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' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

INTRODUCTION

Defendants (USDA) discriminated against Plaintiffs based on their race and sex in eight disaster relief programs. Plaintiffs were underpaid in each program, and therefore were denied the equal protection of the laws. As this Court has already held, these concrete acts of discrimination inflicted stigmatic harm on Plaintiffs. USDA's response to this lawsuit, until just months ago, was always that it would at least compensate Plaintiffs for the financial component of their injury, should they prevail; the question was what *else* USDA might do to correct its past misconduct. But then USDA pulled a bait and switch: it now just says it won't discriminate again when it distributes emergency disaster relief in the future while still refusing to equalize the payments it already made. What USDA asks is for this Court to leave Plaintiffs' injuries unremedied.

Although long on words, USDA's brief does nothing to explain why it reneged on its promises to Plaintiffs and this Court. Nor does it explain how, despite Plaintiffs' detailed allegations about the financial component of their equal protection injury, USDA concluded that the financial disparities its discrimination created could be left unfixed, without regard to the constitutional guarantees to which Plaintiffs are entitled.

Put simply, USDA's limited actions on remand did not moot this case. It is hard to argue otherwise, given that no one thinks that Plaintiffs have actually obtained complete relief for their injuries. Thus, a second remand with instructions to USDA about how it can fully remedy Plaintiffs' injuries is appropriate. A second remand is not barred by sovereign immunity, much like any remand that could incidentally lead to dollars being spent by an agency. And the remand should also instruct USDA to fully reconsider its unlawful implementation of progressive factoring, which it declined to reconsider initially.

FACTS RELEVANT TO RESPONSE

I. USDA already told the Court that it could remedy Plaintiffs' injuries by agency action.

Plaintiffs' Complaint, filed March 29, 2024, details the financial component of their equal protection injury caused by USDA's race- and sex-discriminatory disaster relief programs. Compl., ECF No. 1, ¶¶ 18–30 (providing charts for each plaintiff detailing the financial component of each equal protection injury); *id.* ¶¶ 174–92 (detailing the financial component of Rusty Strickland's equal protection injury for each of the six programs where USDA discriminated against him); *id.* ¶¶ 193–211 (detailing the financial component of Alan and Amy West's equal protection injuries for each of the three programs where USDA discriminated against them); *id.* ¶¶ 212–44 (detailing the financial component of Bryan Baker's equal protection injury for each of the four programs where USDA discriminated against him). Plaintiffs supported these detailed allegations with uncontradicted testimony. Rusty Strickland Decl., App. 968–72 (explaining he was denied disaster relief benefits based on his race and sex); Alan West Decl., App. 956–59 (same); Bryan Baker Decl., App. 964–67 (same).

USDA does not discuss in its opening brief these detailed allegations and testimony about the financial component of Plaintiffs' equal protection injury. *See generally* Defs.' Combined Mot. to Dismiss in Part and Renewed Cross-Mot. for Partial Summ. J., ECF No. 85. Plaintiffs already explained that USDA has repeatedly acknowledged that Plaintiffs' injuries had this financial component. *See* Pls.' Renewed Mem. in Supp. of Mot. for Summ. J., ECF No. 87, at 4–7. USDA also repeatedly asserted that it could and would remedy these financial disparities should Plaintiffs succeed in showing that USDA's race and sex discrimination was unlawful. *See id.* USDA does not identify any dispute about the ongoing existence of these financial disparities in its brief. Instead, it acknowledged the limited nature of the dispute that might remain after remand, a dispute

only over whether "USDA's implementation of progressive factoring still violates the APA after remand." *See* ECF No. 85 at 8 (quoting Order (April 25, 2025), ECF No. 63, at 1).

II. USDA acknowledges that Plaintiffs asked for remand "to remedy the Fifth Amendment violations."

USDA acknowledges in its brief that Plaintiffs requested "that the Court remand the challenged programs to USDA 'to remedy the Fifth Amendment violations.'" *Id.* at 6 (quoting ECF No. 1 at 46–47). USDA's acknowledgment is consistent with Plaintiffs' Complaint, which requested various relief, including that the Court "[h]old unlawful and set aside the programs," and ". . . remand the programs to USDA to remedy the Fifth Amendment violations." ECF No. 1 at 46 ¶¶ E–F.

III. USDA acknowledges that it failed to remedy the financial component of Plaintiffs' equal protection injuries.

After this Court ordered a voluntary remand, USDA revised the programs to remove the "socially disadvantaged" classification that explicitly discriminated based on race and sex. ECF No. 85 at 8–9. This revision touched the seven programs that, per USDA, are no longer operating and which the Court did not preliminarily enjoin. Defs.' Resp. to Pls.' Mot. for Prelim. Inj., ECF No. 21, at 11; *Strickland v. USDA*, 736 F. Supp. 3d 469, 487 (N.D. Tex. 2024). Those programs are no longer actively making payments, so the changes USDA made to them following the voluntary remand will not affect any disaster-relief payments. Only one program, Emergency Relief Program 2022 (ERP 2022), is still making payments that will be affected by the revisions. *See* ECF No. 21 at 11.

USDA agrees that it did not, on remand, remedy the financial disparities caused by its race and sex discrimination in the disaster relief programs. *See* ECF No. 85 at 16. USDA only argues that it has "withdrawn benefits" from the races and sex it favored through the voluntary remand

process, by removing the classification from the text. *Id.* at 19. But USDA does not say—indeed, it opposes the very idea—that it took away any benefits already paid to another person or equalized Plaintiffs' status vis-à-vis their race and sex. *See id.*

ARGUMENT

Plaintiffs are still injured by the financial disparities that USDA created through its race and sex discrimination. USDA has done nothing to cure those financial disparities. This Court is empowered to order USDA to provide them the equal protection of the laws. Thus, there is a live controversy and the case is not moot.

Remand is an available remedy that the Court can order. The Court can remand the programs to USDA a second time with an instruction to fully remedy the Fifth Amendment violations that form the basis of the Complaint here. The Court is free to explain to USDA how it might remedy Plaintiffs' remaining injuries, although it need not do so. No agency possesses sovereign immunity from being instructed to follow the Constitution.

Finally, USDA's implementation of progressive factoring is arbitrary and capricious. USDA fails to identify record support for why progressive factoring was adopted. And USDA may not, through post-hoc briefing, supply reasoning that the agency did not consider during rulemaking. Further, the record does reflect that progressive factoring was adopted to amplify ERP 2022's now-disavowed race and sex preferences. This Court should therefore remand it to the agency to reconsider.

I. This controversy is live because the financial disparities between Plaintiffs and other farmers who were treated favorably based on race and sex endure.

USDA denied Plaintiffs their right to equal protection by treating them worse than others because of their race and sex. Plaintiffs' injury persists, and so this controversy remains live.

Plaintiffs acknowledge that, on remand, USDA removed the "socially disadvantaged" language from its programs. *See* ECF No. 85 at 8–9. But that alone is insufficient to remedy Plaintiffs' enduring equal protection injury. Despite claiming that they could do so on remand, USDA failed to equalize Plaintiffs' position with others who were treated better based on their race or sex. USDA's revisions to seven of the challenged programs have no real-world effect, and in the one program where they do have some effect, the revisions fail to set Plaintiffs on an equal footing with farmers who benefited from USDA's discrimination. Because those financial disparities still exist, Plaintiffs continue to suffer both financial and stigmatic harm.

USDA attempts to evade their failure to remedy these financial disparities by claiming that they have provided Plaintiffs all the relief that the Court may order. *See id.* at 10–16. But USDA is wrong because where the government remedies *some* of a plaintiff's injuries in the middle of a case, but not *all* of them, the case is not moot. USDA's citations to voluntary cessation and capable-of-repetition-yet-evading-review precedents are therefore inapposite, *see id.* at 13–16, because they have not provided Plaintiffs with equal treatment under the law.

A. USDA, not Plaintiffs, has the "heavy burden" of demonstrating mootness here.

USDA incorrectly implies that Plaintiffs carry the burden to rebut USDA's mootness argument. *Id.* at 8–9 (citing *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 310 F.3d 329, 332 (5th Cir. 2002)). USDA confuses standing and mootness, which is why USDA cited a case that only discusses standing. *See Ford*, 310 F.3d at 332 (discussing Article III standing and not mentioning mootness). Mootness confers different burdens on the parties. Unlike with standing, the "heavy burden of establishing mootness lies with the party asserting a case is moot." *La Unión del Pueblo Entero v. FEMA*, 762 F. Supp. 3d 552, 560 (S.D. Tex. 2024) (quoting *Honeywell Int'l v. Nuclear Regul. Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010)).

B. Plaintiffs remain injured because USDA did not cure the financial disparities between Plaintiffs and the farmers USDA favored.

Plaintiffs remain injured because USDA has not provided them equal treatment. USDA refuses to cure the financial disparities its discrimination created. Instead, USDA attempts to evade this crucial fact by relying on cases where the plaintiff's injuries were fully remediable by forward-looking policy changes that they obtained as relief. This is not such a case. Plaintiffs demanded in the Complaint relief for both the stigmatic harm caused by ERP 2022's discriminatory *definitions*, and also for the equal protection *harms* that flowed from them in the form of financial disparities. ECF No. 1 at 46 (asking the Court to "[h]old unlawful and set aside the programs," and ". . . remand the programs to USDA to remedy the Fifth Amendment violations"). USDA has admittedly not remedied the enduring financial disparities, so this case is not moot.

Mooting an equal protection injury requires both (1) that the unlawful conduct will not recur and (2) 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). In the equal protection context, that latter prong is satisfied by "extension of benefits to the excluded class" or by "withdrawal of benefits from the favored class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (quoting *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 247 (1931)). Because USDA has followed neither of *Heckler*'s paths to cure the enduring financial disparities, Plaintiffs remain injured.

Repealing a law or revising a rule only moots a challenge where it provides complete relief to the plaintiff. *See Davis*, 440 U.S. at 631; *see also Ellis v. Bhd. of Ry. Clerks*, 466 U.S. 435, 442 (1984) ("But as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." (citing *Powell v. McCormack*, 395 U.S. 486, 496–98 (1969)). USDA cites two examples to argue that a formal rescission of discriminatory language, as here,

"generally" moots a case. ECF No. 85 at 11 (citing *U.S. Dep't of the Treasury v. Galioto*, 477 U.S. 556, 559–60 (1986), and *United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of Camden* (*Camden*), 465 U.S. 208, 213 (1984)). Neither example resembles this case. In *Galioto*, the plaintiff wanted to purchase a firearm but could not. 477 U.S. at 557. Congress changed the law to allow him to. *Id.* at 559. That was all the relief the plaintiff sought, so there was nothing else for a court to give him. *Id.* at 558. In *Camden*, the plaintiff challenged a one-year residency requirement to be eligible for the defendant city's hiring preference. 465 U.S. at 210–11. The city repealed the residency requirement during the litigation. *Id.* at 213–14. Repealing the residency requirement "moot[ed] appellant's equal protection challenge based on that durational requirement." *Id.* at 213. Nothing in *Camden* indicates that the plaintiff sought relief to address enduring financial disparities. *See generally id.*

This case is different because USDA's discrimination created vast financial disparities between Plaintiffs and the farmers USDA favored, and those disparities persist. As Plaintiffs explained in their Complaint, USDA's discrimination reduced their disaster-relief benefits by about a half-million dollars. ECF No. 1, ¶ 245. USDA by-and-large agrees with their calculations. *See* Ducheneaux Decl., App. 1006–12, ¶¶ 89–93 (detailing adjusted amounts Defendants planned to pay to Plaintiffs if Plaintiffs prevailed). USDA removed the "socially disadvantaged" language from its programs, but it did not equalize the payments it made. For the seven defunct programs, USDA's revisions had no effect. ECF No. 21 at 11. For ERP 2022, USDA's revisions only prevented its discrimination from harming the next wave of applicants. USDA did not equalize Plaintiffs with "socially disadvantaged" benefits recipients, so the financial component of Plaintiffs' equal protection injuries persists. *See* ECF No. 1, ¶¶ 174–92 (Rusty Strickland); *id.* ¶¶ 193–211 (Alan and Amy West); *id.* ¶¶ 212–44 (Bryan Baker); Strickland Decl., App. 972, ¶ 22

(explaining he was denied disaster relief benefits based on his race and sex); West Decl., App. 959, ¶ 21 (same); Baker Decl., App. 967, ¶ 21 (same). With it, the stigmatic injury of being treated worse by the government because of race and sex persists. Yet somehow, USDA ignores Plaintiffs' detailed and uncontested evidence of the financial component of their equal protection injuries. *See* ECF No. 85 at 12 (claiming "Plaintiffs filed this case to seek relief from stigmatic harm").

USDA attempts to sidestep the mountain of evidence for Plaintiffs' financial disparities by limiting its focus to what it calls "redressable" injury. *See* ECF No. 85 at 13. First, this is a tacit admission that this case is not moot. *See id.* (arguing no "redressable injury"—not no injury at all—remains). Second, by limiting its focus to "redressable" injury, USDA conflates mootness and sovereign immunity. But the doctrines are distinct. Mootness deals with whether a plaintiff's injury persists. *See Abbott v. Biden*, 70 F.4th 817, 825 (5th Cir. 2023) (holding no mootness despite rescission of COVID-19 vaccine mandate because Secretary "reserved the ability to punish Guardsmen who didn't seek a religious, administrative, or medical accommodation while the mandate was operative"). Sovereign immunity deals with whether a court has power to redress an injury. *See Rodriguez v. Sarabyn*, 129 F.3d 760, 764 (5th Cir. 1997) (explaining that because sovereign immunity was not waived for certain types of tort claims, "Rodriguez may be left without a remedy for the allegedly tortious acts of the defendants"). The fact that USDA acknowledges that it did not cure the financial disparities is a tacit concession that the case is not *moot* because Plaintiffs' injuries are not fully remedied.

USDA further errs by misinterpreting what *Heckler* held must be done to cure an equal protection violation. To its credit, USDA agrees that *Heckler* is the correct rule to apply here. *See* ECF No. 85 at 18–19 (explaining *Heckler* and claiming that it "took the first option—it withdrew the challenged beneficiary criteria"). But it misapplies the rule. *Heckler* explains that, to cure an

equal protection violation, the government must either extend *benefits* to those it discriminated against or withdraw *benefits* from those its discrimination benefited. 465 U.S. at 740. When the Court referred to "withdrawing the statute's benefits," it meant a remedy of "a *mandate* of equal treatment." *Id.* at 739–40. Rather than provide equal treatment by withdrawing benefits (i.e., the discriminatory enhanced disaster relief payments it provided to some farmers), USDA has misread this language as allowing it to merely withdraw "the challenged *beneficiary criteria*." *See* ECF No. 85 at 19 (emphasis added). "Benefits" here are disaster-relief payments, and the "beneficiary criteria" are *not* payments—they are the criteria which determine the payment of benefits.

USDA's argument leads to absurd results. Under its theory, USDA could tomorrow announce a disaster relief program that paid out all available funds based on race and sex, immediately wire the money to farmers based on information the agency already has on hand, and await a legal challenge. It could then spontaneously revise the program to remove the discriminatory language but make no alterations to the payments already made. Following USDA's theory of this case, that revision would fully cure any equal protection injury. Yet because it had spent all its funds, its revisions would have no real-world effect. USDA's theory would predicate the availability of meaningful equal protection relief on whether a plaintiff can secure a temporary restraining order before an agency finishes cutting checks. That theory incentivizes USDA to commit unconstitutional conduct quickly, not to comply with the Constitution. USDA's theory defies the Constitution's "*mandate* of equal treatment." *See Heckler*, 465 U.S. at 740.

II. Remand is a distinct form of equitable relief that the Court can and should order.

USDA is wrong to suggest that remand is not an available remedy. "[B]y default, remand *with* vacatur is the appropriate remedy." *Texas v. Biden*, 20 F.4th 928, 1000 (5th Cir. 2021), *rev'd on other grounds*, 142 S. Ct. 2528, 2548 (2022). Remand is relief a court can order when the

decision about how to correct its prior unlawful behavior is within the agency's discretion. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (originating the rule that remand for the agency to make a new decision is the lawful course). The Supreme Court has explained that only when the agency is "required" to reach a certain result is it within a court's power to order that result rather than remand for reconsideration. *Calcutt v. FDIC*, 598 U.S. 623, 630 (2023) (per curiam). In other words, only "[w]here '[t]o remand would be an idle and useless formality,'" may a court directly order agency action. *BNSF Ry. v. FRA*, 105 F.4th 691, 701 (5th Cir. 2024) (quoting *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 545 (2008)); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry."). The Supreme Court has often remanded agency action in exactly this manner. *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 36 (2020) (remanding rather than deciding what action the agency should take).

The primary function of remand is to allow courts to review agency action without substituting their discretion for that of the agency, because courts may not wield the executive's discretion. *See Fla. Power & Light Co.*, 470 U.S. at 744. The long-established remand rule protects the separation of powers by having the judiciary say "what the law is," *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), but having agencies wield executive authority, *see Chenery Corp.*, 318 U.S. at 95.

USDA's argument that remand is unavailable is contrary to this longstanding precedent. USDA implies that the Court has no power to order a second remand. ECF No. 85 at 27. But it provides no authority to directly support that claim, which conflicts with the Fifth Circuit's holding in *BNSF Railway*, cited in Plaintiffs' opening brief. ECF No. 87 at 36 (citing *BNSF Ry.*, 105 F.4th

at 702)). There, the agency came to the same conclusion following remand, and the court remanded again, this time with instructions as to what steps the agency needed to take. *BNSF Ry.*, 105 F.4th at 702. It is no surprise that USDA cannot find support for the legally bankrupt proposition that successive remand is unavailable.

USDA concedes both that Plaintiffs have always sought remand and that remand is not barred by sovereign immunity. *See* ECF No. 85 at 6 (quoting Plaintiffs' Complaint's request that this Court remand the programs with an instruction to USDA "to remedy the Fifth Amendment violations"); *id.* at 28 (arguing that Plaintiffs are attempting to use remand to "circumvent Article III and sovereign-immunity limits indirectly"). Instead, USDA relies on the default vacatur rule, but that is no help to it either. *See id.* at 26–27. Plaintiffs acknowledge that vacatur *with* remand is the default rule in the Fifth Circuit. *Purl v. HHS*, 787 F. Supp. 3d 284, 329 (N.D. Tex. 2025); *see also Texas v. Biden*, 20 F.4th at 1000. But Defendants appear to argue for vacatur *without* remand, which is far from the default rule. *See* ECF No. 85 at 27. Nor will it cure Plaintiffs' injuries. On the other hand, remand (of any kind) will.

USDA has repeatedly claimed that it can correct the programs' defects on remand by redressing the financial disparities still injuring Plaintiffs. *See* ECF No. 87 at 4–7; *see also* Defs.' Reply Br. in Supp. of Their Mot. for Summ. J., ECF No. 44, at 14–15 (requesting remand instead of vacatur). Vacatur without remand, on the other hand, would simply lock in the existing disparities and guarantee Plaintiffs remain harmed. The Court is empowered to order USDA to cure the equal protection injuries that Plaintiffs are still suffering from.[1] The agency lacks any

[1] Or, as Plaintiffs explained in their opening brief, the Court could instead direct USDA to recalculate all payments made to accord with the revised programs that no longer use race and sex. ECF No. 87 at 33. It could also instruct USDA to make good on its earlier promises and increase Plaintiffs' payments. *Id.*

discretion to disobey the constitutional command of equality, and so the Court is within its power to order it to comply.

III. Sovereign immunity does not bar every remedy that could result in money changing hands, including an order to treat Plaintiffs equally.

Sovereign immunity does not bar the Court from ordering USDA to remedy its equal protection violations on remand.[2] The United States has waived sovereign immunity for any relief that is not "money damages." 5 U.S.C. § 702. And the payment of money from a government agency to a plaintiff after remand does not make the remand "money damages" barred by sovereign immunity. *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (relief sought was not "money damages" despite that it involved the government paying a substantial amount to Massachusetts); *Esch v. Yeutter*, 876 F.2d 976, 984 (D.C. Cir. 1989) (holding that the APA allows an "injunction against an arbitrary or capricious administrative denial of subsidy payments" for a plaintiff seeking agency reconsideration of USDA's suspension of over $600,000 in federal farm subsidy payments).

The heart of USDA's sovereign immunity argument is its incorrect claim that Plaintiffs are asking the Court to order "money damages." *See* ECF No. 85 at 21. But 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*, 487 U.S. at 893. The distinction between the two is whether the plaintiff is seeking a substitute to compensate them for what they were legally entitled to (i.e., money damages) or an order guaranteeing them specifically what they were

[2] Further, as argued in Plaintiffs' opening brief, USDA is estopped from asserting sovereign immunity bars this relief because it induced Plaintiffs and the Court into a voluntary remand based on repeated assurances that the financial component of Plaintiffs' equal protection injuries would be redressed on remand. *See* ECF No. 87 at 13–19.

legally entitled to. *See id.* The fact that the requested relief would apply retrospectively in no way bars it. *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 90 (1979) (listing cases where the Supreme Court ordered welfare benefits paid to an excluded class); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (affirming lower court judgment that ordered the Secretary "to make payments for the period during which Mr. Goldfarb would have been qualified to receive benefits but for the discrimination against widowers now held to be unconstitutional," 396 F. Supp. 308, 309 (E.D.N.Y. 1975)).

Bowen, for example, concerned a dispute over Medicaid payments (a disallowance decision) and ultimately resulted in an order that forced the federal government to pay Massachusetts over $6 million. 487 U.S. at 909–10. The federal government had disallowed reimbursement of that $6 million, and Massachusetts had sued to challenge that determination. *Id.* at 887. As the Court explained, the fact that the outcome is a payment by the federal government to Massachusetts was "a mere by-product of that court's primary function of reviewing the Secretary's interpretation of federal law." *Id.* at 910. 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.'" *Id.* at 893.

USDA tacitly admits that Plaintiffs' reading of *Bowen* is correct, yet somehow still comes to the wrong conclusion. USDA acknowledges that *Bowen* held that "an order setting aside a disallowance decision is not an order for a 'money judgment.'" ECF No. 85 at 20 (citing *Bowen*, 487 U.S. at 909). But USDA misses the Court's explanation that Massachusetts was after "adjustments in the open account between the parties." *Bowen*, 487 U.S. at 893. USDA's description of the remedy Plaintiffs seek as "money damages" is pure *ipse dixit* and without support from *Bowen*.

Many courts have followed Plaintiffs' view and *Bowen*'s lead and held that remand is permissible under the APA even if money changes hands later. In *Esch*, as another example, the court ordered an "injunction against an arbitrary or capricious administrative denial of subsidy payments" for a plaintiff seeking agency reconsideration of USDA's suspension of over $600,000 in federal farm subsidy payments. 876 F.2d at 984. In *Cobell v. Norton*, Indian plaintiffs brought an action seeking an accounting for the true value of their individual trust accounts held by the Secretary of the Interior and others. 240 F.3d 1081, 1086 (D.C. Cir. 2001). The court noted that their claim for an accounting was permissible under the APA. *See id.* at 1094–95. The specific purpose of an accounting in *Cobell* was to stop the government's practice of "regularly issu[ing] payments to trust beneficiaries 'in erroneous amounts--from unreconciled accounts--some of which are known to have incorrect balances.'" *Id.* at 1089 (quoting *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 6 (D.D.C. 1999)).

Whether money changes hands on remand is not the same thing as whether Plaintiffs seek money damages. *See, e.g.*, *Fort Bend Cnty. v. U.S. Army Corps of Eng'rs*, 59 F.4th 180, 191 (5th Cir. 2023) ("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. June 27, 2025) ("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."). Plaintiffs are not asking for "money damages," they are asking the Court to give them "the very thing to which [they were] entitled"—equal protection. *Bowen*, 487 U.S. at 895.

The cases on which USDA bases its contention that retroactive relief is barred are even further off the mark. *See* ECF No. 85 at 19 (citing five cases). USDA claims that those five cases

show that there is "no judicial authorization for retrospective relief to remedy equal protection violations." *Id.* USDA is dead wrong. Those cases stand for the opposite premise. Indeed, two of them involve a court directly ordering back pay of benefits to individuals wrongfully denied them. And the other three do not say what USDA claims.

In *Goldfarb*, the Supreme Court affirmed a lower court order directing back pay of benefits because the failure to pay benefits violated the equal protection clause. 430 U.S. at 217, *aff'g* 396 F. Supp. at 309 ("The matter is remanded to the Secretary of Health, Education and Welfare who is directed to make payments for the period during which Mr. Goldfarb would have been qualified to receive benefits but for the discrimination against widowers now held to be unconstitutional.")). Similarly, in *Jimenez v. Weinberger*, the Supreme Court remanded so that the appellants could "establish their claim to eligibility" for benefits denied to them in violation of the equal protection clause. 417 U.S. 628, 637 (1974). After remand, the Seventh Circuit later affirmed the lower court's order providing retroactive relief. *Jimenez v. Weinberger*, 523 F.2d 689, 694 (7th Cir. 1975) (explaining that the district court "ordered the Secretary to pay benefits to the plaintiffs for the period after August 21, 1969, the date of their original application").

In a third case, *Frontiero v. Richardson*, the Supreme Court reversed in full a lower court decision that had denied the plaintiff back pay because the denial violated the due process clause. 411 U.S. 677, 690–91 (1973), *rev'g Frontiero v. Laird*, 341 F. Supp. 201, 203 (M.D. Ala. 1972) ("Plaintiffs seek . . . an award of back pay for dependency allowances previously denied Lt. Frontiero."). In this case, there does not appear to be a post-reversal proceeding that reveals what remedies the district court awarded. And in the other two cases, *Sessions v. Morales-Santana*, 582 U.S. 47 (2017), and *USDA v. Moreno*, 413 U.S. 528 (1973), the plaintiffs did not request any relief that would have created a retroactive effect; they only asked for declaratory and injunctive relief.

It is no surprise that the Supreme Court did not order retroactive relief in two cases where it was not requested.

Thus, at least two of the five cases USDA cites for the premise that remedying equal protection violations does not result in retroactive financial adjustment stand for the opposite premise. And none of the other three cases make the point USDA claims they make. In contrast, the weight of cases—including the Supreme Court in *Bowen*—establish that ordering an agency to remedy its unlawful behavior on remand, including through financial adjustments, is proper under the APA. Plaintiffs have made clear that they seek remand, where USDA can decide how to provide them the equal protection of the laws. That relief is permitted under the APA.

IV. Progressive factoring is arbitrary and capricious and was intentionally implemented to advance race and sex discrimination.

This Court correctly held in its order granting Plaintiffs' Motion for Preliminary Injunction that progressive factoring was reviewable, and it should reiterate that holding here. A review of the full record demonstrates that USDA's implementation of progressive factoring is arbitrary and capricious, and so this Court should set it aside and remand for USDA to reconsider it. Similarly, the full record shows that USDA designed progressive factoring with the intent to discriminate based on race and sex, providing another reason for this Court to remand with instructions for USDA to reconsider it.

A. The Court should reiterate its purely legal holding that progressive factoring is reviewable.

Progressive factoring is reviewable. USDA again argues that it is wholly insulated from review, despite what this Court already concluded. ECF No. 85 at 30–33. USDA bases this argument on its application of *Heckler v. Chaney*, 470 U.S. 821 (1985), and *Lincoln v. Vigil*, 508 U.S. 182 (1993), to this case. Neither case controls here, as this Court already explained.

This Court got it right when it said that *Heckler* "applies, 'if at all, to one-off agency enforcement decisions rather than to agency rulemakings.'" *Strickland*, 736 F. Supp. 3d at 477 (quoting *Texas v. Biden*, 20 F.4th at 984, *rev'd on other grounds*, 142 S. Ct. at 2548). This accords with Supreme Court precedent: "to honor the presumption of review, we have read the exception in §701(a)(2) quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U.S. 9, 23 (2018) (quoting *Lincoln*, 508 U.S. at 191).

USDA argues that *Lincoln* applies, but *Lincoln* does not control for two reasons. First, *Lincoln* is an application of *Heckler*, and the Fifth Circuit already held in *Texas v. Biden* that *Heckler* does not apply to rulemaking like occurred here. *See Texas v. Biden*, 20 F.4th at 984; *Lincoln*, 508 U.S. at 193 (applying the *Heckler* framework). Second, USDA misapplies *Lincoln* when it claims that the funds at issue here are a "lump-sum appropriation." *See* ECF No. 85 at 32. The Supreme Court explained in *Lincoln* that it was addressing appropriations lacking statutory restrictions. *See Lincoln*, 508 U.S. at 192. That is different from the appropriations here, which are individual appropriations aimed at disaster relief for individual calendar years and causes. This Court should maintain its prior holding that progressive factoring is reviewable and reconsider whether progressive factoring is arbitrary and capricious with the benefit of the complete administrative record.

B. Plaintiffs maintain the same claims they have throughout this lawsuit.

Plaintiffs have not asserted any new claims, contrary to USDA's throwaway footnote suggesting that they have. *See* ECF No. 85 at 35 n.2. First, arguments like USDA's made only in a footnote are waived. *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 479 n.2 (5th Cir.

2016). Second, Plaintiffs have made arguments supporting pleaded claims, now based on a full administrative record. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim.").

The only case USDA cites for the proposition that Plaintiffs' arguments may not be made bears little resemblance to this one. *See* ECF No. 85 at 35 n.2. There, the plaintiff moved for summary judgment and began requesting declaratory relief after their complaint only requested injunctive relief. *Med-Cert Home Care, LLC v. Becerra*, Civil Action No. 3:18-CV-02372-E, 2023 U.S. Dist. LEXIS 169087, at *29 (N.D. Tex. Sep. 21, 2023). The only precedential authority cited in *Med-Cert* is similarly unrelated. *Cutrera v. Board of Supervisors* concerned a plaintiff who raised a First Amendment retaliation claim for the first time at summary judgment after not including it in her complaint. 429 F.3d 108, 113 (5th Cir. 2005).

Plaintiffs have not asserted any new claims. They have always argued that progressive factoring was arbitrary and capricious. Plaintiffs could not have made arguments about the documents in the administrative record before receiving the administrative record, making this summary judgment briefing the first opportunity to argue them in detail. So even if the Court does conclude that Plaintiffs raised new claims, the relevant inquiries are whether USDA was on notice about the claims, *see Seatrax, Inc. v. Sonbeck Int'l*, 200 F.3d 358, 367 (5th Cir. 2000) (focusing the inquiry on whether the argument or claim "unduly prejudices or surprises the opposing party"), and whether Plaintiffs could have raised the claims earlier, *see Reed v. Neopost U.S., Inc.*, 701 F.3d 434, 442 (5th Cir. 2012) (considering a claim raised for the first time in response to a motion for summary judgment when the claim only became available then). *See also Douglas v. Wells Fargo Bank*, 992 F.3d 367, 373 (5th Cir. 2021) (noting that the proper course in case of an improperly raised claim is to construe it as a motion for leave to amend). USDA has suffered no

prejudice or surprise and Plaintiffs could not have made these arguments before, making the inquiry simple.

C. The administrative record does not explain how USDA arrived at progressive factoring in a reasoned, non-discriminatory manner.

Regardless, USDA's brief does not address the problem with the administrative record: "[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. 2021) (quotation marks omitted). USDA failed to do that. *See* ECF No. 87 at 24–30 (describing why progressive factoring was not borne of reasoned judgment).

USDA's response is off point. The question is not whether USDA acted within a "zone of reasonableness." *See* ECF No. 85 at 33. Rather, the question is whether the agency's choices are adequately and fully explained. *See, e.g.*, *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (explaining that the agency's path must be reasonably discernable). They are not.

USDA's assertions of reasons for progressive factoring lack support from the administrative record. "It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Regents of the Univ. of Cal.*, 591 U.S. at 20 (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). *Post hoc* explanations by lawyers do not suffice. USDA's brief does nothing to explain where in the record USDA's reasoning can be traced. Because the Court cannot trace USDA's decisionmaking process, it should hold that progressive factoring's adoption was arbitrary and capricious.

Further, as Plaintiffs explained in their opening brief, the full administrative record shows that USDA adopted even the neutral components of progressive factoring with a discriminatory

intent. ECF No. 87 at 21–24. That discriminatory intent and effect provide another reason for the Court to remand ERP 2022 with an instruction for USDA to reconsider progressive factoring.

CONCLUSION

This Court should deny USDA's motion, grant Plaintiffs' motion, and remand the eight programs with instructions to fully cure Plaintiffs' equal protection injury.

Dated: February 3, 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 February 3, 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