IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, et al., **Plaintiffs,**	
vs.	**Case Number: 1:00CV02502**
THOMAS VILSACK, SECRETARY UNITED STATES DEPARTMENT OF AGRICULTURE, **Defendant.**	**Judge: Walton, J.**

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNTS III THROUGH VI OF PLAINTIFFS' FOURTH AMENDED AND SUPPLEMENTAL COMPLAINT, AND IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS III THROUGH VI

Defendant Thomas Vilsack, Secretary of the United States Department of Agriculture ("USDA" or the "government") seeks to dismiss Counts III through VI of Plaintiffs' Fourth Amended and Supplemental Complaint (the "Complaint") (Dkt. No. 160), which are Plaintiffs' constitutional and Administrative Procedure Act ("APA") claims regarding USDA's "Hispanic and Women Farmers and Ranchers Claims Resolution Process" (the **"**Claims Process"). At the heart of USDA's motion to dismiss are two startling and ill conceived legal theories. First, because the Claims Process is voluntary on the part of both the government and the claimant, the government has unfettered discretion to formulate and offer a process on any terms it chooses. As demonstrated below, abundant and well-established legal precedent holds that the Court must evaluate the constitutional and statutory validity of a governmental program, even if the program has been established voluntarily. Second, the government argues that it is justified in offering women and Hispanic farmers a more onerous, burdensome, and less beneficial claims program than that provided to African-American and Native American farmers because women and

Hispanic farmers did not obtain class certification of their underlying claims under the Equal Credit Opportunity Act ("ECOA") and the APA. As Plaintiffs demonstrate below, USDA's admitted discriminatory treatment of Plaintiffs, as compared with that of African-American and Native American farmers, on the basis of class certification is irrational, arbitrary, and impermissible as a matter of law.

In addition, USDA asserts a number of technical grounds for dismissal of Counts III through VI. USDA's contention that the Court lacks subject matter jurisdiction over Plaintiffs' Counts III through VI because the government has not waived its sovereign immunity for those claims is without merit because it is well-settled that the federal government has waived sovereign immunity for constitutional and APA claims for non-monetary relief. Similarly, USDA's contention that Plaintiffs lack standing to challenge the Claims Process is also incorrect because Plaintiffs satisfy all standing requirements for these claims, and the voluntariness of the Claims Process does not alter Plaintiffs' right to assert claims regarding it. Nor is USDA correct that the law of the case bars certification of a class of women farmers aggrieved by the Claims Process, where the prior rulings denied class certification for entirely different claims.

As set out further below, not only does Plaintiffs' Complaint state valid causes of action, but Plaintiffs are entitled to summary judgment on each of their Counts III through VI. USDA is arbitrarily treating women farmers less favorably than similarly situated African-American and Native American farmers, in violation of Plaintiffs' equal protection rights. Similarly, USDA has violated Plaintiffs' due process rights by creating a property interest through the Claims Process, but irrationally erecting hurdles and arbitrary procedural burdens in order to deny women farmers their property rights. Plaintiffs' unconstitutional conditions claim is also meritorious because USDA requires women to give up their constitutional property rights to

bring a broad array of discrimination claims against the federal government and restricts the ability of women farmers to contract with attorneys as they see fit. Finally, Plaintiffs' APA claim succeeds because USDA's Claims Process, a final agency action, is arbitrary and capricious and not otherwise subject to court review. In sum, USDA cannot demonstrate that there is a legal basis for the dismissal of Counts III through VI of Plaintiffs' Complaint. To the contrary, Plaintiffs can demonstrate that there exists no dispute of material fact, and that they are entitled to judgment as a matter of law on these claims.[1]

FACTUAL AND PROCEDURAL BACKGROUND

USDA's History of Discrimination and Plaintiffs' Initial Complaint

Initiated on October 19, 2000, Plaintiffs' instant action was brought on behalf of a putative class of women farmers who alleged that dating back to the early 1980s, USDA unlawfully discriminated against them because of their gender in violation of ECOA in connection with their efforts to obtain farm loans and loan servicing. Complaint (Oct. 19, 2000) ("Initial Complaint") (Dkt. No. 1). The ECOA claims brought in this case are nearly identical to those asserted by three other groups of minority farmers against USDA. *See Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Friedman, J.) (African-American farmers); *Keepseagle v. Veneman*, C.A. No. 99-3119 (EGS), 2001 WL 34676944 (D.D.C. Dec. 12, 2001) (Sullivan, J.) (Native American farmers); *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (Robertson, J.) (Hispanic farmers).

According to the most recent Agriculture Census data,[2] there are over 306,000 female principal farm operators in the United States. In comparison, there are approximately 55,570

[1] In further support of their motion for summary judgment, Plaintiffs attached hereto a Statement of Material Facts Not Genuinely in Dispute.

[2] USDA conducts an Agriculture Census every five years. *See* "About the Census," *available at* http://www.agcensus.usda.gov/About_the_Census/index.php (last visited Oct. 15, 2012).

Hispanic principal farm operators, 30,599 African-American principal farm operators, and 34,706 Native American principal farm operators identified in the Census. Compl. ¶ 90; USDA 2007 Census of Agriculture, *available at* http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/ (last visited Oct. 15, 2012). Women farmers' experiences of discrimination are similar to, if not worse than, those of other minority farmers. Dating back to at least the early 1980s, women complained of being denied farm loans by USDA despite being fully qualified, and in other instances, women experienced sexual harassment or quid pro quo sexual advances from USDA officials when women sought to obtain their fair share of farm loans and loan servicing through the agency's direct farm loan programs. Compl. ¶¶ 3-48; Declarations of Plaintiffs, attached hereto as **Exhibit 1**.

There is no dispute that widespread discrimination against minority farmers occurred within USDA, particularly in its Farm Service Agency ("FSA") and predecessor agencies. *See, e.g.*, Testimony of Hon. Dan Glickman (former Sec'y of Agric.), Hearings Before The House Comm. on Agric., Treatment of Minority and Limited Resource Producers by the U.S. Dep't of Agric., at 94 (Mar. 19 & July 17, 1997), Plaintiffs' Motion for Court Review and Supervision Ex. A (Nov. 4, 2010) (Dkt. No. 116) (USDA has a "long history" of discrimination against minority farmers); Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team, at 26-27, 44 (Feb. 1997) ("CRAT Report"),[3] Initial Complaint Ex. B (Oct. 19, 2000) (Dkt. No. 1) (USDA rules "have the effect of disqualifying many minority and disadvantaged farmers from participating in USDA programs, or significantly reducing benefits

[3] USDA challenges Plaintiffs' citation to the CRAT Report in their Complaint as inaccurate. *See* Defendant's Memorandum in Support of Defendant's Motion to Dismiss Counts III Through VI of Plaintiffs' Fourth Amended and Supplemental Complaint ("Def. Mem.") at 6 n.2 (Sept. 24, 2012) (Dkt. No. 166-1). The identified paragraph in Plaintiffs' Complaint (¶ 30), however, contains no reference or citation to the CRAT Report. *See* Compl. ¶ 30. To Plaintiffs' knowledge, all citations to the CRAT Report in their Complaint are accurate. *See, e.g.*, Compl. ¶¶ 64-68.

they may receive" and warning that "failure [of the Agency] to change will mean that minority farmers continue towards extinction."); Testimony of Hon. Tom Vilsack (Sec'y of Agric.), Hearings Before U.S. S. Comm. on Approp., Agric. Subcomm. (Mar. 3, 2010), *available at* http://appropriations.senate.gov/webcasts.cfm?method=webcasts.view&id=8017cf 10-537f-4569-b4c8-d419fabaca24 ("We are very committed to trying to get these [women and minority farmer] cases resolved and closing this rather sordid chapter in USDA history.").

Accordingly, USDA and Congress have each expressed their desire to bring these minority farmer cases to a close. *See* Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration, *available at* http://www.ascr.usda.gov/about_cr_background.html ("USDA has made it a priority to resolve all of the civil rights cases facing the Department, including cases inherited by this Administration brought by black, Hispanic, Native American, and women farmers."); Food, Conservation and Energy Act of 2008, Pub. L. 110-246 (codified at 122 Stat. 1651), at § 14011 ("2008 Farm Bill") ("[A]ll pending claims and class actions brought against [USDA] by socially disadvantaged farmers . . . including Native American, Hispanic, and female farmers or ranchers based on racial, ethnic or gender discrimination in farm program participation should be resolved in an expeditious and just manner.").

In 1998, after learning about USDA's history of discrimination, Congress moved to retroactively extend the limitations period for certain discrimination-related claims against USDA, dating back to 1981, until October 21, 2000 (two years after the enactment of the legislation). *See* Agric. Rural Dev., Food and Drug Admin. and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277 (codified at 7 U.S.C. § 2297). Congress took this extraordinary step in response to its belated recognition that in the early 1980s, USDA had dismantled its civil rights investigatory unit. *See Love v. Connor*, 525 F. Supp. 2d 155, 157

(D.D.C. 2007), *aff'd, Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1138 (2010). This was critical for women farmers who, despite their growing numbers in the ranks of family farm operators, were rampantly discriminated against by USDA officials in what has been, in the words of Secretary Vilsack, a "sordid chapter" in USDA's history. *See* Testimony of Hon. Tom Vilsack, Hearings Before U.S. S. Comm. on Appropriations, Agric. Subcomm. (Mar. 3, 2010). Women farmers, like other minorities, suffered discrimination by USDA dating as far back as the beginning of the limitations period, some 30 years ago. *See, e.g.*, Compl. ¶¶ 5-6, 12, 29, 34-35, 38, 40, 42, 44, 46 (Plaintiffs' allegations of discrimination between 1981 and 1985). Unfortunately, women farmers have continued to experience discrimination by USDA in the intervening years as well. *See, e.g., id.* ¶¶ 9, 15-17, 20-25, 32 (Plaintiffs' allegations of discrimination in the 1990s); *id.* ¶¶ 63-68 (USDA's 1997 CRAT Report found USDA's disparate treatment of minority farmers, including women, led to decreased participation of minority farmers); *id.* ¶¶ 58, 71 (USDA's Office of Inspector General noted in its seventh audit report released in 2000 that despite numerous recommendations, USDA could report "no significant changes in how complaints are processed.").

Plaintiffs originally asserted claims under ECOA, 15 U.S.C. § 1691 *et seq.*, addressing USDA's discriminatory treatment of women with regard to the agency's farm loan program, and the APA, 5 U.S.C. § 500 *et seq*., challenging USDA's failure to investigate women farmers' complaints of gender discrimination in the administration of its farm loan program. The district court dismissed the APA claims related to USDA's failure to investigate discrimination complaints. *Connor*, 525 F. Supp. 2d at 161. Plaintiffs' ECOA claims remain. The case remains stayed[4] following the dismissal of Plaintiffs' APA claims, and for more than three

[4] In addition to Plaintiffs' farm loan discrimination claims being stayed, the district court has stayed the statute of limitations for putative class members' claims. *See* Order at 1 (July 19, 2010) (Dkt. No. 111).

years, the parties have discussed settlement of Plaintiffs' remaining claims.

USDA's Resolution of Other Minority Groups' Claims

Of the original four minority group cases filed, the cases of two groups have settled, resulting in claims programs that adjudicated individual claims filed by qualifying minority farmers. *See Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) ("*Pigford I*") (approving consent decree describing claims process for African-American farmers); *In re Black Farmers Discrimination Litig.*, Misc. No. 08-mc-0511 (PLF) (Oct. 27, 2011) (Dkt. No. 231) ("*Pigford II*") (approving settlement agreement resulting in USDA setting up another claims process for African-American farmers who belatedly filed claims in *Pigford I*); Order on Plaintiffs' Motion for Final Approval of Settlement Agreement, *Keepseagle v. Vilsack*, No. 1:99-cv-03119-EGS (Apr. 28, 2011) (Dkt. No. 606) (approving settlement agreement describing claims process for Native American farmers). In none of these other cases did the Court approve a class action for purposes of monetary damages prior to the parties requesting that the court approve their settlement agreement and their proposed settlement class. *See infra* at 26-27.

Claims Process for Women and Hispanic Farmers

Following its claims processes for African-American and Native American farmers, USDA announced in February 2011 that it was preparing to launch a discrimination claims review process for women and Hispanic farmers, and that as of February 25, 2011, USDA would begin accepting names of interested individuals seeking information about that claims process. *See* USDA Press Release, "USDA Announces Claims Process for Hispanic and Women Farmers" (Feb. 25, 2011), *available at* http://www.whitehouse.gov/blog/ 2011/02/25/usda-announces-claims-process-hispanic-and-women-farmers. Since then, Plaintiffs' counsel have identified flaws in the proposed claims process and brought them to the attention of USDA. This

resulted in some, but not all, of the issues being resolved before the final launch of the program. On September 24, 2012, USDA launched the Claims Process for women and Hispanic farmers, to be administered and adjudicated by the same third parties that handled the other minority groups' claims programs. USDA Press Release, "Claims Filing Period for Hispanic and Women Farmers and Ranchers Who Claim Past Discrimination at USDA to Open on September 24, 2012" (Sept. 24, 2012), *available at* http://www.usda.gov/wps/portal/usda/usdahome?contentid=2012/09/0309.xml (last visited Oct. 14, 2012), attached hereto as **Exhibit 2**; Defendant's Status Report at 1 (July 18, 2012) (Dkt. No. 162). Through the federal government's Judgment Fund, the Claims Process may disseminate approximately $1.33 billion in money awards and up to an additional $160 million in debt relief to satisfy the claims of female and Hispanic farmers. *See id.* The time period for filing claims runs from September 24, 2012 through March 25, 2013. *Id.*

While a positive step toward closing USDA's "sordid chapter" of discrimination against women farmers, the Claims Process is marred by serious problems. And, it is inferior in various ways to the claims programs provided for African-American and Native American farmers. To start, the Claims Process provides to potential claimants multiple lengthy, and at times inconsistent and confusing documents, including:

- Claim Form (16 pages);
- Attachments to Claim Form (9 pages), including Settlement Agreement, Authorization to Disclose Debt Information Form, "Instructions, Summary & Definitions," Application Checklist, Description of Tiers, and Acceptable Forms of Identification;
- Framework for Hispanic or Female Farmers' Claims Process dated January 13, 2012 ("Framework") (19 pages);
- Frequently Asked Questions (6 pages);
- Fact Sheet (3 pages); and
- Summary of Hispanic and Women Farmers and Ranchers Discrimination Claim Process for USDA Farm Loans and Loan Servicing Programs, including questions and answers (10 pages).

See documents *available at* https://www.farmerclaims.gov//Documents.aspx, and as Exhibits D and E to the Declaration of Benny Bunting ("Bunting Decl."), attached hereto as **Exhibit 3**.

By contrast, for example, the claim forms USDA provided to African-American farmers and Native American farmers were each 8 pages long. *See Pigford I* Claim Sheet and Election Form, Bunting Decl. Ex. A; *Pigford II* Claim Form, attached as Exs. C & D to Settlement Agreement, Misc. No. 08-mc-0511 (Mar. 30, 2011) (Dkt No. 161-3); *Keepseagle* Claim Form, attached as Ex. C to Settlement Agreement, No. 99-cv-03119 (Nov. 1, 2010) (Dkt. No. 576-1); *see also* Expert Report of Eugene P. Ericksen ("Ericksen Report") at 18 n.42, attached hereto as **Exhibit 4**.[5] The Claim Form that women farmers must complete includes difficult open-ended questions, ambiguous questions, and compound and double-barreled questions. Ericksen Report, at 6-7, 11-13. In addition, many claimants will find the legal terms and phrases difficult to understand. *Id.* at 16-17. The form also does not include clear "branching instructions," so that claimants may be confused about which sections they should complete. *Id.* at 13-15.

The particulars of the Claims Process also differ in significant ways from the prior claims programs. USDA has made it far more difficult for women and (Hispanic) farmers to be successful in their claims, and even if successful, women (and Hispanic) farmers will likely receive a less beneficial award than was available to the other minority groups.

- Release: Just as with the other claim programs, each woman or Hispanic farmer claimant must execute a release of claims against the government. Claims Process Settlement Agreement at 1 (Claim Form Attachment 1) ("Settlement Agreement"); Bunting Decl. Ex. D. For women and Hispanic farmers, that release is quite broad, encompassing "any credit-related discrimination claims," which extends beyond the scope of claims covered by the Claims

[5] In the *Pigford II* and *Keepseagle* claims programs, claimants with outstanding USDA loans also had to complete a one-page Authorization to Disclose Debt Information Form. *Pigford II* Settlement Agreement at 21; *Keepseagle* Claim Form at 7.

Process. *See id.*; Instructions, Summary & Definitions at 1, Bunting Decl. Ex. D. This is more than was required of African-American claimants in *Pigford I,* which required a release of all claims asserted or that could have been asserted in the Seventh Amended Complaint, and statement that "any class-wide claims of race-based discrimination in USDA's credit programs by members of the class . . . are barred unless the operative facts giving rise thereto did not occur prior to the entry of this Decree." *Pigford I* Consent Decree at 26-27, No. 97-1978 (Apr. 14, 1999) (Dkt. No. 167)). *See also Pigford II* Claim Form at 3 (releasing USDA only from "claims raised that have been or could have been raised in *In re Black Farmers Discrimination Litigation*"); *Keepseagle* Claim Form at 3 (releasing USDA from "claims and causes of action that have been or could have been asserted against the Secretary by the proposed Class and the Class Members in the [*Keepseagle*] Case arising out of the conduct alleged therein").

- USDA Submissions: USDA may submit information in response to any claim filed in the Claims Process, although the claimant will never know if the government has done so and she will have no opportunity to review or refute the government's submission. *See* Framework for Hispanic or Female Farmers' Claims Process at 9 ("Framework"), *available at* https://www.farmerclaims.gov//Documents.aspx, attached hereto as **Exhibit 5**. African-American and Native American farmers were not subjected to this unfair provision. *See generally Pigford I* Consent Decree and *Pigford II* and *Keepseagle* Settlement Agreements.

- Right to Counsel and Limitation on Fees: In the Claims Process materials, USDA states that it will not encourage claimants to obtain counsel. Framework at 18 ("neither USDA, the Administrator, nor the Adjudicator will recommend that a claimant retain counsel"). This is inconsistent with the other claim programs, which had shorter and less complicated claim forms. *See, e.g.*, *Keepseagle* Claim Form at 7 ("**It is strongly recommended you consult an**

attorney to ensure evidence supporting your claim complies with these guidelines.")
(emphasis in original). Moreover, in the other claim programs, unlike this Claims Process, claimants were provided with free counsel as part of the program. *See, e.g.*, *Pigford I* Consent Decree at 24-25; *Pigford II* Settlement Agreement at 38-39; *Keepseagle* Settlement Agreement at 42-43.[6] Here, USDA has instead provided no free counsel and instead has placed a cap of $1,500 or 8% on the legal fees that an attorney may receive from a woman or Hispanic farmer claimant. Settlement Agreement at 1; Framework at 18.

- Evidentiary Requirements: In addition to the evidentiary standard that women claimants must meet to be successful in the Claims Process, women farmers must also meet onerous documentation requirements. For example, a "constructive applicant" must supply either: (a) a witness statement from someone who witnessed the discriminatory incident; (b) a copy of a written complaint of discrimination filed within one year of the incident; or (c) a document to or from a non-family member, written within one year of the incident, describing the woman's loan application attempt, business plan, and discrimination by USDA.
Claim Form at 3. These requirements did not exist for African-American or Native American farmers. *See, e.g.*, *Keepseagle* Settlement Agreement at 22-23 (examples of evidence that while not required would establish "active discouragement" by USDA of those who sought to apply for farm loans); *Pigford II* Settlement Agreement at 23-24 (same); *see* Ericksen Report, Ex. 4, at 21.

- Confusing and Complicated Claim Form: The Claim Form that women (and Hispanic) farmers must complete is more lengthy, burdensome, and difficult than the forms that

[6] For example, the government have committed to pay counsel for Native American farmers in *Keepseagle* over $60 million, Order on Plaintiffs' Motion for Final Approval of Settlement, Motion for Approval of Class Representative Service Awards, and Motion for an Award of Attorneys' Fees and Expenses at 3, *Keepseagle* (Apr. 28, 2011) (Dkt. No. 606), and pay counsel in *Pigford II* fee awards totaling at least $50 million. *See* Order at 7, *Pigford II* (Oct. 27, 2011) (Dkt. No. 231) (approving fee range between 4.1% and 7.4% of $1.2 billion, with fees to be paid at a later date).

African-American and Native American farmers had to complete in their claim programs. *See* Ericksen Report, Ex. 4, at 18-21. For instance, women farmers must fill out approximately twenty open-ended questions and fifty closed-ended questions, while *Pigford II* claimants had to complete only twenty open-ended questions and ten closed-ended questions, and *Keepseagle* claimants only had to answer fifteen open-ended questions and ten closed-ended questions. *Id.* at 18. The Claim Form here also includes entire sections that did not appear on the forms in the other programs, such as lengthy sections on meeting loan eligibility requirements and the capacity in which a claimant applied for a loan. *See id.* at 18-19.

There are many confusing and internally inconsistent aspects of the Claim Form. For example, the Claim Form and the Framework conflict on whether Tier 1(b) claimants must have complained to USDA in writing, and the documentary proof that a Tier 1(b) claimant must submit in support of her claim. The Claim Form requires that Tier 1(b) claimants submit "*a copy of your discrimination complaint* you sent to USDA or a copy of a document from USDA or another U.S. Government official showing that they received your discrimination complaint." Claim Form at 4 (emphasis added). Yet Claim Form Attachment 3 adds another document that may satisfy this proof requirement: "**OR** a signed statement by someone who is not your family member who has personal knowledge about your discrimination complaint." Claim Form Attachment 3, at 1 (emphasis in original), Bunting Decl. Ex. D; Ericksen Report, Ex. 4, at 17 ("These contradictory instructions are likely to confuse claimants."). Inconsistent with both of these documents, the Framework does not expressly require that a claimant must have submitted a complaint in writing, but adds a time limitation on when the complaint must have been made: "The claimant *complained* of discrimination to an official of the United States Government during the period January 1, 1981, through June 30, 1997, or during the periods October 13,

1998 through October 13, 2000 (Hispanic farmers) or October 19, 1998 through October 19, 2000 (female farmers) . . . ." Framework at 13-14 (emphasis added). The Summary states yet another formulation of the complaint requirement: "You [must have] *filed* a discrimination complaint with USDA, either directly or through a representative, alleging that USDA discriminated against you . . . ." Summary of Hispanic and Women Farmers and Ranchers Discrimination Claim Process at 5 ("Summary"), Bunting Decl. Ex. E.

Another confusing aspect of the Claims Process is that the Claim Form appears to be inconsistent with USDA loan requirements. For example, the Claim Form under the heading "DID YOU MEET BASIC USDA LOAN ELIGIBILITY REQUIREMENTS?" asks claimants a series of questions that one would presume all relate to loan eligibility requirements. Yet some of the questions posed do not relate to loan eligibility requirements during some or all of the claims period, such as whether the claimant had any federal debt delinquency. Claim Form at 10. Similarly, constructive applicants are asked for the "names of any commercial or agricultural banks in the area that denied you a loan(s)," even though this was not a loan eligibility requirement. Claim Form at 6; *see* 7 C.F.R. § 764.101.

- Limitations Based on "Participation" In Other Claims Programs: The Claims Process excludes from participation any woman farmer if she, her spouse, or anyone on her behalf "participated in" any of the other minority groups' claims programs, namely *Pigford I*, *Pigford II*, *or Keepseagle*. Claim Form at 15. USDA has defined "participation" as including if someone "asserted a claim" in those other claims programs. Instructions, Summary & Definitions at 4. Thus, if a woman farmer's husband – even before they were married – asserted a claim in *Pigford I*, the woman now may be precluded from filing her own separate claim for USDA's discriminatory actions against her as a woman at a time when she was single. None of

the other claims programs had such broad limits on participation. *See generally Pigford I* Claim Sheet and Election Form; *Pigford II* and *Keepseagle* Claim Forms. To the contrary, women who filed claims in the *Keepseagle* claims process were afforded the opportunity, prior to adjudication of their claims, to withdraw them in favor of filing a claim in the women farmers' Claims Process. *Keepseagle* Settlement Agreement at 15. Yet now, if there are any such women who elected this option, the Claims Process's "participation" instructions would preclude her from pursuing her claim at all.

These issues with conflicting and incorrect claim and supporting documentation requirements make it difficult for women (and Hispanic) farmers to submit a correct claims package for consideration, unlike other minority groups' claim programs.

ARGUMENT

I. Legal Standards.

A. Standard for USDA's Partial Motion to Dismiss.

To withstand a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), "a plaintiff need only plead 'enough facts to state a claim to relief that is plausible on its face to nudge[] [his or her] claims across the line from conceivable to plausible.'" *Bryant v. Pepco*, 730 F. Supp. 2d 25, 28 (D.D.C. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Twombly*, 550 U.S. at 555(internal quotation marks and citation omitted). This requires more than labels and conclusions, but detailed factual allegations are not necessary. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Twombly*, 550 U.S. at 555. "So long as the pleadings suggest a

plausible scenario to show that the pleader is entitled to relief, a court may not dismiss." *Owens v. D.C.*, 631 F. Supp. 2d 48, 53 (D.D.C. 2009) (internal quotation marks and citation omitted). In considering a motion to dismiss under Rule 12(b)(1) or 12(b)(6), the Court accepts Plaintiffs' allegations as true and construes all reasonable factual inferences in Plaintiffs' favor. *Ihebereme v. Capital One, N.A.*, 730 F. Supp. 2d 40, 46 (D.D.C. 2010).

B. Standard for Plaintiffs' Motion for Partial Summary Judgment.

The Court "*shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). While the Court must draw "all justifiable inferences" in the non-moving party's favor and accept its evidence as true, the non-moving party "cannot rely on mere allegations or denials, . . . and must do more than simply show that there is some metaphysical doubt as to the material facts." *Wiley-Burruss v. Mabus*, No. CIV.A. 10-0427 RBW, 2011 WL 719479, at *1 (D.D.C. Feb. 23, 2011) (Walton, J.) (internal quotation marks and citations omitted).

II. Plaintiffs Have Standing to Challenge the Claims Process.

Contrary to USDA's argument, Def. Mem. at 10-12, Plaintiffs have standing to challenge USDA's Claims Process. To have Article III standing to show the existence of a "case or controversy" and invoke the jurisdiction of a federal court, a party must demonstrate: (1) an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and conduct complained of"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and quotation marks omitted).

Here, Plaintiffs have alleged that, in offering women farmers a more onerous claims program than claims programs offered to similarly situated African-American and Native American farmers, USDA has violated Plaintiffs' constitutionally protected rights, including their rights to due process and equal protection. As the Supreme Court has explained, that women are unable to compete for a benefit offered by the government on equal footing with other groups is itself a concrete and particularized "injury in fact":

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, . . . [t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 (1978) (individual had standing to challenge public university's affirmative action program; plaintiff's "injury" was school's "decision not to permit Bakke to *compete* for all 100 places in the class, simply because of his race") (emphasis in original); *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (plaintiffs who did not own property had standing to challenge rule requiring that members of school board be property owners because of their "federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications") (footnote omitted).[7] Plaintiffs' injury here is also "actual or imminent," as the 180-day filing period of the claims program began on September 24, 2012. USDA Press Release, Ex. 2. The contours of the Claims Process are known and final, and women must decide *now* whether to participate.

[7] The case law is similarly clear that, to have standing to challenge a program or benefit, an individual need not show that, but for the inequity, the individual would have succeeded in obtaining the benefit. *See, e.g.*, *City of Jacksonville*, 508 U.S. at 658 (association of contractors need not show that its member would have received a government contract absent an ordinance dictating preferential treatment for certain minority-owned businesses); *Bakke*, 438 U.S. at 280-81 ("even if Bakke had been unable to prove that he would have been *admitted*" to a public university in the absence of the university's set-aside for minority applicants, "it would not follow that he lacked standing.") (emphasis in original); *Clements v. Fashing*, 457 U.S. 957, 962 (1982).

The requisite causal connection is also clear. Plaintiffs challenge the inequitable requirements and details of the very program that they allege violates their constitutional rights. Finally, if Plaintiffs were awarded the relief that they seek – an injunction compelling USDA to offer women farmers a program comparable to those offered to African-American and Native American farmers – that relief would redress the unequal and unfair treatment alleged by Plaintiffs. Plaintiffs, women farmers who are presently faced with deciding whether to participate in a claims program that they allege violates their constitutional rights, have standing to challenge that program and seek an injunction that would make it equitable.

III. The "Voluntary" Nature of the Claims Process Does Not Deprive Plaintiffs of Standing or Otherwise Preclude Judicial Review.

USDA makes the unusual argument that women farmers have no standing to allege that the program violates their constitutional rights because it is voluntary on the part of the farmers, and no individual woman farmer is *required* to participate in the claims program. *See* Def. Mem. at 11-12. This argument is meritless.[8] While no individual *must* apply for any program or benefit offered by a state or federal government, courts regularly entertain challenges to government programs and benefits in which individual participation is "voluntary." *See, e.g.*, *City of Jacksonville*, 508 U.S. 656 (1993) (federal government contracts); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (public university education); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (social security disability benefits); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits), *overruled in part on other grounds*, *Edelman v. Jordan*, 415 U.S. 651 (1974); *Like v. Carter*, 448 F.2d 798 (8th Cir. 1971) (welfare benefits); *see also* 28 U.S.C. § 1491(b)(1) (disappointed bidders on government

[8] Plaintiffs also note that "voluntary" is a relative term. Many women farmers could not afford to hire counsel to pursue discrimination claims in court, and so they do not truly have another realistic option to pursue their claims if they choose not to participate in the Claims Process.

contracts may challenge and seek court review). Government programs and benefits are not somehow insulated from judicial review simply because individuals may choose not to apply.[9] USDA's suggestion that individuals must simply ignore inequitable treatment by their government is, at best, self-serving, and at worst, hubristic and insulting.

USDA similarly suggests that the Court cannot review the Claims Process for constitutional infirmities because it is voluntary *on the part of USDA*. *See* Def. Mem. at 17, 18-19. This argument ignores decades of jurisprudence by federal courts in which programs voluntarily offered by governmental entities, to individual applicants who can also voluntarily choose whether to apply, are subject to judicial review. USDA's Claims Process is not free of judicial review simply because applicable statutes and regulations do not require its creation.

For many years, state and federal governmental actors such as USDA have chosen voluntarily to offer affirmative action-type programs to individuals who choose to participate, and it is well-established that courts have the jurisdiction to review those programs for constitutional infirmity. *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Supreme Court reviewed special admissions program voluntarily devised by public university to promote the admission of minority students, and held that the program violated the Equal Protection Clause of the Fourteenth Amendment); *Hammon v. Barry*, 813 F.2d 412 (D.C. Cir. 1987) (D.C. Circuit reviewed race-conscious hiring provision of affirmative action plan of D.C. fire department and held that it violated the equal protection clause of the Fifth Amendment);

[9] *Public Utility District No. 1 of Snohomish County, Washington v. Federal Energy Regulatory Commission*, 272 F.3d 607 (D.C. Cir. 2001), relied on by Defendant, does not change this analysis. *See* Def. Mem. at 12. There, plaintiff electric utilities challenged a Federal Energy Regulatory Commission ("FERC") Order, which required their participation in regional transmission organizations ("RTOs"), which would allegedly result in lower rates, less control over customer contracts and company assets, and plaintiffs giving up statutory rights to file rate changes with FERC. *Id.* at 617. The Court simply determined that the FERC Order did not require participation in RTOs, and so plaintiffs had not shown that the Order caused them any injury. *Id.*

Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) (Fourth Circuit reviewed the University of Maryland's voluntary minority scholarship program and found it not narrowly tailored to remedy present effects of past discrimination), *on remand*, 838 F. Supp. 1075 (D. Md. 1993), *vacated by* 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995); *Dean v. City of Shreveport*, 438 F.3d 448 (5th Cir. 2006) (Fifth Circuit reviewed city's race-conscious hiring process for firefighters and found a genuine issue of material fact as to whether the city's policy was sufficiently narrowly tailored to advance compelling government interest, precluding summary judgment); *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001 (D. Mass. 1996) (court found that Boston Latin School's voluntary affirmative action program favoring black and Hispanic students in admittance was not sufficiently narrowly tailored and would likely not survive an equal protection challenge); *Quirn v. City of Pittsburgh*, 801 F. Supp. 1486 (W.D. Pa. 1992) (court held that city's voluntary policy favoring women in the hiring of firefighters was not narrowly tailored to remedy past discrimination and accordingly violated the equal protection clause of the Fourteenth Amendment). A governmental entity, acting voluntarily in establishing a program that it is not *required* to create pursuant to its regulations, state constitution, or other governing documents does not insulate its actions from judicial review. To the contrary, such programs are regularly reviewed by courts. *Id.*[10] In the instant case, the voluntary nature of the Claims Process does not deprive the Plaintiffs of standing or otherwise preclude the Court from exercising the rigorous review required by the Constitution and the APA.

IV. Plaintiffs' Claims Are Not Barred by Sovereign Immunity.

Even more curious, USDA challenges Plaintiffs' Counts III through VI on grounds of sovereign immunity. *See* Def. Mem. at 9. But it is without question that the federal government

[10] After extensive and diligent research, Plaintiffs have been unable to locate any case that holds that a court has no jurisdiction to review the legality of a program voluntarily established by a governmental actor, and USDA has cited none in its moving papers. *See generally* Def. Mem.

has waived sovereign immunity for both constitutional and APA claims seeking non-monetary relief, which is the sole relief Plaintiffs seek for these claims.[11] *See Bowen v. Massachusetts*, 487 U.S. 879, 891-93 (1988) (5 U.S.C. § 702 provides a broad waiver of the federal government's sovereign immunity in actions for injunctive and declaratory relief); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2204 (2012) ("The APA generally waives the Federal Government's immunity from a suit 'seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.'") (quoting 5 U.S.C. § 702); *Bywaters v. United States*, 670 F.3d 1221, 1224 (Fed. Cir. 2012) ("The United States has waived its sovereign immunity with respect to constitutional claims . . . .") (citing 28 U.S.C. §§ 1346(a)(2)). Nor has USDA alleged that there is any statute that bars the relief that Plaintiffs seek. *Match-E-Be-Nash-She-Wish Band*, 132 S. Ct. at 2204-05 ("the APA's waiver of immunity . . . does not apply 'if another statute that grants consent to suit expressly or impliedly forbids the relief which is sought' by the plaintiff") (citation omitted).[12]

V. Plaintiffs' Equal Protection Claim States a Valid Cause of Action, and Summary Judgment Should Be Granted in Plaintiffs' Favor on This Claim.

Plaintiffs have satisfied all elements for an award of summary judgment in their favor on

[11] USDA's sole support for its sovereign immunity challenge is cases in which plaintiffs sought monetary damages. *See, e.g.*, Def. Mem. at 9, citing *Benoit v. USDA*, 608 F.3d 17, 20-21 (D.C. Cir. 2010) ("The plaintiffs wisely take no issue with the district court's holding that suits for damages against the United States . . . are barred by sovereign immunity . . . .").

[12] USDA also argues that Plaintiffs are not entitled to class certification for their constitutional and APA claims. Def. Mem. at 2, 8, 12-14. USDA's argument is premature since Plaintiffs have not yet filed a motion for class certification of these claims. USDA's argument also misses the mark on the merits. That Plaintiffs were denied class certification for their underlying claims of loan discrimination occurring up to 30 years ago does not preclude the Court from certifying a class based on these new claims related to USDA's discriminatory Claims Process launched in 2012. The Court previously declined to certify a class for Plaintiffs' underlying discrimination claims because of difficulty meeting the "commonality" requirement given the dispersed decision-making at FSA offices nation-wide. *See Love v. Veneman*, 224 F.R.D. 240, 242-44 (D.D.C. 2004). As Plaintiffs' claims related to the Claims Process make clear, the offering of a sub-par program for women farmers was a single decision made centrally by USDA.

their claim for violation of their right to equal protection under the Fifth Amendment. Contrary to USDA's assertion, *see* Def. Mem. at 16, Plaintiffs need not make an extrinsic showing of a "discriminatory purpose" to state a cognizable equal protection violation, because the government's differing treatment of women farmers is overt. "A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification." *Wayte v. United States*, 470 U.S. 598, 610 (1985) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)); *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485 (1982) ("A racial classification, regardless of purported motivation, is presumptively invalid."); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994) (same).

While discriminatory intent may be required when a facially neutral law, policy, or program is at issue, discriminatory intent need not be shown when a government actor makes an express classification based on race or gender. *Id.* In *Cook v. Babbitt*, 819 F. Supp. 1, 4 (D.D.C. 1993), cited by USDA, Def. Mem. at 16, the D.C. district court confirmed that "gender classifications, like racial classifications, are presumed invalid," 819 F. Supp. at 13, and that "[i]n cases where a law or regulation makes an explicit reference to a suspect characteristic, purposeful discrimination is self-evident, and the measure is subject to challenge on its face without any evidentiary inquiry into the motives of the relevant government actors." *Id.* at 14. Here, the government has expressly and unapologetically erected barriers for women (and Hispanic) claimants that it has not erected for similarly situated African-American and Native American claimants.[13] Tellingly, USDA does not even attempt to argue that it is treating women

[13] Nevertheless, Plaintiffs have included allegations regarding USDA's discriminatory intent in their Complaint. Compl. ¶ 125 (USDA "has a discriminatory purpose in its claims administration program . . . to treat women farmers less favorably than similarly situated African-American and Native American farmers . . . ."); ¶ 102 (USDA's intentional refusal to settle women's claims on similar terms "continues USDA's persistent discrimination against women farmers on the basis of gender").

(and Hispanics) like other claimants; rather it argues only that class certification determinations justify the government treating women (and Hispanics) less favorably than other groups.

When the government classifies citizens by gender, its actions are subject to intermediate scrutiny. "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). When the government applies racial classifications, which it also does here because it offers the inferior Claims Process to Hispanic as well as women farmers, while it has offered superior programs to Native American and African-American farmers, its actions must satisfy strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). This means that "such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Id.* Because USDA has expressly offered a lesser claims program to women and Hispanic farmers who have suffered the same discrimination at the hands of USDA as African-American and Native American farmers, its classifications must meet at least intermediate scrutiny.

While USDA has not stated what level of review it believes should apply, it appears to suggest that rational basis review, the lowest level of scrutiny for governmental action that creates distinctions between citizens, is appropriate. *See* Def. Mem. at 16 (USDA's consideration of class certification decisions "reasonable"). Under rational basis review, a classification that is *not* based on a suspect class such as race or gender is constitutional only if it is "reasonably related" to a "legitimate" government interest. *See, e.g.*, *Moreland v. W. Pa. Interscholastic Athletic League*, 572 F.2d 121, 124-26 (3d Cir. 1978) (applying rational basis review to equal protection claim based on basketball league rules requiring suspension of some players); *Marshall v. D.C.*, 392 F. Supp. 1012, 1017 (D.D.C. 1975) (applying rational basis

review to police regulation that allegedly prohibited individuals with beards from serving as police officers). The rational basis test is not a rubber stamp of the government's actions, but instead requires a rigorous analysis of whether the purported basis for governmental action is indeed rational, and not arbitrary. *Cf. Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000) ("rational basis review is not a rubber stamp of all legislative action, as discrimination that can *only* be viewed as arbitrary and irrational *will* violate the Equal Protection Clause") (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1979)) (emphasis in original).

Despite the obvious fact that the government is treating women (and Hispanic) farmers less favorably than it is treating African-American and Native American farmers, USDA argues that it is doing so only because women (and Hispanic) farmers did not obtain class certification for their underlying claims and the other groups did. Def. Mem. at 17. USDA argues that its different treatment of women (and Hispanic) claimants is justified on this basis because it faces "limited financial exposure" from the claims of women and Hispanic farmers, whereas it faced greater potential payouts for the claims of African-American and Native American farmers. *Id.* at 16. USDA's argument is incorrect and based on mischaracterizations, and its different treatment of women (and Hispanic) farmers fails to satisfy even rational basis scrutiny.

A. USDA Has Created a More Difficult Claims Process for Women Farmers Than it Did for Other Similarly Situated Groups.

"In essence, the guarantee of 'equal protection of the laws' requires that similarly situated persons be treated similarly." *Cook,* 819 F. Supp. at 11 (citation omitted). USDA has not disputed that it is treating women (and Hispanic) farmers differently than it has treated African-American and Native American farmers. These minority groups suffered similar discrimination in the awarding of farm loans at the hands of USDA, and brought nearly identical claims against USDA. *See* Compl. ¶ 124. These groups are similarly situated, and as explained below, there is

no reasoned explanation for the government's imposition of a more difficult Claims Processes for women (and Hispanic) farmers.

USDA has arbitrarily erected higher evidentiary hurdles and imposed process problems for women (and Hispanic) farmers that do not exist for other groups. *See generally supra* at 8-14 and *infra* at 35-39 (detailing problems with Claims Process). For example, the Claim Form and other documents in the Claims Process for women (and Hispanic) farmers are much more complex and confusing than the documents African-American and Native American farmers had to complete in their respective processes. *See* Ericksen Report, Ex. 4, at 18-21. This problem is magnified because, while African-American and Native American claimants applying for up to $50,000 in their programs had free legal counsel, women farmers in a similar position do not have this option. *Compare Pigford I* Consent Decree at 24-25; *Pigford II* Settlement Agreement at 38-39; *Keepseagle* Settlement Agreement at 42-43; *with* Framework at 18. And USDA has also chosen to limit the legal fees a woman claimant may pay her attorney. Framework at 18.

The government has also chosen to erect higher evidentiary hurdles for many women farmers that it did not insist on for similarly situated African-American and Native American farmers. Specifically, female "constructive applicants" (those who attempted to apply but could not due to discrimination) must provide copies of complaints and other documents or witness statements related to events occurring up to 30 years ago, while African-American and Native American applicants did not need to produce the same evidence to obtain the same relief. Claim Form at 3; Ericksen Report, Ex. 4, at 21.

In the programs set up for other minority groups, claimants and their counsel received notice of submissions to the Adjudicator by USDA. *See Pigford II* Settlement Agreement at 21 (copy of debt information submitted by USDA provided to claimant and counsel); *Keepseagle*

Settlement Agreement at 20 (same). In contrast, in the Claims Process for women (and Hispanic) farmers, USDA has reserved the right to submit evidence in response to any claim filed, but there is no provision indicating that women will receive notification or a copy of that evidence. Framework at 9.

Moreover, a woman farmer who has participated *in any way* in a previous claims program cannot submit a claim for consideration in the Claims Process, nor can she submit a claim if her spouse or other family member participated in another process, even if the episodes of discrimination were at different times in different geographic locations, perpetrated by different USDA representatives, and were based on totally different characteristics of the victims. *See* Instructions at 4; Claim Form at 15. While the *Keepseagle* claims program made clear that a claimant could obtain only one recovery on a single discrimination claim, an individual who had filed a claim in a *Pigford* program that was rejected as untimely or incomplete could have submitted a claim to the *Keepseagle* adjudicator. *See Keepseagle* Settlement Agreement at 15. The programs for African-American and Native American farmers did not exclude claimants due to prior filings by spouses or family members. *See generally Pigford I* Consent Decree; *Pigford II* Settlement Agreement; *Keepseagle* Settlement Agreement.

In addition, the Settlement Agreement a woman farmer must sign in the Claims Process is broader than releases signed by claimants in the other programs. *See* Settlement Agreement at 1 (releasing "*any* credit-related discrimination claims" against the United States and USDA); *see supra* at 9-10. And while women farmers will encounter more procedural hurdles and problems than African-American and Native American farmers, most women who succeed in the Claims Process will likely receive *less* in recovery than members of the other groups. Due to the larger numbers of women farmers than other groups, many women are likely to receive less than

$50,000 due to the overall cap on recovery through the Claims Process. *See infra* at 30 (comparing groups of minority farmers). The variety of differences between the program for women (and Hispanic) farmers when compared to those for similarly situated minority groups demonstrates that USDA has chosen to treat women (and Hispanics) less favorably.

B. Differing Class Certification Rulings Do Not Provide Even a Rational Basis for USDA's Admittedly Different Treatment of Women Farmers.

USDA cannot show that it has even a rational basis to treat women (and Hispanic) farmers differently than other groups of minority farmers.

1. The Government Agreed to Class Certification for Money Damages for African-American and Native American Farmers, But Not for Women and Hispanic Farmers.

USDA mischaracterizes the class certifications in *Pigford* and *Keepseagle* in describing its supposed premise for different treatment of women (and Hispanic) farmers. It is important to understand that to the extent that Courts certified classes including monetary relief in the *Pigford* and *Keepseagle* cases, they did so *only after USDA agreed to such relief as part of settlements in those cases*.

In *Pigford I*, the Court initially certified a class for injunctive and declaratory relief only, under Rule 23(b)(2). *Pigford v. Glickman*, 182 F.R.D. 341, 351-52 (D.D.C. 1998).[14] In connection with the parties' settlement shortly thereafter, the government and the plaintiffs *jointly* requested that the Court certify a new class, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. *Pigford*, 185 F.R.D. at 92. Thus, in *Pigford I* there was no court order certifying a class for monetary damages except the order that USDA requested be entered.

[14] The Court left open the possibility that at a later time certification for money damages might be appropriate: "[i]f liability is found and the case reaches the remedy stage, the Court will have to determine the most appropriate mechanism for determining remedy. It is possible that at that point it would be appropriate to certify a class pursuant to Rule 23(b)(3) . . . ." *Pigford*, 182 F.R.D. at 351 (citing *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997) (in class action seeking both injunctive and monetary relief, court may adopt "hybrid" approach and certify (b)(2) class for former and (b)(3) class for latter)).

In *Pigford II*, the Court did not order class certification – on any basis – until the parties requested class certification in accordance with their settlement agreement. The government agreed to enter into a *second* class-wide settlement for African-American farmers and consented to a settlement class, although the *Pigford II* claimants no longer had any actionable claims because the deadline for submission of claims had long passed. *See Pigford II* Settlement Agreement at 9.

And the *Keepseagle* class of Native American farmers was certified only for injunctive and declaratory relief, and *not for the payment of any monetary claims*. *Keepseagle v. Veneman*, No. CIV.A.9903119EGS1712, 2001 WL 34676944, at *1 (D.D.C. Dec. 12, 2001) (Court granted class certification in September 2001 pursuant to Rule 23(b)(2)). Despite this, USDA agreed to enter a settlement with Native American farmers that included $760 million in monetary relief,[15] and agreed that a "settlement class" would receive this relief. *See Keepseagle* Settlement Agreement at 8-10 12-13, 26.

The Courts' certifications of classes of African-American and Native American farmers who could receive awards of money damages were brought about by the actions of USDA itself, which joined with the plaintiffs in *Pigford I*, *Pigford II*, and *Keepseagle* to request such relief through settlements. The government's contention that it can differentiate between minority groups that obtained class certification and those that did not is a result borne entirely of the government's own manipulative actions and should not be the basis upon which USDA may distinguish among farmers. *Cf. Arcon Dev. Corp. v. United States*, 409 F. Supp. 671, 673-74 (W.D. Pa. 1976) (court refused to find lease forfeited by lessee for nonpayment of rent where plaintiff-lessor withheld from lessee its new mailing address for receiving rent payments in order

[15] The amount of $760 million covers all damages claimed by Native American farmers's expert. Final Expert Rebuttal Report of Patrick M. O'Brien at 6, 31-32, 49, *Keepseagle v. Vilsack*, No. 99-cv-03119 (Dec. 4, 2009) (Dkt. No. 551-4) (calculating $585-$744 million in damages to Native American farmers).

to fabricate a cause of action for material breach of the lease); *United States v. Timberlake*, 896 F.2d 592, 596 (D.C. Cir. 1990) (same). *See also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.'") (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

Any possibility that the certification of classes would expose the government to substantial liability was brought about by the government's own actions in agreeing to, and asking for, the certification of classes that included monetary relief. Directly contrary to USDA's argument about the vast liability it allegedly faced in the other minority farmer cases, Def. Mem. at 16, prior to the government's agreement to a settlement and class including monetary relief in *Keepseagle*, the D.C. Circuit explicitly recognized that the certification of a Rule 23(b)(2) class did *not* threaten USDA with huge liability exposure. *In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002) ("the Department faces no possibility of a massive damage judgment.").

The government's machinations and manipulations in its treatment of women (and Hispanic) farmers when compared to its conduct towards African-American and Native American farmers show that the government could have agreed to the certification of classes in the *Love* and *Garcia* cases, but it chose not to do so, although all of these groups of minority farmers are similarly situated.[16] When class certification was denied in *Love* and *Garcia*, USDA itself argued that the narrow class certification in *Keepseagle* was improvidently granted, and should be reconsidered and denied *because these groups are similarly situated*. Def.'s Resp. to

[16] Indeed, class certification can be agreed to in the context of a settlement, even where the court has previously denied it. *See, e.g.*, *In re Terazosin Hydrochloride Antitrust Litig.*, Case No. 99-MDL-1317, 2005 U.S. Dist. LEXIS 46189, at *12 (S.D. Fla. Mar. 17, 2005).

Pls.' Petition for Permission to Take an Interlocutory Appeal, *Garcia v. Vilsack*, D.C. Cir. No. 04-8008, at 19-20 (Oct. 1, 2004) (Dkt. No. 6) ("Now that there is an actual conflict in the certification of class actions in virtually identical suits by Hispanic, female, and Native American farmers, review by this Court may well be appropriate to ensure that *similarly-situated minority groups* are treated consistently.") (emphasis added). The differing class certification rulings in the minority farmers' cases simply do not provide a rational basis for USDA's discriminatory treatment of women farmers.[17]

2. There Is No Cost Savings in Treating Women and Hispanic Farmers Differently from African-American and Native American Farmers.

The government argues that it may differentiate its treatment of women and Hispanic farmers when compared with African-American and Native American because after the *Pigford* and *Keepseagle* classes were certified (with USDA's consent), the government was faced with financial exposure arising from the class claims that differs from the "very limited exposure" it faces with women and Hispanic farmers' claims. Def. Mem. at 16-17. The government's suggestion that certified classes of African-American and Native American farmers threatened the public fisc with more financial exposure than from the claims brought by women and Hispanic farmers is simply incorrect and contrary to the undisputed facts.

As a threshold matter, treating certain minority groups less favorably than others in order to save government funds does not provide a valid basis for discrimination. Generally, while the government may have a legitimate interest in saving money, limiting public expenditures is not an adequate basis on which to justify Government discrimination. *See Shapiro*, 394 U.S. at 633 ("We recognize that a State has a valid interest in preserving the fiscal integrity of its programs.

[17] Further, "the Rules Enabling Act forbids interpreting Rule 23 'to abridge, enlarge, or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b)) (citing *Ortiz v. Fireboard Corp.*, 527 U.S. 845 (1999)).

It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.").

Even more to the point, the government's math simply does not work. According to USDA's own most recently available census data, there are roughly 40,000 African-American and 35,000 Native American principal farm operators. Compl. ¶ 90. In contrast, there are approximately 306,000 women and 55,000 Hispanic principal farm operators. *Id.* Even if only **half** of the women and Hispanic principal farm operators assert claims against USDA, those claims would still total more than the claims brought by **all** the African-American and Native American principal farm operators (180,500 versus 75,000).[18] The number of claims asserted by women and Hispanic farmers, whether brought through litigation or in class settlements, would still be substantially greater in number and dollar amount than the claims asserted by African-American and Native American farmers through their respective claims processes.[19]

If USDA's underlying argument is that it will save the government money by, in lieu of agreeing to class certification for women farmers as it did for other groups, establishing a more difficult and burdensome administrative claims process that will result in few payouts, that cost

[18] Moreover, the number of claims filed by Native American farmers was only 5,191. Status Report at 1, *Keepseagle v. Vilsack*, No. 99-cv-03119 (Mar. 9, 2012) (Dkt. No. 617).

[19] Although USDA insists that it faces ECOA discrimination claims brought by only ten women farmers, Def. Mem. at 6, USDA knows full well that thousands of women are represented by counsel and ready to bring claims, and that through this case, the statute of limitations remains stayed for these women and countless others. *See, e.g.*, Plaintiffs' Motion for Court Review and Supervision at 26 (Plaintiffs' counsel represent thousands of women farmers); Order at 1 (July 19, 2010) (Dkt. No. 111).

Moreover, the award monies committed by USDA for the Claims Process reflect the valuation of women (and Hispanic) farmers' claims: at least $1.33 billion in cash awards, plus up to $160 million in debt relief. Framework at 1-2. This compares with the *Pigford I* claims program's $1 billion in awards and unlimited debt relief; the *Pigford II* claims program's up to $1.25 billion allocated by Congress for awards and unlimited debt relief; and the *Keepseagle* claims program's $680 million in awards and up to $80 million in debt relief. Monitor's Final Report at 4-5, *Pigford I* (Apr. 1, 2012) (Dkt. No. 1812); *Pigford I* Consent Decree at 15, 19-20; 2008 Farm Bill § 14012(b); Claims Resolution Act of 2010, Pub. L. 111-291 (codified at 124 Stat. 3064), § 201; *Keepseagle* Settlement Agreement at 12.

savings does not create a rational basis for the discrimination. Certainly the Claim Form being utilized in the Claims Process is not user-friendly – markedly less so than the claim forms used in the other minority groups' claims programs – and the requirements of the Claims Process are so onerous that both will act as a bar to awards for many women and Hispanic applicants. *See generally* Ericksen Report, Ex. 4; discussion of the Claims Process form, *supra* at 11-13 and *infra* at 35. The government should not be permitted to take into account any such cost savings arising from its creation of an excessively burdensome Claims Process for certain groups under which few applicants can succeed. Certainly such bad faith in the manipulation of deserving applicants should not be considered "rational" by the Court for the purposes of determining whether USDA's actions pass constitutional muster.

Under rational basis review, the government actor must show that the classification it makes is truly linked to a legitimate government interest and provides a rational, reasoned explanation for differing treatment of citizens. *See Turner*, 396 U.S. at 362 (court must determine "whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective"); *Shapiro*, 394 U.S. at 637-38 (state's one-year waiting period for welfare benefits not justified as means of encouraging new residents to join the labor force; because "this logic would also require a similar waiting period for long-term residents of the State," the stated purpose "provides no rational basis for imposing a one-year waiting-period restriction on new residents only."). Here, class certification is the *single factor* identified by the government for its different treatment of women and Hispanic farmers on the one hand, and African-American and Native American on the other. Discriminatory treatment on that basis, particularly when the government itself agreed to class certification for damages for African-American and Native American farmers, but refused to do so for women and Hispanic farmers,

fails to pass constitutional muster. "[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). While Plaintiffs maintain that the Court should apply intermediate or strict scrutiny to USDA's actions, USDA's discriminatory classifications violate women farmers' equal protection rights regardless of the level of scrutiny applied.

USDA's motion to dismiss Plaintiffs' equal protection claim must fail, as USDA has failed to present any reason for its discrimination between groups of minority farmers that satisfies even rational basis scrutiny. Further, Plaintiffs have demonstrated that the government has arbitrarily chosen to treat women farmers less equitably than other similarly situated groups. Accordingly, Plaintiffs are entitled to summary judgment on this claim.

VI. Plaintiffs' Due Process Claim States a Valid Cause of Action, and Plaintiffs Are Entitled to Summary Judgment On This Claim.

USDA has created a property interest in recovery from the Claims Process for women farmers who qualify, and has not afforded those women appropriate due process of law. Accordingly, USDA's motion to dismiss this claim fails, and Plaintiffs are entitled to summary judgment as a matter of law.

A. Women Farmers Who Meet the Claims Process Requirements Have a Property Interest in Recovery.

The government posits that because the Claims Process is "voluntarily" offered by USDA, Plaintiffs cannot possibly have any protectable property interest related to it. Def. Mem. at 18. This position is untenable. Federal and state governments, in their discretion, choose to offer a variety of benefits and programs to citizens, and case law makes clear that citizens *can* have constitutionally protected interests in benefits offered by the government. USDA focuses largely on cases holding that an individual has no protected property interest in police protection, because police necessarily employ discretion in how and when to enforce the laws. Def. Mem.

at 18. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-62 (2005) (describing the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands"); *Barnes v. Dist. of Columbia*, No. 03-2547(RWR), 2007 WL 1655868, at *2 (D.D.C. June 6, 2007) ("the decision of whether and how to deal with a juvenile's escape from a group home is entirely discretionary" and related to the "well-established tradition of police discretion") (internal quotation marks omitted). But the appropriate analogy here is not to the exercise of prosecutorial or police discretion; a more apt comparator is public benefit programs – programs constructed by federal and state governments which result in provision of specified benefits to applicants who demonstrate that they meet program requirements. Individuals have "a legitimate claim of entitlement" to such benefits, even though the government voluntarily chooses to implement the program. *See, e.g.*, *Mathews*, 424 U.S. at 321; *Goldberg*, 397 U.S. at 274; *Shapiro*, 394 U.S. at 628.

The government similarly argues that because the program is "voluntarily" offered by USDA, USDA can design it in any manner it deems fit, even if the program and its processes are discriminatory. *See* Def. Mem. at 16-17. Surely a government actor cannot offer a blatantly discriminatory program with inadequate procedures simply because it could choose to offer no program at all. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (quoting *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003) (other citation omitted) ("'[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate

procedural safeguards."); *Perry*, 408 U.S. at 597 (government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"); *Frost v. R.R. Comm'n of the St. of California*, 271 U.S. 583, 599 (1926) ("states cannot use their most characteristic powers to reach unconstitutional results"); *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276 (1855) (The due process clause "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."); *see also supra* at 17-19 (voluntariness on the part of the government or individual does not bar individuals from challenging processes involved in government programs). In fact, this Court has already recognized that the government cannot violate the constitutional rights of its citizens simply because it acts as a volunteer. *See* Transcript of Status Conference at 25 (Oct. 21, 2011) (Dkt. No. 148) (THE COURT: "even though you're talking about a voluntary program that nonetheless there are restrictions, it seems to me constitutional restrictions, on how that program can be developed"). That USDA would suggest anything different is deplorable.

B. USDA Does Not Provide Sufficient Due Process Protections to Women Farmers.

Courts recognize both "an entitlement in certain forms of government assistance," and that "government is not free to [then] dispose of individual claims of entitlement in any manner it deems fit." *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 597 n.1 (1985) (Brennan, J., concurring). When an individual has a legitimate claim of entitlement to a property right, the government must afford that person due process. *See Perry*, 408 U.S. at 601-02. Determining what process is due is dependent on facts and circumstances, and requires consideration of a flexible test with three factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used,

and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 334-35. It is important first to understand the burdens and barriers that women farmers face in the Claims Process.

1. The Claims Process Includes Unfair Procedural Problems.

Defendant has erected several procedural barriers for women (and Hispanic) farmers, which will likely result in women missing out on recovery to which they are entitled and giving up their legal rights due to confusion, incomplete information, and processes lacking in fundamental fairness. In most cases, the imposition of these barriers is entirely arbitrary, as the same hurdles have *not* been erected for African-American and Native American claimants in their respective programs. *See supra* at 8-14, 23-26 (describing differences between Claims Process and other minority groups' programs).

First, the Claim Form and other documents a woman farmer must complete in order for her claim to be considered are long, complex, and filled with confusing questions and legalese. *See* Ericksen Report, Ex. 4, at 6-8, 10-13, 16-17. What is more, women are required to collect and provide a large number of documents, *see id.* at 8-9, and the instructions provided by USDA are insufficient and sometimes conflicting. *See id.* at 13-15, 17. Because of the confusing questions and instructions, a woman who truly is eligible for relief may answer questions incorrectly, or misunderstand the consequences of particular responses. *See id.* at 10-17.

The problem of the complex forms and other documents is exacerbated by the fact that the assistance of legal counsel is not built into this program for any claimants. While African-American and Native American claimants applying for up to $50,000 in their programs had free legal counsel, women in a similar position do not. *Pigford I* Consent Decree at 24-25; *Pigford II*

Settlement Agreement at 38-39; *Keepseagle* Settlement Agreement at 42-43. USDA has limited, to $1,500 or 8%, the amount a woman farmer may pay any lawyer she hires. Framework at 16; Def. Mem. at 21.[20] With that limitation, it may be difficult for women to hire competent counsel who can dedicate the necessary time to gather evidence and complete the forms. Without counsel, women will have much more difficulty completing the necessary documents. *See* Ericksen Report, Ex. 4, at 3-4, 10, 17, 18, 21.

The Settlement Agreement that a woman farmer must sign in order to participate in the Claims Process states that she foregoes the right to bring "*any* credit-related discrimination claims" against the United States and USDA. Settlement Agreement at 1 (emphasis added). While the Claim Form provides that a claimant discharges only "claims of lending discrimination against USDA that arose *during the time period covered by the claims process*," Claim Form at 15 (emphasis added), this statement conflicts with the text of the Settlement Agreement women must execute to participate. Because they have to sign the Agreement, many unsuspecting women may release claims arising later in time or not covered by the Claims Process for other reasons. Many of these women will likely give up rights to bring claims in court against the government without a full understanding of whether the discrimination they suffered fits within the program's parameters, due to the confusing form and other documents.

The government has also erected lofty and likely insurmountable evidentiary hurdles for many women farmers. A "constructive applicant" – a woman who attempted to apply for a farm loan but whose application was discouraged and never considered due to discrimination – must supply either: (a) a witness statement from someone who witnessed the discriminatory incident;

[20] While USDA states in its Claims Process "Summary" that it deems $1,500 a reasonable fee, but claimants may negotiate a different rate with their counsel, the Framework says otherwise. *Compare* Summary at 10 *with* Framework at 18. In its Memorandum, USDA now confirms that $1,500 is indeed a maximum permissible limit on attorneys' fees, Def. Mem. at 21, though this information has not been communicated to potential claimants and their counsel to resolve the existing discrepancy.

(b) a copy of a written complaint of discrimination filed within one year of the incident; or (c) a document to or from a non-family member, written within one year of the incident, describing the woman's loan application attempt, business plan, and discrimination by USDA. Claim Form at 3. USDA did not erect such barriers for African-American and Native American claimants, and requiring original documents from events occurring in some cases over 30 years ago is onerous and irrational, *see* Ericksen Report, Ex. 4, at 8-10, 21, particularly in light of USDA's own destruction of documents relevant to Plaintiffs' claims.[21]

Another unfair aspect of the program is that a woman farmer apparently cannot apply if she has participated in *any way* in the *Pigford* or *Keepseagle* claims processes, regardless of whether her claim was ever even considered by an adjudicator. *See* Instructions at 4; Claim Form at 15. If a woman's claim has never been previously considered on the merits, it does not make sense to exclude her from this program, and many women may not understand that their non-substantive involvement in another program will foreclose recovery here. Even more nonsensical, it appears that if a woman farmer's *spouse* (or other family member) has participated in any way in the *Pigford* or *Keepseagle* claims processes, that woman farmer may be excluded from this Claims Process, regardless of whether her spouse's claim had anything to do with her claim, and whether the two were even married when the discrimination occurred. *See* Instructions at 4 ("'Participated in' means that you, a spouse, or anyone on your behalf asserted a claim in Pigford I, . . . 'Pigford II'[], or Keepseagle."); *see also* Claim Form at 15 ("No claim will be accepted if you, your spouse, or anyone on your behalf participated" in the other programs). These provisions are illogical and unfair.[22]

[21] USDA has admitted to destroying farm application data for most or all of the relevant time period. *See, e.g.*, Plaintiffs' Motion for Class Certification at 11 n.10 & Ex. 48 thereto (Jan. 16, 2004) (Dkt. No. 54).
[22] In the claims program for Native American farmers, USDA made clear that a claimant could obtain only one award for discrimination faced. However, claimants could file a claim in the *Keepseagle*

An additional process problem exists because USDA has the right to submit evidence to the Adjudicator after any claim is filed, and the claimant will not receive notification that USDA has submitted evidence, a copy of that evidence, or an opportunity to respond. Framework at 9. Moreover, any debt relief awarded will likely be based on information provided by USDA to the Adjudicator after the claimant has submitted a claims package. *Id.* at 14-16. A claimant who has been subjected to multiple events of discrimination and has obtained multiple loans has no way of knowing: (1) which single event of discrimination is the basis for her award; (2) which resulting loans may be the basis for debt relief under the "forward sweep" concept contemplated by the Claims Process; or (3) whether USDA's records have accurately listed the debt due and owing by the claimant. The government's refusal to permit a claimant to know what information it is submitting to refute her claim, and provide her an opportunity to respond, presents serious due process concerns. *See Goss v. Lopez*, 419 U.S. 565, 581 (1975) (due process requires that public school student facing temporary suspension be given "an explanation of the evidence the authorities have"); *Fowler v. Smith*, 68 F.3d 124, 127 (5th Cir.1995) (due process entitles public employee with property right in employment to "an explanation of the employer's evidence" before he can be dismissed); *cf. Rafeedie v. I.N.S.*, 795 F. Supp. 13 (D.D.C. 1992) (alien's due process rights violated when he had to submit information and argument on his behalf without knowledge of the information the government had submitted against him).

Compounding all of these problems is the fact that the program does not provide any opportunity for a claimant to seek reconsideration or appeal of the Adjudicator's decision. Framework at 8. A woman farmer will be faced with the daunting task of completing the 16-

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program, but then choose to withdraw their claim from consideration in the *Keepseagle* program and opt for consideration in the *Love* and *Garcia* program. *Keepseagle* Settlement Agreement at 15. By the terms of the program for women and Hispanic farmers, a claimant who did just that – withdrew her claim from consideration in *Keepseagle* – would be barred from participating in the current Claims Process.

page Claim Form and signing a Settlement Agreement giving up her right to sue the government, while at the same time she will have no idea what evidence is submitted against her, and will have no ability to question or appeal the outcome of her claim.

2. Additional Process Is Due to Protect the Rights of Women Farmers.

While due process cannot be "'precisely defined,'" at its heart is the requirement of "'fundamental fairness.'" *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 983 (9th Cir. 1998) (quoting *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 24 (1981)). USDA's Claims Process has created a property right or entitlement in eligible women farmers, including Plaintiffs, and many of the processes and procedures in the program do not ensure fairness and due process for claimants.

Under the flexible test articulated in *Mathews v. Eldridge*, *see supra* at 34-35, USDA must provide additional process to claimants. The "private interest" that will likely be affected here is great, and the "risk of erroneous deprivation of such interest" is high. *Mathews*, 424 U.S. at 335. There is a real risk that many deserving women farmers will be erroneously deprived of their right to recover for the discrimination they have suffered through the Claims Process or in Court. Many deserving women will likely both waive their right to pursue claims in Court in order to participate in the process, and fail to recover due to the procedural barriers and burdens imposed by the process. The "probable value . . . of additional or substitute procedural safeguards" – such as a more user-friendly form, increased access to counsel, and more reasonable evidentiary burdens – is great. *Id.* Finally, the procedural hurdles USDA has arbitrarily erected for women farmers are of little benefit to USDA, and fixing these problems would not pose great "fiscal and administrative burdens." *Id.* USDA has admitted to a long history of discrimination against women farmers, and has allocated funds toward remedying that

discrimination, and after waiting decades for relief, women deserve a fair Claims Process.

VII. Plaintiffs' Unconstitutional Conditions Claim States a Valid Cause of Action, and Plaintiffs Should Prevail on this Claim.

USDA's only challenge to Plaintiffs' unconstitutional conditions claim is that this doctrine in "unsettled." Def. Mem. at 20. To the contrary, the Supreme Court has declared that the doctrine of unconstitutional conditions is indeed "well-settled." *Dolan v. City of Tigard*, 512 U.S. 374, 375 (1994).[23]

Under the unconstitutional conditions doctrine, the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the relinquished right has little or no relationship to the government benefit. *See id.* This is precisely Plaintiffs' situation. The government has launched a program through which Plaintiffs and other women (and Hispanic) farmers have an opportunity to participate, but not unless they give up (1) their rights to pursue various other claims against USDA that extend beyond the scope of the Claims Process, potentially including their right to challenge the Claims Process as discriminatory, and (2) their rights to enter contracts of their choosing with attorneys.

In order to file a claim through the Claims Process, women must release the United States and USDA from "*any* credit-related discrimination claims." Settlement Agreement at 1 (emphasis added). Women must give up their right to sue the United States government for a wide variety of discrimination claims, and their right to sue USDA for discrimination occurring outside the temporal scope of the Claims Process. Many women may do this without full knowledge and understanding of the property right they are giving up, since Plaintiffs here are

[23] In *Dolan v. City of Tigard*, the Supreme Court struck down a city's requirement that a landowner dedicate portions of her property for improvement of a storm drainage system and for a pedestrian/bicycle path as a condition of granting the landowner a permit to redevelop her property, since the city's actions "forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements." *Id.* at 375, 385-86.

called upon to forfeit their rights without the full benefit of the assistance of legal counsel, as was provided in the other similar programs, *Pigford I* Consent Decree at 24-25; *Pigford II* Settlement Agreement at 38-39; *Keepseagle* Settlement Agreement at 42-43, and with the Government taking the unusual step of expressly limiting the amount of legal fees that claimants may pay to legal counsel. Framework at 18. In so doing, the Government impermissibly violates Plaintiffs' constitutionally protected property right to pursue other claims that they may legitimately have against USDA beyond the scope of the Claims Process itself. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72, 576 (1972) (recognizing constitutionally protected property rights as a "safeguard of the security of interests that a person has already acquired in specific benefits" which "may take many forms," extending "well beyond actual ownership of real estate, chattels, or money"); *Perry*, 408 U.S. at 601 (quoting *Roth*, 408 U.S. at 576).

Plaintiffs also have a constitutionally protected right to contract with counsel under the terms that they and their attorneys mutually agree upon. U.S. Const. Art. I, Sec. 10, cl. 1 (right to contract); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 595-96 (1819) (states may not impair private right to contract). USDA seeks to trammel upon Plaintiffs' contract rights by impermissibly limiting the terms of those contracts, specifically the amount of fees to which Plaintiffs' counsel are entitled. And, USDA does so in a confusing manner, including conflicting statements about attorneys' fee limits in various Claims Process documents.[24] USDA advises women farmer claimants that there is a mandatory cap on legal fees of $1,500 or 8%, depending on the selected claim tier, that an attorney may receive from a woman (or Hispanic) farmer

[24] In addition, USDA takes a starkly different approach on to whether women claimants should have the benefit of counsel, not encouraging counsel for women farmers, while USDA "strongly recommended" that Native Americans seek the advice of counsel, which was provided at no cost. *Compare* Framework at 18 *with Keepseagle* Claim Form at 7 (emphasis in original). *See also Pigford I* Consent Decree at 24-25; *Pigford II* Settlement Agreement at 38-39; *Keepseagle* Settlement Agreement at 42-43.

claimant out of a claim award.[25] *See* Settlement Agreement at 1; Framework at 18. Through the plain language of the Claims Process documents, USDA has clearly interfered with Plaintiffs' constitutional right to contract with counsel as they see fit.

The doctrine of unconstitutional conditions requires the court to review the challenged condition – here, Plaintiffs being required to give up property rights in other claims and their right to contract with legal counsel as they see fit in order to participate in the Claims Process – under rational basis scrutiny, at a minimum. *See supra* at 22-23 (discussion of rational basis review of government limitations on individuals' constitutional rights). In order for the government's conditions placed upon Plaintiffs' participation in the Claims Process to pass constitutional muster, the government must show a legitimate state interest that has an "essential nexus" to the conditions it has placed on participation in the Claims Program. *See Dolan*, 512 U.S. at 383. USDA has offered no state interest, legitimate or otherwise, in support of its challenge to Plaintiffs' unconstitutional conditions claim. Instead, the government has focused on challenging Plaintiffs' claim based on standing and sovereign immunity, without ever getting to the merits of Plaintiffs' unconstitutional conditions claim.[26] *See* Def. Mem. at 9-12, 20.

Even if USDA sought to establish some permissible nexus between its interest in establishing the Claims Process, on the one hand, and a broad release of other claims without the full benefit of assistance of counsel and the limitation of contract rights, on the other, it would fail. USDA has offered Plaintiffs "no special benefits" in return for the government trammeling their property rights to other potential claims upon consultation with legal counsel, *see Dolan*, 512 U.S. at 386 (reviewing whether the government's unchallenged factual findings support the

[25] As noted above, USDA's Summary document implies that these caps are not mandatory, but the Settlement and Framework say otherwise, and claimants must sign the Claim Form and Settlement Agreement under penalty of perjury. *See* Framework at 18; Settlement Agreement; *supra* n.20.
[26] On this basis alone, Defendant's motion to dismiss Plaintiffs' unconstitutional conditions claim should be denied.

conditions it imposed on a property owner), and in doing so has also placed constitutionally impermissible limits on Plaintiffs' right to contract with their own legal counsel. Hence, there is no justification that passes muster under the U.S. Constitution for USDA, through the Claims Process, placing conditions on Plaintiffs' protected property and contract rights.

For these reasons, the government's motion to dismiss Plaintiffs' unconstitutional conditions claim should be denied, and summary judgment should be granted to Plaintiffs.

VIII. Plaintiffs' APA Claim States a Valid Cause of Action, and Plaintiffs Are Entitled to Summary Judgment in their Favor.

USDA's challenge to Plaintiffs' APA claim also fails, and Plaintiffs should be granted judgment in their favor on this claim. USDA's chief arguments are that (1) ECOA provides an adequate alternative remedy in a court, and (2) USDA has acted reasonably in instituting the Claims Process. USDA is wrong on both counts. In their APA claim, Plaintiffs challenge the Claims Process for its gender discrimination against Plaintiffs, as women farmers, in comparison with USDA's treatment of other groups, namely African-American farmers and Native American farmers in the Claims Process that was launched September 24, 2012. Thus, Plaintiffs' APA claim is wholly unrelated to their ECOA claim, which challenges USDA's credit decisions in the granting of farm loans and loan servicing as discriminatory. And, through its institution of a lesser Claims Process for women farmers, USDA has acted arbitrarily and *un*reasonably. USDA's proffered reason for the disparate treatment in the Claims Process – that women farmers were denied class certification in their ECOA litigation – is not rational, especially given that in *none* of the other minority farmer cases did the Court grant class certification for monetary damages except in approving a proposed settlement reached by the parties. *See supra* at 26-32.

The APA provides for judicial review of a federal agency's actions. In order to state a claim under the APA, a plaintiff must establish that (1) there has been final agency action, (2) the

action has not been committed to agency discretion as a matter of law, and (3) there is no other adequate remedy available from a court. 5 U.S.C. §§ 701(a), 704. All conditions are met with regard to the Claims Process.

First, a final agency action exists here. USDA's launch of the Claims Process on September 24, 2012, *see* USDA Press Release, Ex. 2, rendered the program a final agency action.[27] Second, while USDA may have the discretion to institute programs such as the Claims Process, it does not have unfettered discretion to do so in a manner that discriminates against women (or Hispanics). Rather, USDA regulations expressly prohibit discrimination based on gender in all of its programs and activities. *See* 7 C.F.R. § 15d.2. Finally, as described above, Plaintiffs' ECOA claims do not provide them an adequate remedy in court for the agency's discrimination in implementing a discriminatory Claims Process.

Moreover, no statute bars the Court's review of USDA's action to institute the Claims Process, and there are judicially manageable standards under which the agency's action may be reviewed. Although the APA provides a presumption of judicial review, Congress created a narrow exception for agency actions that are committed to agency discretion by law. 5 U.S.C. § 701; *see Citizens to Preserve Overton Park v. Volpe, Inc.*, 401 U.S. 402, 410 (1971). Under this exception, even if Congress has not affirmatively barred review, courts cannot review an agency action "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion." *Heckler*, 470 U.S. at 830. The D.C. Circuit recognizes statutes, regulations, and even formal and informal policy statements as constituting "judicially manageable standards." *See Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (citing

[27] USDA has not alleged that its Claims Process fails to constitute final agency action. *See* Def. Mem. at 10, 22-23.

Citizens to Preserve Overton Park, 401 U.S. at 410). Here, USDA regulations mandate that USDA not engage in discrimination in the administration of its programs. *See* 7 C.F.R. §§ 15d.1 – 15d.4. Thus, through these judicially manageable standards, the Court can determine whether or not USDA has engaged in discrimination in the institution of the Claims Process. *Id.*

Finally, Plaintiffs are not required to exhaust administrative remedies before requesting court review since individuals *may*, but are not required to, avail themselves of an administrative procedure to allow the agency to review their discrimination complaint. *See* 7 C.F.R. § 15d.4 . Individuals harmed by discrimination in USDA's administration of its programs do not have any other adequate remedy in court, specified by statute or otherwise. 5 U.S.C. §§ 703, 704. As a result, Plaintiffs are entitled to seek relief for their APA claim from this Court. *Id.*

Plaintiffs' APA claim challenging the Claim Process as discriminatory is properly the subject of judicial review under the APA. Furthermore, the clear differential treatment of women farmers in the Claims Process as compared to the claims programs instituted for African-American and Native American farmers, *see supra* at 8-14, 23-26, establishes Plaintiffs' claim for injunctive relief under the APA. Thus, judgment should be entered in Plaintiffs' favor on their APA claim, and USDA should be ordered to ensure that the Claims Process is consistent with the programs instituted for African-American and Native American farmers.

CONCLUSION

USDA has failed to meet its burden under Rule 12(b)(1) or 12(b)(6) for the dismissal of any of Plaintiffs' constitutional and APA claims, Counts III through VI. Furthermore, Plaintiffs are entitled to summary judgment as to these claims. Hence, Plaintiffs request that the Court deny USDA's partial motion to dismiss in its entirety, and grant Plaintiffs' motion for partial summary judgment and grant relief accordingly.

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Respectfully submitted,

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