
Broken Promises: The Continuing Decline of Black Farm Owners and Operators in America

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Introduction

Since the industrialization of farming in the United States there has been a continuous decline in the number of independent farm owners in America. In the modern era, a myriad of factors affects this diverse group of Americans: climate change, burdensome debts, and the corporatization of modern farming.¹ This stark reality is even worse for America’s Black farmers. After hitting its peak in the 1920s, the rate of Black farm ownership

¹ See generally Alana Semuels, ‘They’re Trying to Wipe Us Off the Map.’ *Small American Farmers Are Nearing Extinction*, TIME (Nov. 27, 2019), <https://time.com/5736789/small-american-farmers-debt-crisis-extinction/>.

has steadily declined over the past hundred years.² Black farmers once made up fourteen percent of America's farm owners; today, Black farmers comprise less than two percent.³

There has been much scholarship focused on the decline of Black farm ownership and operation (generally, these two groups will be referred to jointly as "farmers" within this paper). The history of this decline, the root problems underlying it, and the lack of clear solutions have all been well-addressed. However, despite this extensive scholarship and public interest, the decline of Black farm ownership persists. The strains on Black farmers have worsened in the wake of the Trump Administration's trade wars and the ongoing global pandemic.⁴

The decline of Black farm ownership in America is fundamentally connected to America's history of racist treatment towards Black landowners. A class-action lawsuit in 1999, *Pigford v. Glickman*, resulted in a \$1.25 billion settlement to Black farmers for race-based discrimination in lending by the United States Department of Agriculture ("USDA").⁵ After decades of discriminatory practices, many hoped that this case would rectify the woes of America's Black farmers.⁶ But despite *Pigford's* substantial settlement, Black farm ownership continues to decline. For many farmers, the payment that they received from the settlement in *Pigford* was insufficient to offset the losses they incurred during the years spent waiting for a resolution.⁷

The failure of *Pigford* to provide effective relief to America's Black farmers shows that there is a need for a more robust and proactive solution to this problem. Addressing the decline that has persisted in the wake of the *Pigford* settlement was a major campaign goal of now-President Joe Biden

² Hiroko Tabuchi & Nadja Popovich, *Two Biden Priorities, Climate and Inequality, Meet on Black-Owned Farms*, N.Y. TIMES (Feb. 18, 2021), www.nytimes.com/2021/01/31/climate/black-farmers-discrimination-agriculture.html.

³ *Id.*

⁴ Patrice Gaines, *USDA issued billions in subsidies this year. Black farmers are still waiting for their share.*, NBC NEWS (Oct. 28, 2020), <https://www.nbcnews.com/news/nbcblk/usda-issued-billions-subsidies-year-black-farmers-are-still-waiting-n1245090>.

⁵ See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999); see also Jordan D. Nickerson, *American's Invisible Farmers: From Slavery, to Freedmen, to the First on The Land*, 23 DRAKE J. AGRIC. L. 253, 263–65 (2018).

⁶ Nickerson, *supra* note 5, at 265–66 (citing U.S. DEP'T OF AGRIC., WHITE PAPER: THE PIGFORD SETTLEMENT: GRADING ITS SUCCESS AND MEASURING ITS IMPACT 1 (2017)).

⁷ See Nathan Rosenberg & Bryce Wilson Stucki, *How USDA distorted data to conceal decades of discrimination against Black farmers*, THE COUNTER (June 26, 2019), <https://thecounter.org/usda-black-farmers-discrimination-tom-vilsack-reparations-civil-rights/>.

during the 2020 election.⁸ However, despite the inclusion of a significant financial provision within the American Rescue Plan Act (“ARPA”) to allow for the debt cancellation for farmers subjected to historical discrimination, there has been no such relief to date.⁹ President Biden’s failure to deliver this major campaign promise—and a central piece of the ARPA—is due in part to a number of lawsuits filed on behalf of white farmers who claim they should be allowed access to the same benefit.¹⁰

Part I of this Article provides an overview of the current state of the decline of Black farm ownership in America and possible resolutions. Part II will briefly discuss the historical factors that led to the decline of Black farm ownership rates. Part III will discuss the impact of the groundbreaking class-action settlement of *Pigford v. Glickman*. Part IV will analyze Section 1005 of the American Rescue Plan Act and subsequent lawsuits that enjoined the debt cancellation promised by the federal government. Finally, Part V will raise possible alternative remedies to put an end to the decline of Black farm owners and operators.

I. The Growth of Black Farm Ownership and the Rotten Roots of Decline

The struggle of Black farmers in America can be traced in part to the Reconstruction era. The United States never fulfilled its responsibility of reparations to those formerly enslaved in the aftermath of the Civil War.¹¹ That responsibility was pushed off for the sake of political compromise.¹² Despite this lack of restorative action, one pervasive misconception persists in the collective memory of most Americans: the promise of “forty acres and a mule” given to every formerly enslaved person. This never happened—at least not in the way that most Americans think it did.¹³

⁸ Ximena Bustillo, *Biden courts Black farmers to dent Trump's lead among rural voters*, POLITICO (Sept. 12, 2020), <https://www.politico.com/news/2020/09/12/biden-Black-farmers-rural-voters-412791>.

⁹ Natasha Mundkur, *Black Farmers Face Severe Economic Displacement if Critical USDA Debt Relief is Denied*, LAWYERS’ COMM. FOR CIVIL RTS. UNDER LAW (Oct. 12, 2021), <https://www.lawyerscommittee.org/Black-farmers-face-severe-economic-displacement-if-critical-usda-debt-relief-is-denied/>.

¹⁰ *Id.*

¹¹ See generally Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (arguing the need for reparations to all descendants of enslaved Black Americans and the implications of delay).

¹² *Id.*

¹³ See Thomas W. Mitchell, *From Reconstruction to Destruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. UNIV. L. REV. 505, 527 (2001).

Instead, in the era that followed the Civil War, Southern farming reshaped itself into a minimally adapted version of its Antebellum form.

In the first six months after General Sherman offered the land to emancipated slaves, 40,000 Black people settled on more than 400,000 acres of farmland along the eastern coast, including the Sea Islands off South Carolina and coastland in Georgia and Florida. General Sherman gave speeches trumpeting this land as a first step for freed slaves — a way to feed themselves and their families and even as a way to earn money by selling produce. As an added benefit, the rent they paid helped to support the Freedmen's Bureau.¹⁴

Then-President Andrew Johnson reversed course, however, and the land was returned to the Confederate owners.¹⁵ This was the beginning of the end of the Reconstruction era. The benefits that had been provided to freed slaves, now American citizens, began to fade away. By the time of the Compromise of 1877, any hope for reparations had long faded from the mind of Congress.¹⁶

Throughout the southeastern part of the United States, sharecropping¹⁷ took the place of the chattel-slavery plantation form of farming that had dominated the region.¹⁸ Despite these obstacles, Black farm ownership began to rise entering into the twentieth century. “While there were approximately 888,000 Black-operated farms in 1910, Black farmers owned only a fraction of the farms: 175,000 of these farms were fully owned by Black farmers, while another 43,000 were partially owned.”¹⁹ Black farmers at the turn of the century were barely a generation removed from the conflicts of the Civil War. They faced threats of violence from white supremacists, were barred from election booths, and possessed

¹⁴ John Francis Ficara & Juan Williams, *Black Farmers in America*, NPR (Feb. 22, 2005), <https://www.npr.org/2005/02/22/5228987/Black-farmers-in-america>.

¹⁵ *Id.*

¹⁶ Coates, *supra* note 11.

¹⁷ See Jennifer T. Manion, *Cultivating Farmworker Injustice: The Resurgence of Sharecropping*, 62 OHIO ST. L.J. 1665, 1668 (2001) (“Historically, sharecropping arrangements between landowners and farmworkers deliberately kept workers in debt and under a continuing obligation to landowners.”).

¹⁸ Nickerson, *supra* note 5, at 256 (“By 1920, there were around 926,000 black-operated farms, and these farmers managed an estimated 15 million acres of land. In this same year, 14% of all farmers in the United States identified as African-American. Furthermore, on an unprecedented note, all but 10,000 of these farmers lived in the South. . . [E]ven at this peak, a majority of African-American farmers were not truly owners of the land they inhabited. . .”).

¹⁹ Mitchell, *supra* note 13, at 527.

far less economic resources than their white counterparts.²⁰ All of these challenges made it more difficult for Black farmers to buy farmland and to render it profitable. This legacy is still felt today, as Black farmers “[h]av[e] fewer industry connections, less access to credit, and smaller farms [that] [make] it difficult for African-American farm owners to improve machinery, modernize, or expand, all of which would generate more revenue.”²¹

It was not long after Black farmers had established their farms before individuals—as well as state and local governments—began attempts at dispossession. State laws were of particular concern: In many states, local ordinances directly served to separate Black farmers from their land.²² A prime example of state laws that resulted in dispossession of land for Black farmers’ families were the intestate succession statutes across the South.²³ When a landowner died without a will, the decedents’ heirs were rendered the owners of only a fractional interest in their property.²⁴ Partially due to historic barriers to legal services, around seventy percent of African Americans today die without a will.²⁵ This has historically contributed to significant generational loss of wealth.²⁶ For farmers, that wealth loss has meant the loss of their farmland.²⁷ “Although heirs’ property is worth an estimated \$28 billion in the South, court-ordered sales of this property, often to white buyers, have resulted in it being purchased for ‘pennies on the dollar.’”²⁸

There is a near inexhaustible list of examples of how the systems surrounding Black farmers worked against them retaining their land, both in their lifetime and generationally. This Article will look at one crucial

²⁰ Vann R. Newkirk II, *The Great Land Robbery*, THE ATLANTIC (Sept. 2019), <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/>.

²¹ Nandra Nittle, *Black-Owned Farms Are Holding on by a Thread*, EATER (Feb. 23, 2021), <https://www.eater.com/22291510/Black-farmers-fighting-for-farmland-discrimination-in-agriculture>.

²² *Id.*

²³ *Id.*

²⁴ See generally Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 498 (2010) (exploring how substantive and procedural aspects of intestacy law contributes to the inequitable loss of wealth between generations of Black families).

²⁵ See, e.g., Angie Chatman, *When my mother died without a will, I learned a big lesson about money management as an African American*, BUS. INSIDER (Sept. 9, 2019), <https://www.businessinsider.com/personal-finance/what-mothers-death-taught-me-about-money-as-african-american-2019-9>.

²⁶ *Id.*

²⁷ Nittle, *supra* note 21.

²⁸ *Id.*

example of systemic discrimination that had a direct impact on the life of Black farmers: the legacy of discriminatory lending practices by the United States Department of Agriculture (“USDA”) and other federal government agencies. “Black farmers have historically faced race-based lending discrimination when applying for loans from the [USDA], which often denied loan applications from Black farmers, delayed the loan process or allotted them insufficient funds.”²⁹ Certainly, other factors have contributed to the decline of Black farmers in America, such as a general lack of generational wealth, unfair state and local tax practices, and threats of violence.³⁰ However, the most significant cause of the modern decline of Black farmers in America is arguably the legacy impact of discriminatory lending practices and farmer debt. What follows is a discussion of past futile attempts to rectify this harm, followed by proposals for potential alternative solutions.

II. *Pigford* and the Jim “USDA” Crow

The United States Department of Agriculture (“USDA”) serves as the primary lender for farm loans across the country.³¹ Over the past hundred years, the USDA has had a well-documented history of race-based discriminatory lending practices.³² The class-action lawsuit *Pigford v. Glickman* was brought in the late twentieth century and attempted to remedy this undeniable history of discrimination.³³ However, the result of the settlement left most Black farmers who had experienced discrimination with limited options and no plausible alternative remedies. In the long run, the *Pigford* settlement may have done more harm for Black farmers than good, as it resulted in a façade of resolution but failed to fully address the needs of the community.

²⁹ Jillian Forstadt, ‘*Make Farmers Black Again*’: African Americans Fight Discrimination to Own Farmland, NPR (Aug. 25, 2020), <https://www.npr.org/2020/08/25/904284865/make-farmers-black-again-african-americans-fight-discrimination-to-own-farmland>.

³⁰ See generally Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910 – Freedom: Personal Liberty and Private Law*, 70 CHI.-KENT L. REV. 439 (1994) (discussing factors causing dispossession of Black property).

³¹ Nickerson, *supra* note 5, at 260–62.

³² *Id.*

³³ *Id.* at 263–64.

A. *Pigford v. Glickman*

Farming is expensive.³⁴ Between land costs, equipment, seeds, fertilizer, water, labor, and more, the average annual cost of running a farm is around \$180,000.³⁵ Like most industries, farming (and, more so, farmers) survives despite these high costs by utilizing credit. Rising costs coupled with decreased average returns on crops in the mid-twentieth century resulted in an overall decline in the profitability of farming.³⁶ This turbulent era resulted in a fundamental shift in the American farming industry. Individual farmers began to be replaced by large corporate farming conglomerates that possessed the requisite resources and could more easily withstand fluctuations in the market.³⁷ This period of change within the industry permanently altered the face of farming in America, but no group of farmers felt the impact more severely than Black farmers.³⁸ “Studies show that from the late 1970s until the turn of the century, no other minority group . . . experienced a loss of farm operations at a rate comparable to the African-American population.”³⁹ Since the 1950s, Black farmers have lost nearly ninety-eight percent of the land that they once owned and operated, and much of that land was purchased by agriculture corporations.⁴⁰

The credit system for farmers differs from traditional business loans because the primary provider of farm loans is the federal government.⁴¹ Through the USDA, the federal government provides low interest loans to farms and farmers across the country.⁴² However, the decisions of who receives the loans, and how much the loan is for, are left to local farm boards.⁴³ “Governmental agencies, such as Farmer’s Home Association (now Farm Service Agency) and Agricultural Stabilization and Conservation Service, were trusted and tasked to aid the continued success

³⁴ See generally Shawn Williamson, *How Much \$ Does it Take to Become a Farmer?*, SUCCESSFUL FARMING (June 27, 2017), <https://www.agriculture.com/farm-management/business-planning/how-much-does-it-take-to-become-a-farmer> (estimating that a prospective farmer in the Midwest may require over five million dollars in capital).

³⁵ See *Farm Production Expenditures 2018 Summary*, USDA NAT’L AGRIC. STATISTICS SERV. 5, 6 (Aug. 2019), https://www.nass.usda.gov/Publications/Todays_Reports/reports/fpex0819.pdf (discussing the statistical report of farm production expenditure).

³⁶ Newkirk, *supra* note 20.

³⁷ *Id.*

³⁸ Nickerson, *supra* note 5, at 259.

³⁹ *Id.*

⁴⁰ Newkirk, *supra* note 20.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Kristol Bradley Ginapp, *Jim “USDA” Crow: Symptomatic Discrimination in Agriculture*, 8 DRAKE J. AGRIC. L. 237, 249 (2003).

of all farmers, but they often times completely overlooked the Black population.”⁴⁴

Unsurprisingly, these locally run county boards were typically white-dominated representative bodies.⁴⁵ This was particularly true in the deep South where local elections were restricted to white voters prior to the mid-1960s.⁴⁶ The institutional structure and makeup of these local boards resulted in the unfair denial of loans and aid to non-white farmers.⁴⁷ In response to the Civil Rights Act of 1964, the USDA opened an appeals office at the federal level for applications that were denied based on alleged racial discrimination.⁴⁸

[N]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of an applicant or recipient receiving Federal financial assistance from the Department of Agriculture.⁴⁹

This appeals process was intended to be a remedy for the discriminatory lending practices that were pervasive throughout these local farm boards.⁵⁰ But for a federal appeals process to be effective in stopping racial discrimination in lending to farmers, it must be operational. Instead, the USDA gutted its Office of Civil Rights and stopped responding to claims of discrimination in 1983.⁵¹ The class-action settlement in *Pigford v. Glickman* was in response to the failures of the USDA to protect farmers from discriminatory lending practices, brought under the Equal Credit Opportunity Act in 1999.⁵²

The sticking point of this case was not a determination of fact or law, but rather a determination of the class that would qualify for an agreed-upon settlement. The proof of discriminatory lending was based upon a USDA-sanctioned investigation and report showing that from 1983 to 1997, legitimate claims of lending discrimination by local boards were ignored,

⁴⁴ Nickerson, *supra* note 5, at 260.

⁴⁵ Ginapp, *supra* note 43, at 244.

⁴⁶ Newkirk, *supra* note 20.

⁴⁷ Ginapp, *supra* note 43, at 244.

⁴⁸ 7 C.F.R. § 15.1 (putting into practice title VI of the Civil Rights Act of 1964 for the Department of Agriculture).

⁴⁹ *Id.* § 15.3(a).

⁵⁰ See Ginapp, *supra* note 43, at 244–45 (showing the discrimination from white local farm boards).

⁵¹ *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999) (alleging racial discrimination in violation of the Equal Credit Opportunity Act (ECOA)).

⁵² *Id.* at 86. See also Equal Credit Opportunity Act, 15 U.S.C. § 1691.

denied, or destroyed without being appropriately considered.⁵³ Complaints that were filed were often never processed, investigated, or forwarded to the appropriate agencies for conciliation. As a result, farmers who filed complaints never received a response or proper consideration of their claims.⁵⁴ Such inaction was a clear violation of both the Civil Rights Act and the Equal Credit Opportunity Act.

In April of 1999, following rounds of negotiations and attempts at mediation, Judge Paul L. Friedman of the U.S. District Court for the District of Columbia approved a settlement agreement and consent decree in *Pigford*.⁵⁵ The deadline for submitting a claim as a class member was September 12, 2000.⁵⁶ The consent decree laid out two tracks for remedy as part of the settlement: Track A provided a monetary settlement of \$50,000 plus loan forgiveness and offsets of tax liability.⁵⁷ However, claimants under Track A had to present substantial evidence to prove on a reasonable basis that (1) the claimant owned or leased, or attempted to own or lease, farm land; (2) the claimant applied for a specific credit transaction at a USDA county office during the applicable period; (3) the claimant's said loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or the USDA failed to provide appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and (4) the USDA's treatment of the loan application led to economic damage for the claimant.⁵⁸ Despite this demanding showing, just above two-thirds of claims under Track A were approved.⁵⁹

Track B allowed for claimants to seek larger settlements specific to their documented discrimination. However, the burden of proof under Track B required a showing by a preponderance of the evidence—a more demanding standard than reasonable basis—which made these claims even more difficult to prove. One example of a successful Track B claim is the Scott family of the Mississippi Delta.⁶⁰ “[A]fter a long battle to prove their case—with the assistance of [Willena] Scott-White’s meticulous notes and family history—in 2012 the family was awarded more than \$6 million in

⁵³ See *Pigford*, 185 F.R.D. at 88.

⁵⁴ *Id.*

⁵⁵ NAT. RES. AND RURAL DEV., CONG. RSCH. SERV., RS20430, THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 1 (2013) [hereinafter *The Pigford Cases*].

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

⁵⁸ *Id.* at 3–4.

⁵⁹ *Id.* at 6.

⁶⁰ Newkirk, *supra* note 20.

economic damages, plus almost \$400,000 in other damages and debt forgiveness.”⁶¹ Unfortunately, this kind of success story was rare after *Pigford*. Most families did not have the often thousands of pages of detailed documents needed to systematically demonstrate the discrimination they had suffered at the hands of the USDA. The result is that only 104 claims had been approved under Track B as of 2012.⁶²

At the time, the Court stated that “[t]he purpose of the Consent Decree is to ensure that in the future all class members in their dealings with the USDA will ‘receive full and fair treatment’ that is ‘the same as the treatment accorded to similarly situated white persons.’”⁶³ However, the data and real-life experiences of farmers party to the *Pigford* settlement proved the sentiments of the case to be hollow. “Cumulative data show[ed] that as of December 31, 2011, 15,645 (69%) of the 22,721 eligible class members had final adjudications approved under the Track A process, and 104 (62%) prevailed in the Track B process . . . approximately \$1.06 billion in cash relief, tax payments, and debt relief.”⁶⁴

While a billion-dollar settlement was a sticker shock to most Americans at the onset of the twenty-first century, the reality of the settlement was underwhelming. A onetime \$50,000 payout and the hope of eventual debt relief, which was what most farmers received, was not enough to stop the loss of Black farms for those still buried under the mountain of defaulting loans.⁶⁵ Nor was it going to buy back the family farms that had been seized and auctioned off, most often to white farmers who were able to receive loans without discrimination. Rather, the *Pigford* settlement proved to be an empty apology to a community that had been systematically denied justice for decades by the inaction of the federal government.

B. Pigford II: In re Black Farmers Discrimination Litigation

There were significant issues with the *Pigford* settlement. For one, the structure of the settlement agreement limited most farmers to a one-time cash pay off.⁶⁶ Second, there were a large number of applicants who filed late and were restricted from receiving any payment from the settlement.⁶⁷ There were also reported deficiencies in representation by class counsel.⁶⁸

⁶¹ *Id.*

⁶² *The Pigford Cases*, *supra* note 55, at 7.

⁶³ *Pigford*, 185 F.R.D. at 95.

⁶⁴ *The Pigford Cases*, *supra* note 55, at 6–7.

⁶⁵ *See infra* note 79.

⁶⁶ *The Pigford Cases*, *supra* note 55, at 3–4.

⁶⁷ *Id.* at 5.

⁶⁸ *Id.*

However, the issue that resulted in an extension of *Pigford* was the requirement that claims be submitted within 180 days.⁶⁹

Due to these concerns, a provision in the annual congressional farm bill passed in 2008 permitted any claimant who had submitted a late-filing request under *Pigford*, and who had not previously obtained a determination on the merits of his or her claim, to petition in federal court to obtain such a determination.⁷⁰ A maximum of \$100 million in mandatory spending was made available for payment of these claims, and the multiple claims that were subsequently filed were consolidated into a single case, *In re Black Farmers Discrimination Litigation* (“*Pigford II*”).⁷¹

In February of 2010, Attorney General Eric Holder and Secretary of Agriculture Thomas Vilsack announced a \$1.25 billion settlement of these *Pigford II* claims.⁷² However, because only \$100 million was made available in the 2008 farm bill, the *Pigford II* settlement was contingent upon congressional approval of an additional \$1.15 billion in funding.⁷³

Eventually, this supplemental funding was approved and signed into law in December of 2010.⁷⁴ *Pigford II* followed the same two-track settlement process.⁷⁵ Nearly forty-thousand claim forms were filed, and of those, approximately 34,000 were deemed complete and timely.⁷⁶ Under *Pigford II*, around fifty to fifty-six percent of claims under Track A were favorably adjudicated.⁷⁷

⁶⁹ *Id.* at 4.

⁷⁰ *Id.* at 7.

⁷¹ *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011), *as amended* (Nov. 10, 2011).

⁷² *Id.* at 13.

⁷³ *Id.*

⁷⁴ *The Pigford Cases*, *supra* note 55, at 8.

⁷⁵ *Id.*

⁷⁶ *Id.* at 8.

⁷⁷ *Id.* at 9.

Table I. Track A Statistics as of February 16, 2012 (Final)

Track A	Totals
Track A Decisions	22,551
Final Track A Adjudications Approved	15,645 (69%)
Final Track A Adjudications Denied	6,906 (31%)
\$50,000 Cash Awards	\$770,050,000 ^a
\$3,000 Non-Credit Awards	\$1,656,000
Debt Relief	\$43,715,385
IRS Payments for Title A Claimants	\$192,512,500
IRS Payments for Debt Relief	\$7,793,610
Total Track A Relief	\$1,015,727,495

Source: Office of the Monitor, <http://www.dcd.uscourts.gov/pigfordmonitor/>.

The Congressional Research Service established the above statistical table for Track A, showing that the majority of Track A payments were one-time \$50,000 cash awards.⁷⁸ This has been attributed to administrative burdens coupled with the consent decree requirement that claimants show their treatment was “less favorable than that accorded specifically identified, similarly situated white farmers.”⁷⁹

In the end, *Pigford* and *Pigford II* failed to meet the true need of the moment for most Black farmers who had suffered harm by way of the pervasive discriminatory lending practices across the USDA and the Farm Service Agency (“FSA”). A one-time payout of \$50,000 was never going to rectify the harm that had been done to Black farmers. “Black farmers who lost their landholdings lost more than the property itself; they also lost the ability to use it . . . [as] collateral.”⁸⁰ As a result, the estimated overall economic harm to Black Americans from the loss of rural landholdings is \$350 billion.⁸¹ What the Court failed to see was the long-term impact of decades of discriminatory lending to the Black farming community. Decades of loans that Black farmers were denied or forced into with unfair terms based upon their race had compounded losses for those farmers and their families. One year of unfair lending practices may not be enough to cause significant damage, but sixteen years of the USDA failing to enforce federal requirements of equality in lending allowed thousands of Black farms to fail. The failure of those farms resulted in the loss of millions of acres of farmland and has nearly spelled the end of the independent Black farmer in America.

⁷⁸ *Id.* at 6.

⁷⁹ *Obstruction of Justice: USDA Undermines Historic Civil Rights Settlement with Black Farmers*, ENVIRONMENTAL WORKING GROUP (July 20, 2004) <https://www.ewg.org/research/obstruction-justice>.

⁸⁰ Tabuchi & Popovich, *supra* note 2.

⁸¹ *Id.*

III. The American Rescue Plan Act

The 2020 Presidential election was conducted against the backdrop of innumerable political issues. There was a tension within the Democratic party between the progressive and moderate wings as to what platform issues should be prioritized. After selecting the relatively moderate candidate, Joe Biden, as the Democratic nominee, the party adopted some progressive platform goals to avoid a repeat of the division that had occurred within the party in 2016.⁸² One of those progressive goals was debt cancellation for disadvantaged farmers, a progressive cause that was taken up by members of Congress.⁸³ This legislative priority was included in the first bill passed by the Democratic majority of the 117th Congress in 2021, the American Rescue Plan Act,⁸⁴ which was designed to respond to the then-raging COVID-19 pandemic.

A. Section 1005: Farm Loan Assistance for Socially Disadvantaged Farmers and Ranchers

The 2020 Presidential election was a whirlwind experience for all Americans. So it is understandable if, while in the midst of that whirlwind, voters missed the campaign promise of then-candidate Biden to remedy the legacy of discriminatory lending for farmers of historically marginalized groups.⁸⁵ The legacy of the *Pigford* settlement coupled with the aftermath of the Trump trade wars had left the few remaining Black farmers in America teetering on the edge of survival.⁸⁶ Then the COVID-19 pandemic hit, and farmers across the country were left reeling. However, the government response to the pandemic under President Trump resulted in further disparate treatment for Black farmers:

All kinds of American farmers felt the impact of the revenge tariffs, but when the pandemic hit — causing global shutdowns that evaporated consumer bases and disrupting the food supply chain — Black farmers in particular lacked a safety net. According to a report from the Counter, white business owners received 99.5 percent of the subsidies designed to help farmers survive the trade war. And although

⁸² See generally *Election 2020: Voters are Highly Engaged, but Nearly Half Expect To Have Difficulties Voting*, PEW RSCH. CTR. (Aug. 13, 2020), www.pewresearch.org/politics/2020/08/13/the-2020-trump-biden-matchup/.

⁸³ Justice for Black Farmers Act of 2020, S. 4929, 116th Cong. § 403 (2020).

⁸⁴ American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005, 135 Stat. 12–13.

⁸⁵ *The Biden-Harris Plan to Build Back Better in Rural America*,

DEMOCRATIC NAT'L COMM., <https://joebiden.com/rural-plan> [hereinafter *Rural America*] (last visited Dec. 7, 2021).

⁸⁶ See Nittle, *supra* note 21.

Trump handed out record subsidies to help farmers rebound from COVID-19, African Americans in agriculture largely didn't receive these monies. For the most part, Black farmers did not obtain federal Paycheck Protection Program (PPP) and Coronavirus Food Assistance Program (CFAP) aid designed to help businesses weather the pandemic.⁸⁷

The Biden campaign recognized the inequity of the Trump Administration's response to the trade wars and the ongoing global pandemic and promised to provide aid to Black farmers as part of the new administration's agenda.⁸⁸

The American Rescue Plan Act (ARPA) was a substantial piece of legislation aimed at combatting the effects of the COVID-19 pandemic and equitably restarting economic growth in the United States.⁸⁹ ARPA was estimated to have \$1.9 trillion funneled toward a number of President Biden's agenda priorities.⁹⁰ Of that, around \$10.4 billion was allocated to address needs within the farming industry.⁹¹ Within that substantial amount of funding was an impressive \$1.01 billion set aside to create a "racial equity commission and address longstanding discrimination across USDA by investing in land access, outreach, education, assistance overcoming barriers to access USDA programs, business development, and more."⁹² Another \$4 billion was allocated under Section 1005, entitled "Farm Loan Assistance for Socially Disadvantaged Farmers and Ranchers."⁹³ The final version of that section is as follows:

(a) PAYMENTS.—

(1) APPROPRIATION.—In addition to amounts otherwise available, there is appropriated to the Secretary for fiscal year 2021, out of amounts in the Treasury not otherwise appropriated, such sums as may be necessary, to remain available until expended, for the cost of loan modifications and payments under this section.

⁸⁷ *Id.*

⁸⁸ *Rural America*, *supra* note 85.

⁸⁹ See, e.g., Fact Sheet, *Am. Rescue Plan*, THE WHITE HOUSE, <https://www.whitehouse.gov/wp-content/uploads/2021/03/American-Rescue-Plan-Fact-Sheet.pdf> (last accessed Jan. 13, 2023 6:40PM).

⁹⁰ Laura Reiley, *Relief bill is most significant legislation for Black farmers since Civil Rights Act, experts say*, WASH. POST (Mar. 8, 2021), www.washingtonpost.com/business/2021/03/08/reparations-black-farmers-stimulus/.

⁹¹ *Id.*

⁹² *FACT SHEET: United States Department of Agriculture Provisions in H.R. 1319, the American Rescue Plan*, USDA (Mar. 10, 2021) (last visited Nov. 2, 2022), <https://www.fns.usda.gov/news-item/usda-004221>.

⁹³ American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005, 135 Stat. 12–13.

(2) PAYMENTS.—The Secretary shall provide a payment in an amount up to 120 percent of the *outstanding indebtedness of each socially disadvantaged farmer or rancher* as of January 1, 2021, to pay off the loan directly or to the socially disadvantaged farmer or rancher (or a combination of both), on each—

(A) direct farm loan made by the Secretary to the socially disadvantaged farmer or rancher; and

(B) farm loan guaranteed by the Secretary the borrower of which is the socially disadvantaged farmer or rancher.

(b) DEFINITIONS.—In this section:

(1) FARM LOAN.—The term “farm loan” means—

(A) a loan administered by the Farm Service Agency under subtitle A, B, or C of the Consolidated Farm and Rural Development Act (7 U.S.C. 1922 et seq.); and

(B) a Commodity Credit Corporation Farm Storage Facility Loan.

(2) SECRETARY.—The term “Secretary” means the Secretary of Agriculture.

(3) SOCIALLY DISADVANTAGED FARMER OR RANCHER.—*The term “socially disadvantaged farmer or rancher” has the meaning given the term in section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a)).*⁹⁴

The original House version of Section 1005 provided a clear justification for the appropriation of these funds:

For the purposes of addressing the longstanding and widespread discrimination against socially disadvantaged farmers and ranchers in farm loan programs and across the Department of Agriculture, as documented for decades by Congress and Federal agencies, and alleviating discriminatory barriers preventing socially disadvantaged farmers and ranchers from fully participating in the American farm economy. . .⁹⁵

⁹⁴ *Id.* (emphasis added).

⁹⁵ American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. § 1005 (as reported in House, Feb. 24, 2021).

However, this language was dropped in the final version of the ARPA. Exclusion of this crucial language as justification for the relief opened the door for claims of discrimination in federal lawsuits filed by white farmers.

Section 1005 defined the class of individuals qualified for relief by cross-referencing to the term “socially disadvantaged farmer or rancher.” Socially disadvantaged farmer or rancher is defined by the USDA as

A farmer or rancher who is a member of one or more of the following groups whose members have been *subjected to racial or ethnic prejudice* because of their identity as members of a group without regard to their individual qualities, 7 U.S.C. § 2279(e). Groups include, but are not limited to: African Americans, American Indians, Alaskan Natives, Asians, Hispanics, Pacific Islanders, Refugees and Immigrants belonging to any of the groups named above.⁹⁶

This cited language was cross-referenced from established definitions used frequently by the USDA and FSA, in part due to the long-standing, historically evidenced discrimination that has impacted farmers and ranchers of color.⁹⁷

B. Lawsuits Claiming Discrimination by White Farmers

The ARPA was signed into law in March of 2021.⁹⁸ In May of that same year, the USDA announced that an official “Notice of Funds Available” would be filed by the end of that month and that debt cancellation payments were expected to begin by June of 2021.⁹⁹ Despite the delay in announcing that funds were available to fulfill the wishes of Congress, lawsuits by several white farmers had already been filed in federal district courts across the country. Each of the following cases asserted equal protection claims against the Secretary of Agriculture Thomas Vilsack, the USDA, and the FSA. Race-based equal protection claims asserting a violation of the Fifth Amendment filed against the federal government are subject to strict scrutiny, meaning the government must have a compelling interest for racial classification and the remedy must be

⁹⁶ *Frequently Asked Questions 2501 Program*, USDA, <https://www.usda.gov/partnerships/frequently-asked-questions-2501-program> (last visited Dec. 10, 2022) (emphasis added).

⁹⁷ *See, e.g., id.*

⁹⁸ American Rescue Plan Act of 2021, 15 U.S.C. 9001 § 1005.

⁹⁹ *In Historic Move, USDA to Begin Loan Payments to Socially Disadvantaged Borrowers under American Rescue Plan Act Section 1005*, USDA (May 21, 2021), <https://www.usda.gov/media/press-releases/2021/05/21/historic-move-usda-begin-loan-payments-socially-disadvantaged>; *see also* Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment, 86 Fed. Reg. 28329 (May 26, 2021).

narrowly tailored.¹⁰⁰ In each of the following cases, the courts found that the government failed its burden of proof.

1. *Faust v. Vilsack* (E.D. Wis. June 10, 2021)

In June of 2021, twelve white farmers from nine different states filed suit against the Secretary of Agriculture, Thomas Vilsack, and the FSA Administrator seeking to enjoin USDA officials from implementing the debt cancellation program for farmers and ranchers under Section 1005 of ARPA.¹⁰¹ They argued that since eligibility to participate in the program was based solely on racial classifications, it denied them equal protection under law.¹⁰² The farmers filed a motion for temporary restraining order (“TRO”) to enjoin the agency from moving forward as Congress intended.¹⁰³ Judge William Griesbach of the Eastern District of Wisconsin held that the government lacked a “compelling interest” for racial classifications¹⁰⁴ and that the remedy was not narrowly tailored.¹⁰⁵ The court granted the motion for a TRO. As a result, the USDA was enjoined from implementing the debt cancellation program as laid out in Section 1005.¹⁰⁶

2. *Wynn v. Vilsack* (M.D. Fla. June 23, 2021)

A white farmer in Florida brought action in the Middle District of Florida against the Secretary of Agriculture and Administrator of FSA, similarly challenging the constitutionality of Section 1005.¹⁰⁷ This farmer filed a motion for preliminary injunction that would prohibit enforcement of this provision.¹⁰⁸ The court applied strict scrutiny in analyzing the likelihood of the farmer’s success on his claims of violation of equal protection.¹⁰⁹ Judge Marcia Morales Howard reasoned that the court need not determine whether the government had a compelling interest, because

¹⁰⁰ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

¹⁰¹ *Faust v. Vilsack*, 519 F. Supp. 3d 470, 474 (E.D. Wis. June 10, 2021).

¹⁰² *Id.* at 473.

¹⁰³ *Id.* at 474.

¹⁰⁴ *Id.* at 475–76 (“Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry. But Defendants cannot rely on a ‘generalized assertion that there has been past discrimination in an entire industry’ to establish a compelling interest.”) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989)) (internal citations omitted).

¹⁰⁵ *Id.* at 476.

¹⁰⁶ *Id.* at 478.

¹⁰⁷ *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1271 (M.D. Fla. 2021).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1277.

even if it did, the language of Section 1005 was not sufficiently narrowly tailored.¹¹⁰ The court stated

[I]t appears that in adopting Section 1005's strict race-based debt relief remedy Congress moved with great speed to address the history of discrimination, but did not move with great care. Indeed, the remedy chosen and provided in Section 1005 appears to fall well short of the delicate balance accomplished when a legislative enactment employs race in a narrowly tailored manner to address a specific compelling governmental interest.¹¹¹

The court granted the motion for preliminary injunction.

3. *Holman v. Vilsack* (W.D. Tenn. July 8, 2021)

The same result occurred in the Western District of Tennessee. There, the court cited Judge Howard's decision in *Wynn v. Vilsack* and stated that “[d]espite the arguments of Defendants, the Court cannot rewrite Section 1005 and order that Plaintiff receive equivalent relief. While an injunction may harm socially disadvantaged farmers, the Court has balanced the equities and determines that they favor enjoining Section 1005.”¹¹² Multiple other suits have been filed across the country asserting similar reverse discrimination claims.¹¹³

4. *Miller v. Vilsack* (N.D. Tex. July 1, 2021)

A similar suit was filed in April of 2021 against USDA Secretary Vilsack by Republican Texas Agriculture Commissioner Sid Miller.¹¹⁴ This case was backed by America First Legal, a group run by former Trump aide Stephen Miller and former Chief of Staff Mark Meadows.¹¹⁵ The implicitly partisan nature of this suit raised its prominence above other similar suits filed across the country. This is due in part to the fact that *Miller* sought

¹¹⁰ *Id.* at 1287.

¹¹¹ *Id.* at 1294.

¹¹² *Holman v. Vilsack*, No. 21-1085, 2021 WL 2877915, at *13 (W.D. Tenn. July 8, 2021).

¹¹³ *See, e.g., Joyner v. Vilsack*, 121CV01089STAJAY, 2021 WL 3699869 (W.D. Tenn. Aug. 19, 2021) (“Because Plaintiff does not fall under the definition of a ‘socially disadvantaged’ farmer based on his race, he is ineligible for debt relief under Section 1005, notwithstanding his substantial outstanding farm debt.”).

¹¹⁴ *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 6129207 (N.D. Tex. Dec. 8, 2021).

¹¹⁵ Safiya Charles, *After a last-ditch lawsuit is filed in Texas, Black farmers wait to learn the fate of USDA's imperiled debt relief program*, THE COUNTER (Oct. 26, 2021), <https://thecounter.org/lawsuit-miller-versus-vilsack-texas-Black-farmers-usda-debt-relief/>.

class certification for a collective of white farmers against the implementation of Section 1005.¹¹⁶

Here, a motion to intervene on behalf of the farmers of color was initially filed by the Federation of Southern Cooperatives (“the Federation”).¹¹⁷ The Federation argued that its members had compelling testimony that could bolster the defense of the \$5 billion program.¹¹⁸ Law firms representing the Federation—a nonprofit association of about 20,000 mostly Black farmers and landowners—sought to enter evidence of ongoing discriminatory practices by the USDA.¹¹⁹ The Federation argued that the USDA could not properly represent the interests of the socially disadvantaged farmers since the government was unwilling to discuss claims of ongoing discrimination.¹²⁰

This motion to intervene was denied by District Court Judge Reed O’Connor on December 8, 2021.¹²¹ However, the Fifth Circuit Court of Appeals overturned the District Court’s decision granting the Federation’s motion to intervene by a Per Curium decision filed on March 22, 2022.¹²² The Federation was not alone in this endeavor—other groups also sought to intervene.¹²³ Ultimately, these efforts would turn out to be moot.¹²⁴

While aspects of this case were pending in the Circuit Court of Appeals, President Biden signed into law the Inflation Reduction Act of 2022 (“IRA”).¹²⁵ This was the second major piece of legislation enacted during President Biden’s first term aimed at economic recovery.¹²⁶

¹¹⁶ Lauren Berg, *Minority Farmer Groups Want In On COVID-19 Relief Fight*, LAW360 (Mar. 18, 2022), <https://www.law360.com/nativeamerican/articles/1475587/minority-farmer-groups-want-in-on-covid-19-relief-fight>.

¹¹⁷ *Supra* note 115.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Katie Buehler, *Black Farmers Tell 5th Circ. USDA Can’t Represent Them*, LAW360 (Mar. 7, 2022), <https://www.law360.com/articles/1470894/black-farmers-tell-5th-circ-usda-can-t-represent-them>.

¹²¹ *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 6129207 (N.D. Tex. Dec. 8, 2021).

¹²² *Miller v. Vilsack*, No. 21-11271, 2022 WL 851782 (5th Cir. Mar. 22, 2022); *see also* Joyce Hanson, *Black Farmers Win 5th Circ. Bid to Enter Virus Relief Fight*, LAW360 (Mar. 23, 2022), <https://www.law360.com/articles/1476562/black-farmers-win-5th-circ-bid-to-enter-virus-relief-fight>.

¹²³ *Berg*, *supra* note 116.

¹²⁴ *See* Caleb Symons, *Racial Bias Suit Dropped After Aid Cut For Minority Farmers*, LAW360 (Aug. 30, 2022), <https://www.law360.com/articles/1525752/racial-bias-suit-dropped-after-aid-cut-for-minority-farmers> (discussing President Biden’s decision to repeal the pandemic-era loan relief initiative).

¹²⁵ *See id.*; *see also* H.R. 5376, 117th Cong. (2021-2022).

¹²⁶ *See* Tony Romm, *House passes Inflation Reduction Act, sending climate and health bill to Biden*, WASH. POST (Aug. 12, 2022), <https://www.washingtonpost.com/us->

Provisions within the IRA repealed Section 1005 of the ARPA.¹²⁷ Because the challenged provision of the statute had been repealed, this case was withdrawn by the plaintiffs.¹²⁸ These cases filed by white farmers were successful in leveraging the courts to block the funding in Section 1005 and played a role in Congress adopting a race-neutral debt relief plan as seen in the IRA.¹²⁹ The IRA's debt relief plan will certainly help farmers, but it will not have the same level of impact or historically corrective lens as the original distribution plan laid out in Section 1005 of the ARPA.¹³⁰

C. The Courts Should Adopt a Restorative Justice Framework

The decisions in these cases point to an ongoing need for a restorative justice framework in the courts. While not the sole focus of this Article, the Author would be remiss to not highlight it in this moment. The opinion of the court in *Faust v. Vilsack* stated that “[t]he obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin.”¹³¹ This kind of historically ignorant, color-blind statement is indicative of the failure of the court to consider the impact of long-standing systemic discrimination against minority farmers. Furthermore, it is worth noting that the burden of proof for a TRO to stop a program that provides a benefit based on racial classification to a group that has been historically discriminated against is a much lower threshold than the burden of proving actual discrimination from having been denied a government benefit.¹³² For Black farmers to prevail on a similar claim of

policy/2022/08/12/inflation-reduction-act-house-vote/ (discussing President Biden's goal to cap costs and reduce the federal deficit).

¹²⁷ See Symons, *supra* note 124 (discussing Democrats' repeal of Section 1005 from the Inflation Reduction Act).

¹²⁸ See *id.* (discussing the white farmers' dismissal notice of their April 2021 lawsuit).

¹²⁹ Caleb Symons, *Minority Farmers Say US Broke Promise Of Financial Aid*, LAW360 (Oct. 13, 2022), <https://www.law360.com/articles/1539445/minority-farmers-say-us-broke-promise-of-financial-aid>.

¹³⁰ *Id.*

¹³¹ *Faust v. Vilsack*, 519 F. Supp. 3d. 470, 476.

¹³² Compare *id.* at 474 (“In general, the showing required for a temporary restraining order and a preliminary injunction are the same. Specifically, a plaintiff must show that ‘(1) without this relief, it will suffer “irreparable harm”; (2) “traditional legal remedies would be inadequate”; and (3) it has some likelihood of prevailing on the merits of its claims.’”) (internal citations omitted), with *Pigford*, 185 F.R.D. at 104 (“In order to recover damages under ECOA at a trial, a class member would have to be able to establish by a preponderance of the evidence a discriminatory denial of loans or terms of credit, the extent of the injury to him caused by the denial and the amount of damages he suffered. Absent

equal protection violations, they must wait until the damage is done and then file claims to prove that they have been discriminated against. The white farmers in these cases have no burden to prove actual harm, but rather can prevail on claims of potential harm. This is absurd when considering the context of all that has been discussed in this Article. Data clearly shows that this same group of white farmers have benefited substantially from prior government programs when Black farmers have not, even though those government programs used facially race-neutral language.¹³³

These cases were ultimately successful at blocking the distribution of the funds to cancel the debt for qualified historically disadvantaged farmers. It appears the courts will not take into consideration the historic legacy of discriminatory lending, often pointing to *Pigford* as a catchall remedy that should have rectified the situation. The problem with this approach is that it ignores the generational impact of the settlement agreement. The debt cancellation provided by Section 1005 was severely needed for the survival of Black farmers and other historically discriminated against groups.

IV. Possible Alternative Remedies

If a large-scale attempt to remedy the legacy of historic discriminatory lending practices by the USDA and FSA (like ARPA Section 1005) proves to be impossible, there are other possible remedies that may be effective in aiding the survival of Black farmers. Each of these remedies require further study, but the intention of this Section is to provide a brief overview of several options that aim to support Black farmers.

A. Adopt Cannabis Production Equity Bills

One area of new potential growth that could be used to combat the legacy of past discrimination is cannabis production.¹³⁴ In 2017, the City of Oakland implemented a groundbreaking program aimed at addressing historical inequalities related to dispensary permits for recreational and medicinal sales of cannabis.¹³⁵ This Equity Permit Program “addresses

any documentation, this would have been an impossible burden for the majority of class members.”).

¹³³ Gaines, *supra* note 4.

¹³⁴ See, e.g., *Cannabis Equity Program*, CITY OF OAKLAND (last visited Jan. 5, 2023), <https://www.oaklandca.gov/topics/equity-program>; but see Matthew Peddie, *Fried says the application rules for medical marijuana licenses are discriminatory*, WMFE (Oct. 27, 2021), <https://wusfnews.wusf.usf.edu/politics-issues/2021-10-27/fried-says-the-application-rules-for-medical-marijuana-licenses-are-discriminatory> (discussing ongoing legal debates occurring in Florida related to an issue parallel to this program that is punishing farmers who were party to the *Pigford* settlement).

¹³⁵ CITY OF OAKLAND, *supra* note 134.

disparities in the cannabis industry by prioritizing the victims of the war on drugs, and minimizing barriers of entry into the industry.”¹³⁶ Similar programs could be put in place in other states to prioritize marginalized groups in relation to licensing for the growing of cannabis. Such programs could be for either THC-based cannabis farming, or the more widely accepted practice of hemp farming. This would need to occur on a state or local level, as restrictive federal regulations governing the production of cannabis have not yet been lifted.¹³⁷

B. Increase Support for Urban Farming

Another possible solution is renewed support for urban farms.¹³⁸ “Today, the vast majority of Americans live and work in cities. . . Data suggests that by 2050, over 87 percent of the population will live in urban areas.”¹³⁹ Urban farming seeks to utilize the available vacant space in an urban setting to cultivate crops for community use. Increasing the amount of urban farming opportunities would lower the threshold of entry for new farmers and expand opportunities for farming in economically diverse zones of opportunity, as the farming can occur in the communities people already live. There is also the added benefit of an opportunity to reinvent the traditional paradigm of farming and “promote sustainability within [the] agricultural industry.”¹⁴⁰ Increasing urban farming could also utilize vacant property, increase minority land ownership, help eliminate food deserts, and create jobs in underserved communities.¹⁴¹

C. Overhaul Farm Subsidies to Prioritize Farmers Rather than Corporations

The most ambitious goal that would benefit Black farmers is an overhaul of the farm subsidies program in the United States. Currently, the massive array of subsidy programs is designed to benefit the largest landholders rather than those farmers most in need of assistance. Farm subsidies are complex and changes to these programs are often highly politicized. Anne Schechinger of the Environmental Working Group (“EWG”) laid out a succinct plan to attack the ballooning amount of farm subsidies and to help actual independent farmers.

¹³⁶ *Id.*

¹³⁷ See *Statement from President Biden on Marijuana Reform*, THE WHITE HOUSE (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/>.

¹³⁸ Jordan M. Jennings, *The Disappearing Act: How to Prevent the Decline of Black Farmers in the United States*, 12 KY. J. EQ. AG. & NAT’L RES. L. 325 (2020).

¹³⁹ *Id.* at 333.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 334–334.

Ending the huge ad hoc subsidy programs of the Trump administration. [Market Facilitation Program], which paid out over \$23 billion in 2018 and 2019, should not be renewed. [Coronavirus Food Assistance Program], is still making payments to farmers, but when those payments are complete, it should not be renewed unless targeted to small farmers in need.

Increasing funding for conservation programs. Instead of sending billions to the largest and wealthiest farms, funding for existing conservation programs should be increased. These programs still give money to farmers, but they also generate public health and environmental benefits through improved water quality and soil health. These programs also encourage the adoption of conservation practices that may reduce greenhouse gas emissions.

Reforming traditional commodity farm subsidy programs. The [Agricultural Risk Coverage] and [Price Loss Coverage] programs need a strict means test to stop most of the payments from going to the largest farms. Currently, farmers can receive payments as long as their income is less than \$900,000 a year, or \$1.8 million for a farmer and spouse. There is a \$125,000 annual payment limit, but a farm can have an unlimited number of “partners” that can each receive up to \$125,000, allowing many people who do not live or work on the farm to get a check every year. Restricting farms to just a few eligible managers could greatly reduce the number of city slickers who get payments.

Changing farm subsidy programs to end USDA’s racist legacy. Stricter payment and income limits that would send payments to small farms, instead of the largest farms, would benefit Black, Latino and Asian American farmers, who often own smaller farms than white farmers do.¹⁴²

EWG’s plan would benefit not only Black farmers, but all non-agro-corporate farms in the United States.

¹⁴² Anne Schechinger, *Under Trump, Farm Subsidies Soared and the Rich Got Richer. Biden and Congress Must Reform a Wasteful and Unfair System*, ENV’T WORKING GRP. (Feb. 24, 2021), <https://www.ewg.org/interactive-maps/2021-farm-subsidies-ballooned-under-trump/> (emphasis added).

D. Cultivate the Next Generation of Farmers

No matter what next steps are taken, preserving existing Black farms alone is not enough. Ultimately, the decline of Black farmers in America is an intersectional failure of government. As such, the federal government should provide debt cancellation, rectify past discrimination, and provide legal protections to stem the tide of the decline. However, to ensure that Black farmers can thrive in the United States, initiatives must be taken to develop a new generation of farmers. This is a real and tangible goal that should be a priority of all political leaders in America. This can happen at the federal level, as seen in part of the ARPA that was directed at creating new opportunities for fledgling farmers.¹⁴³ But this endeavor should also be taken up by local and state governments. Cultivating the next generation of farmers is beneficial to all regions and a healthy, thriving farming community should be a goal of every state in America.

Conclusion

The modern decline of Black farm ownership is a federal government problem requiring a federal solution. *Pigford* was too narrow, and courts appear to believe that Section 1005 of the American Rescue Plan Act is too broad. Perhaps there is a solution that will be wide enough to truly remedy the issues at hand, while also narrowly tailored enough to withstand equal protection challenges within the courts. The crisis of the decline of Black farmers in America differs from other examples of the systemic racism that Black Americans have faced because its narrow scope is distinctly measurable and traceable, and thus readily redressable. Debt cancellation for Black farmers who were discriminated against by the USDA is not an amorphous idea of reparations for the very real sins of America's past—it is concrete justice for individual farmers who were harmed by policies of the federal government. Absent such a solution, there will only be more broken promises to the Black farmers of America.

¹⁴³ American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1006, 135 Stat. 13 (2021) (providing “assistance and support for socially disadvantaged farmers”).