the law; if they meet that burden, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Veasey v. Abbott*, 830 F.3d 216, 231 (5th Cir. 2016) (quotation marks and citations omitted). "Determining whether invidious discriminatory purpose was a motivating

factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

To begin with, USDA took explicitly discriminatory actions related to progressive factoring. USDA began by extending Noninsured Crop Disaster Assistance Program (NAP) coverage for free to farmers of its preferred races and sex, without even requiring them to apply. ERP 2022, 88 Fed. Reg. at 74411; ERP 2021 Phase 2, 88 Fed. Reg. at 1871. Then it exempted crops covered by NAP from having their payments reduced by progressive factoring. ERP 2022, 88 Fed. Reg. at 74411; ERP 2021 Phase 2, 88 Fed. Reg. at 1871. The effect of this change was to apply progressive factoring for NAP-eligible crops only to farmers who were not members of USDA's preferred races and sex. USDA also chose to apply progressive factoring to a farmer's total before refunding federal crop insurance and NAP fees and premiums. ERP 2022, 88 Fed. Reg. at 74410. This means that those refunds evaded progressive factoring. *See Strickland*, 736 F. Supp. 3d at 481 (explaining that this was a race- and sex-discriminatory component of progressive factoring). USDA's decision to exempt NAP-covered crops from progressive factoring and not to apply progressive factoring to its discriminatory insurance premium refunds are both forms of race and sex discrimination in its implementation of progressive factoring. Although USDA has ceased its explicit race and sex discrimination, these examples still highlight USDA's intent to discriminate against Plaintiffs based on their races and sex.

Elsewhere in the record, USDA explained that they chose a calculation because it "substantiates the highest benefit for [underserved producers] by adding the premiums/fees after factoring." App. 862. USDA also took care to design progressive factoring for ERP 2022 Track 2 to maximize benefits to underserved producers. Faced with options for how to apply progressive factoring alongside the underserved producer "top-up benefit" (USDA's internal term for the

additional 15% payment increase denied to some farmers based on their race and sex, *see* App. 868), USDA again chose to use a methodology that "maximizes available assistance to all small-scale operations while supporting the additional [underserved producer] top-up benefit for non-traditional operations and participants." App. 868.

USDA has always justified progressive factoring by explaining it intended to target relief to smaller producers—the same fact that it used to try to justify its assumption that producers of its preferred races and sex were disadvantaged and needed additional disaster relief. *Compare* ERP 2022, 88 Fed. Reg. at 74410 n.14 (justifying progressive factoring as a method of increasing "the proportion of funding provided to smaller producers"), *with id.* at n.15 (justifying providing benefits based on race and sex by explaining USDA's view that farms owned by its preferred races and sex are "smaller operations" that "lack financial reserves"). According to USDA, it designed progressive factoring to give more money to smaller farmers at the expense of comparatively larger farmers. *Id.* at n.14. And USDA believed that its preferred races and sex usually operated smaller farms, meaning USDA knew that its preferred races and sex were more likely to receive more money from progressive factoring. *Id.* at n.15.

The administrative record for ERP 2022 demonstrates that USDA made every effort to steer its limited resources directly to "underserved producers"—a category that discriminated based on race and sex—based on the application of progressive factoring before refunding insurance premiums and fees. *See* App. 862 (giving insurance refunds after progressive factoring to maximize race- and sex-based benefits); App. 873 (explaining that with only $3 billion to cover more than $10 billion in uncovered losses, USDA was prioritizing $432 million to race- and sex-discriminatory premium and fee refunds). When USDA explained that it was using progressive factoring to make "target[ed] payments" to "losses incurred by smaller producers" and "shallow

losses," App. 873, while also explaining that underserved producers run "smaller operations" and "lack financial reserves," ERP 2022, 88 Fed. Reg. at 74410 n.15, it was saying that it designed progressive factoring to steer disaster relief payments towards its preferred races and sex.

Together, these examples show USDA's intent with progressive factoring: to reduce disaster relief payments to white male farmers and increase disaster relief payments to other farmers. Progressive factoring was enacted by a policymaker with a profound recent history of animus towards white men. And, according to USDA itself, it had a disparate impact, reducing payments even further to the one group that was not a beneficiary of its "socially disadvantaged" category. The inference to draw is obvious: USDA did not adopt progressive factoring just "merely 'in spite of,' its adverse effects upon an identifiable group"—it adopted it "because of" those effects. *See Pers. of Mass.*, 442 U.S. at 279. There is sufficient undisputed evidence in the record to demonstrate both a discriminatory impact and intent in USDA's implementation of progressive factoring. That makes progressive factoring unlawful race discrimination, even if it is (now) facially neutral.

B. Progressive factoring is arbitrary and capricious.

Progressive factoring is arbitrary and capricious because USDA's decision is the product of unclear reasoning that is impossible to follow logically to the agency's eventual decision. The deferential standard of the APA does not require that an agency's decision be "a model of analytic precision to survive a challenge." *Frizelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997). But agencies must articulate a "satisfactory explanation" for their actions, and that includes "a rational connection between the facts found and the choices made." *Huawei Techs. USA, Inc.*, 2 F.4th at 434. Thus, an agency rule is arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, or when "the agency's path" to

its eventual decision cannot "reasonably be discerned," *Bowman Transp., Inc.*, 419 U.S. at 286. And the APA affirmatively prohibits a reviewing court from "supply[ing] a reasoned basis for the agency's action that the agency itself has not given." *Bowman Transp., Inc.*, 419 U.S. at 286. USDA was not required to submit to notice-and-comment rulemaking for ERP 2022. *See* 5 U.S.C. § 553(a)(2). But even when it escapes the strictures of notice-and-comment rulemaking, USDA remains bound by the APA's requirement that it not behave arbitrarily and capriciously. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 105–06 (2015).

State Farm provides four ways agency action can be arbitrary and capricious. 463 U.S. at 43. USDA miraculously managed all four as it rushed progressive factoring out the door in ERP 2022: (1) progressive factoring considers factors Congress never asked USDA to look at; (2) USDA implemented it counter to how the agency initially planned it; (3) USDA ignored several important aspects of the problem when implementing it; (4) its flaws are so plain that it could not plausibly be the product of agency expertise. *See id.*

The APA requires that USDA produce a record that the Court can review to see the thought behind USDA's action. This record fails to meet that basic expectation and shows the danger of USDA's decision to no longer voluntarily undergo notice-and-comment for benefits rulemaking. *See* Revocation of Statement of Policy on Public Participation in Rule Making, 78 Fed. Reg. 33045 (June 3, 2013). Without the wisdom of public comment, agencies are more likely to act hastily and without fulsome consideration. USDA acted thoughtlessly. It did not consider alternatives, nor did it articulate why it preferred the results of progressive factoring, nor did it leave behind a reasonably discernable path for a reviewing court to follow. The administrative record ignores the most important questions surrounding progressive factoring. There is not one mention in the record of (1) where to set the payment thresholds and why; (2) why USDA chose to steer funds to smaller

operations and shallower losses; or (3) why USDA calculated it on a per-producer basis, disadvantaging single-owner businesses and favoring multi-owner businesses independent of size. By all appearances in the record, progressive factoring and its many components appeared out of thin air. USDA's institution of progressive factoring is arbitrary and capricious.

1. USDA set the payment thresholds without discussion.

The payment thresholds provide a perfect example of the administrative record's recounting of USDA's decisionmaking process. In the final version of ERP 2022, published October 31, 2023, there are six payment thresholds that change every $2,000 in losses. ERP 2022, 88 Fed. Reg. at 74410, 74414. The payment amounts scale linearly downward, decreasing from 100 percent down by 20 percent at each threshold until reaching $10,000. *Id.* at 74410, 74414. Any loss over $10,000 is paid out at 10 cents on the dollar. *Id.* at 74410, 74414. But in the memorandum published on May 19, 2023, clearly marked "2022 EMERGENCY RELIEF DECISIONS" that begins by stating that "[t]his memo provides the final decisions for the following key items pertaining to ERP 2022 . . . ERP Track 1 Payment Calculation using Progressive Factoring," the thresholds are completely different. App. 862.

Rather than change every $2,000, the thresholds changed every $5,000. App. 862. Rather than decrease by 20 percent, the thresholds decreased by 25 percent. App. 862. Rather than end at a minimum of 10 percent, the minimum was 25 percent. App. 862. The difference is substantial. A farmer with $100,000 in losses would be progressively factored down to $15,000 under the published system, but $32,500 under the formula in the memo that "provides the final decision . . . ." App. 862. And that "final decision" formula stuck around for a while. It was used as recently as an email on June 26, 2023—just three weeks before the OMB presentation that included the revamped formula. App. 868.

And that is the real problem. Sometime in those three weeks, USDA completely revamped the payment formula. But the record is completely bereft of explanation for the change. Why did USDA make this change? There is zero information in the record—not even just about the change, but about selecting the formula at all. Progressive factoring could have been the result of sophisticated calculations or well-placed darts.

USDA's path to deciding the payment thresholds it would use for progressive factoring cannot reasonably be discerned, and so its adoption is arbitrary and capricious. *See Bowman Transp., Inc.*, 419 U.S. at 286. There is no discussion in the record of why USDA selected the $2,000 breakpoints. There is no discussion in the record of why USDA selected the 20 percent intervals. There is no discussion in the record of the sudden change from the 2022 Emergency Relief Decisions memo that "provides the final decision" for progressive factoring and contained $5,000 breakpoints at intervals of 25 percent. *See* App. 862. Nor is there discussion of how those $5,000 breakpoints and 25 percent intervals were decided. Once an internal decision had been made—as it clearly was, albeit again with no explanation—one would expect that before it was altered, there would be discussion in the record about *why*. But the record contains no discussion about why the "final decisions" were not, in fact, final. USDA does not point to any. The "final decisions" were changed later with no reason given. That is the hallmark of arbitrary and capricious agency action: a sudden and unexplained about-face. *See State Farm*, 463 U.S. at 43.

The progressive factoring payment thresholds are arbitrary and capricious. USDA does not explain why it set the thresholds the way it did, nor does it explain why it shifted from the "final decision" of May 19, 2023, to a different decision mere weeks later. The APA demands more than the possibility of a dartboard being used to design a payment formula.

2. USDA never explained why it decided to steer funds to smaller operations and shallower losses.

USDA's decision to steer additional funds toward smaller operations and shallower losses is also arbitrary and capricious. USDA repeats the same hollow line many times throughout the record: progressive factoring targets payments towards smaller operations and shallower losses. But it never explains *why* it thinks that is a good idea. The problem is not that there are no plausible good reasons—for instance, if USDA has data that shows that smaller operations are more likely to go bankrupt without the extra assistance provided by progressive factoring, that would be a plausible reason—it is that USDA did not explain its reasons at all. And the Court may not supply reasons for it. *See Bowman Transp., Inc.*, 419 U.S. at 286. The heart of arbitrary and capricious review is the requirement that agencies must make rational choices, connecting the facts found to the decisions made. *See id.* USDA chose to provide additional disaster relief to smaller operations and shallower losses. The record makes that (somewhat) clear. But it does not explain—at all—*why* USDA did so. USDA must explain not only its intent, but the facts it found that led it to pursue that goal. *See id.* Here, the record is silent as to why USDA believed it should steer funds where it did. That is arbitrary and capricious. And the trend of arbitrary and capricious decisionmaking continues and worsens when examining USDA's decision to apply progressive factoring on a per-producer basis.

3. USDA decided to calculate on a per-producer basis without considering the change.

USDA applied progressive factoring to each beneficiary individually rather than to each entity. App. 862. That means that if a single-owner farm, or a corporate-entity farm, lost $10,000

of crops, that would be progressively factored down to $6,000.[8] But if a dual-owner farm of the same size lost $10,000 of crops, that would be progressively factored down to a total of $8,400. Strangely, USDA does not seem to be aware that this was even a policy decision. The only discussion of this fact is in the abandoned memo that purported to provide the "final decisions," and the memo cursorily notes that this "[r]esults in higher payment to primary policy holder and all [beneficiaries]." App. 862. The record does not discuss whether USDA realized that the switch from a flat factor to a progressive factor caused these odd results, or whether USDA decided that this was not a problem, or that it had a way to handle the peculiar payment results. There is simply no discussion. And the effect of this decision on Plaintiffs is substantial and, frankly, bizarre.

Plaintiffs Alan West and Amy West co-own Plaintiff Alan and Amy West Farms; Alan owns 52 percent, and Amy owns 48 percent. Alan and Amy West Farms suffered $208,706.00 in losses covered by ERP 2022 Track 1. App. 958 ¶ 15. This was progressively factored down to $25,870.60. App. 958 ¶ 15. But Plaintiff Rusty Strickland and his wife Alison were treated differently for the farm they each own 50 percent of. App. 971–72 ¶ 20. Their farm's losses were split into "shares" of 50 percent each and their losses were progressively factored separately. App. 971–72 ¶ 20. This meant that they each received $9,696.95 for their losses of $46,969.50. App. 971–72 ¶ 20. Had Alan and Amy West's payments been split into shares the same way, the difference would have been an additional $5,000.

[8] Example numbers provided in this section use the Federal Register formulas rather than the Emergency Relief Decisions memo formulas. *Compare* ERP 2022, 88 Fed. Reg. at 74410, 74414, *with* App. 862.

It is hard to overstate how odd this system is. It creates powerful incentives to structure a farm's ownership in unintuitive ways to manipulate how it files losses with USDA.[9] It provides a much greater benefit to farms with many owners and denies benefits to large farms organized as single corporate entities. Most disturbing, it does not appear from the record that USDA ever considered this decision. Had it, it likely would have reached a different conclusion about the propriety of this decision. Decisions like this serve as a reminder about the value of notice-and-comment rulemaking. Until 2013, USDA voluntarily participated in notice-and-comment rulemaking even for benefits programs. *See* 78 Fed. Reg. at 33045. Without any process, the administrative record lacks the kind of reasoned deliberation that makes a rule legally valid.

Because the decision it made "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," it is arbitrary and capricious. *State Farm*, 463 U.S. at 43. So too because USDA "entirely failed to consider an important aspect of the problem" by not considering how the results of the producer-payee structure would differ between the novel progressive factoring system and the traditional flat factor system. *See id.*

Arbitrary and capricious review is deferential. But the bar it sets is not so low as to permit the agency to blindly stumble over it. The agency must demonstrate reasoned decisionmaking that allows the reviewing court to follow its logical path. Progressive factoring has no logical path found in the administrative record, and so this Court should hold that its adoption was arbitrary and capricious and remand it to USDA for reconsideration.

[9] One example of the odd behavior this system incentivizes includes restructuring one's farm as a series of much smaller farms. Each corporate entity would receive separate progressive factoring. In Alan and Amy West's case, if they had restructured Alan and Amy West Farms as Alan and Amy West Farms numbers 1 through 20 and filed separately, with each entity losing about $10,000, USDA would apparently have paid them an additional $100,000.

IV. Remand is not barred by sovereign immunity and can remedy Plaintiffs' remaining injuries.

Plaintiffs have never requested money damages and have always sought specific relief in the form of a remand directing USDA to provide them exactly what they were always entitled to: equal, non-arbitrary treatment. Plaintiffs wanted to be treated equally in the disaster relief programs and wanted USDA not to behave arbitrarily and capriciously in implementing progressive factoring. Compl., ECF No. 1, ¶¶ 174, 193, 212; *see also* Rusty Strickland Decl., App. 972, ¶ 23; Alan West Decl., App. 959, ¶ 22; Bryan Baker Decl., App. 967, ¶ 22. They asked for the challenged programs to be "vacate[]d and set aside . . . and *remand[ed] . . . to USDA to remedy the Fifth Amendment violations*." Compl., ECF No. 1, ¶ F (emphasis added). As detailed above, USDA has made a sudden about-face to argue that this requested relief is barred by sovereign immunity. USDA is incorrect.

The APA waives sovereign immunity for any suit seeking relief other than money damages. 5 U.S.C. § 702. Plaintiffs have always asked for remand with an instruction to the agency to fully remedy their injuries. Compl., ECF No. 1, ¶ F. That relief is not money damages because it does not require USDA to compensate Plaintiffs with money. USDA could cure Plaintiffs' injuries without paying them a cent, as Plaintiffs have explained repeatedly. *See, e.g.*, ECF No. 44 at 16; ECF No. 77 at 4.

As such, the Court remains capable of ordering a remedy, despite USDA's suggestion that it is powerless to act. The APA instructs that this Court "shall" "set aside" agency action that violates the Constitution. 5 U.S.C. § 706. As explained above, the parties previously agreed that the discriminatory payments—not just the text of the prior rules—needed to be cured to remedy Plaintiffs' injuries. *See* ECF No. 61 at 4 ("USDA is willing to provide relief to the six Plaintiffs in this case, and to remand the challenged programs to remove the use of 'socially disadvantaged'

designations moving forward . . . ."). As USDA admits, the discriminatory payments remain unchanged. This Court should remand the challenged programs to USDA with instructions about how it might cure Plaintiffs' injuries, as it has not yet done so. *Accord* 5 U.S.C. § 706 (directing that courts shall "hold unlawful and set aside agency action . . . contrary to constitutional right, power, privilege or immunity").

A. The specific relief requested—remand—does not implicate sovereign immunity.

Plaintiffs' requested remand is an equitable action for specific relief, not an action at law for damages, because they seek an order from this Court directing USDA to execute the programs in conformity with their equal protection rights. The Supreme Court has "long recognized the distinction between an action at law for damages — which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation — and an equitable action for specific relief." *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988).

The requested remand is not money damages because it does not compel monetary relief—monetary relief is just one possible result of several USDA can select from. Monetary relief may come to them, but, as Plaintiffs have repeatedly explained, the ball will be in USDA's court on precisely how to proceed. And this Court already recognized exactly that: "Plaintiffs don't even seek economic relief." *Strickland*, 2024 U.S. Dist. LEXIS 101547, at *27. The remedy sought is Plaintiffs' choice to make as "the plaintiff is the master of his complaint, and defendants cannot restate his claims, consistently recasting the claims against the plaintiff's consistent opposition." *Wells v. City of Alexandria*, 178 F. App'x 430, 433 (5th Cir. 2006) (citing *BP Chems. Ltd. v. Jiangsu Sopo Corp. (Grp.)*, 285 F.3d 677, 685 (8th Cir. 2002)).

Sovereign immunity does not bar Plaintiffs' requested relief.

B. This Court can order remand and USDA can cure the remaining injury.

USDA has options on remand that would, in fact, achieve equality for the past payments. Equal protection injuries can generally be remediated in at least two ways: by "extension of benefits to the excluded class" (leveling up) or by "withdrawal of benefits from the favored class" (leveling down). *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (quoting *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 247 (1931)).

This Court need not decide for USDA which way to go. It need only hold that Plaintiffs *are* injured following this first remand and order USDA to reconsider its unlawful actions with instructions to cure the injury however it sees fit. USDA ought to be allowed to decide how to fix the mess it made in its "informed discretion." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). What USDA may not do is complain about the difficulties involved in remedying the remaining injuries and refuse to cure them when it is undeniable that Plaintiffs remain injured. The mess USDA created must be fixed, and not only on paper.

Here, that means Plaintiffs' injuries are remediated by either (1) giving Plaintiffs more money (leveling up); (2) taking away funds from the favored races and women (leveling down) by clawing back funds; or (3) a novel solution by USDA that balances the playing field and fully redresses the payment disparity through some combination of those two options or through another method, like prospective credits to Plaintiffs for future programs, prospective debits to those who unlawfully benefited, or however else the agency believes best to rectify its past unlawful behavior.

USDA can fix the problem. First, USDA can just give injured farmers more money. Per USDA's own "dashboard," it retains more than a billion dollars to spend. *See* USDA, ERP 2022 Dashboard, https://perma.cc/V9ZA-PAA3 (noting $2.4BN spent); *see also* Emergency Relief Program 2022 (ERP 2022), 88 Fed. Reg. 74404, 74405 (Oct. 31, 2023) (noting $3.74BN available). Another way USDA can remedy this injury is by clawing back funds from those who

received extra money based on their race and sex. USDA does not squarely say it cannot do this, just that it would "raise a host" of difficulties. *See* ECF No. 44 at 16 (making this suggestion earlier in the litigation). That does not mean that USDA cannot do it.

Clawbacks are lawful. In *United States v. Wurts*, the Supreme Court held that the government has the right to recover funds unless Congress explicitly precludes such recovery. 303 U.S. 414 (1938). As Plaintiffs already explained, "[i]t is well established that the government, without the aid of a statute, may recover money it mistakenly, erroneously or illegally paid from a party that received the funds without right." *LTV Educ. Sys. v. Bell*, 862 F.2d 1168, 1175 (5th Cir. 1989); *Woods v. United States*, 724 F.2d 1444, 1448 (9th Cir. 1984) ("The government has the authority to recover funds which its agents have wrongfully, erroneously or illegally paid. No statute is necessary to authorize the United States to sue in such a case."); *see also* 31 U.S.C. § 3351(4) (defining improper payment to include payments made contrary to a "statutory, contractual, administrative, or other legally applicable requirement"); Congressional Research Service, Recouping Federal Grant Awards: How and Why Grant Funds Are Clawed Back, https://perma.cc/U7QC-LS4Z (Oct. 21, 2024) (detailing mandatory requirements on clawing back improper payments and noting that agencies are usually required to do so). Clawing back funds is not the only possible way to redress Plaintiffs' remaining injuries (nor, for that matter, is it Plaintiffs' preference), but USDA cannot claim it is unavailable.

USDA could also remedy the inequality it has created in a more creative way. It could offer a future credit to those discriminated against equal to their disadvantage. Or it could debit those who unlawfully benefited.

C. Instructing USDA to recalculate payments is not barred by sovereign immunity.

Alternatively, the Court could directly instruct USDA to recalculate all payments made in accordance with the revised programs that do not include the use of race and sex. As the Fifth Circuit has explained, whether the requested relief is "equivalent to 'money damages' . . . depends on the application of the [*Bowen*] standard." *Fort Bend Cnty. v. U.S. Army Corps of Eng'rs*, 59 F.4th 180, 190 (5th Cir. 2023). In other words, "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen*, 487 U.S. at 893. Indeed, equitable actions for specific relief can come very close to directly providing money; "specific relief," the Court explained, includes "the recovery of specific property or *monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions." *Id.* (emphasis added) (internal quotation marks omitted).

And the Supreme Court has been consistent about this; where the only thing sought is money as compensation for injury, it is barred. *See Dep't of the Army v. Blue Fox*, 525 U.S. 255, 257 (1999). "Damages," the Court explained, "are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Id.* at 262 (quoting *Bowen*, 487 U.S. at 895).

Courts in the Fifth Circuit have also been consistent that an order that may result in monetary relief is not the same as an order for money damages. *See Fort Bend Cnty.*, 59 F.4th at 191 ("Even though this would require the Corps to pay money to the Plaintiffs, that fact alone is not a sufficient reason to characterize the relief as money damages."); *La. Delta Serv. Corps v. Corp. for Nat'l & Cmty. Serv.*, No. 25-378, 2025 U.S. Dist. LEXIS 122459, at *72 (M.D. La. ("Because the enforcement of AmeriCorps' mandate would require it to continue funding Plaintiff's grant, Defendant has mistaken this for a payment of money damages."). In both cases,

at issue was an order that would guarantee the payment of money to the plaintiffs. *Fort Bend Cnty.*, 59 F.4th at 191; *La. Delta Serv. Corps*, 2025 U.S. Dist. LEXIS 122459, at *72. Despite that, the courts held that the plaintiffs were not seeking money damages. *Fort Bend Cnty.*, 59 F.4th at 191; *La. Delta Serv. Corps*, 2025 U.S. Dist. LEXIS 122459, at *72. This was true even though money was the core of the relief sought.

Plaintiffs present this Court with an easier case than any of those. Plaintiffs seek remand, not an order guaranteeing them monetary relief. Even if this Court directed USDA to correct the payments, an order for the recovery of "monies" in this posture is still fundamentally equitable, is not "money damages," and is thus authorized under the APA. *See Bowen*, 487 U.S. at 893. This Court should grant the relief Plaintiffs sought—relief that fully remedies their injuries—not only the partial relief USDA prefers to give them by claiming they sought money damages when they sought only equal protection.

V. This Court should remand with an instruction to cure Plaintiffs' injuries.

To complete a remedy, USDA must ensure that its new final agency action fully cures the injuries Plaintiffs suffered. The agency should be permitted to decide how exactly to do that in the first instance on remand. USDA, as the agency, is best positioned to decide how to correct the constitutional defect. But that does not require the Court to be silent about the required components of a remedy.

Remanding to USDA with instructions about what is required to correct the injury is appropriate here. The Fifth Circuit dealt with this problem and explained that repeated remands are not necessary when specific instruction can be given. *See BNSF Ry. v. FRA*, 105 F.4th 691, 702 (5th Cir. 2024). Just as there, here "[t]here is no ambiguity as to what [USDA] must do on a second remand," and so this Court "need not doom [Plaintiffs] to an endless loop of regulatory

activity." *Id.* This Court should not "'convert judicial review of agency action into a ping-pong game.'" *Id.* at 702 (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 545 (2008)). Instead, this Court should treat it "more like tennis": "One faulty serve is given grace. Two are not." *Id.* at 702 n.13.

Plaintiffs respectfully request that the Court (1) vacate and remand the revised programs to USDA; (2) instruct USDA that its new final agency action must fully cure Plaintiffs' injuries; and (3) maintain jurisdiction over the action on remand and impose a 90-day or shorter timeline. *See* 5 U.S.C. § 702 (authorizing these forms of relief). This Court should return the revised programs to USDA for its *third* attempt to comply with the Constitution. It should do so along with an instruction that USDA must conform its actions to the Fifth Amendment's guarantee of equal protection. Equal protection requires equal treatment. Not just a dead letter.

CONCLUSION

Plaintiffs respectfully request that this Court grant summary judgment in their favor and vacate and remand the challenged programs with an instruction to fully remedy their injuries.

Dated: January 16, 2026

Respectfully submitted,

/s/ Benjamin I. B. Isgur
JAMES V.F. DICKEY
Minnesota Bar No. 393613
BENJAMIN I. B. ISGUR
Virginia Bar No. 98812
Southeastern Legal Foundation
560 W. Crossville Road, Suite 104
Roswell, GA 30075
(770) 977-2131
jdickey@southeasternlegal.org
bisgur@southeasternlegal.org

WILLIAM E. TRACHMAN
Colorado Bar No. 45684
Mountain States Legal Foundation
2596 South Lewis Way

Lakewood, Colorado 80227
(303) 292-2021
wtrachman@mslegal.org

ED MCCONNELL
Texas Bar No. 13442500
Tormey & McConnell, LLC
310 SW 6th Ave.
Amarillo, TX 79101
Tel. (806) 355-2700; Fax. (806) 355-4771
ed@tmcattorneys.com

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

This brief conforms to the requirements of Local Rule 7.2. It was prepared in 12-point Times New Roman Font. It is double-spaced and has margins that are at least one inch on all four sides. No text other than page numbers is in the margins.

Respectfully submitted,

/s/ Benjamin I. B. Isgur
BENJAMIN I. B. ISGUR

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2026, a copy of the foregoing was filed electronically. Notice of this filing will be sent by the Court's electronic filing system to all parties indicated on the electronic filing receipt.

Respectfully submitted,

/s/ Benjamin I. B. Isgur
BENJAMIN I. B. ISGUR