

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GUADALUPE L. GARCIA, *ET AL.*,
Plaintiffs-Appellants,
v.
CHARLES F. CONNER, Acting Secretary,
UNITED STATES DEPARTMENT OF
AGRICULTURE,
Defendant-Appellee.

08-8003

No. _____
(Civ. No. 00-2445 (JR))

**PETITION OF PLAINTIFFS GUADALUPE L. GARCIA, *ET AL.* FOR PERMISSION TO
TAKE AN INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**

Plaintiffs Guadalupe L. Garcia, *et al.* (“plaintiffs”) respectfully petition, pursuant to 28 U.S.C. § 1292(b), for permission to appeal the district court’s November 30, 2007 Memorandum and Order¹ (“11/30/07 Order”) (Addendum B) holding that plaintiffs’ allegations that the United States Department of Agriculture (“USDA”) failed to investigate plaintiffs’ discrimination complaints arising out of their attempts to participate in USDA sponsored non-credit farm benefit and farm credit programs do not create causes of action under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706.

PRELIMINARY STATEMENT

This action is brought on behalf of a putative class of Hispanic farmers and ranchers who allege that USDA has discriminated and continues to discriminate against them in its farm credit and non-credit benefit programs operated by its former agency, the Farm Home Administration (“FmHA”), and its successor, the Farm Service Administration (“FSA”), in violation of the

¹ In this case, the district court held that plaintiffs’ “claims for failure to investigate discrimination must be dismissed for the reasons set forth in my memorandum in *Love v. Veneman*, 00-2502 (D.D.C. Nov. 30, 2007) which is attached” *Garcia* Order dated Nov. 30, 2007.

Equal Credit Opportunity Act (“ECOA”)², 15 U.S.C. §§ 1691 *et seq.*, and the APA. In addition, USDA failed and still fails to process and investigate plaintiffs’ discrimination complaints filed with the agency.

Plaintiffs initially sought class certification on the same basis as African-American and Native American farmers, who, with complaints virtually identical to the initial complaint in this case, had classes certified on the basis of USDA’s failure to investigate their discrimination complaints. *See Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Friedman J.); *Keepseagle v. Veneman*, No. 99-03119 (EGS), 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001) (Sullivan, J.), *petition denied*, *In re Veneman*, 309 F.3d 789 (D.C. Cir. 2002), *petition denied*, No 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004). The district court rejected the failure-to-investigate allegations as a basis for commonality in its March 20, 2002 Memorandum Order (“3/20/02 Order”) and made clear that it would certify a class of Hispanic farmers and ranchers only if they proved more than the African-American and Native American farmers.³ Consequently, plaintiffs sought alternative bases on which to certify a class.

² ECOA prohibits discrimination in the administration of credit. ECOA makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age.” 15 U.S.C. § 1691(a)(1). ECOA creates a private right of action for credit applicants against creditors, including the United States, who violate its anti-discrimination provisions, and makes such creditors “liable to the aggrieved applicant for any actual damages . . .” *Id.* § 1691e (a). ECOA also expressly provides that “[u]pon application by an aggrieved applicant, the appropriate . . . district court . . . may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under [ECOA].” *Id.* § 1691e (c).

³ As the Court explained during a January 10, 2002 scheduling conference in *Love v. Veneman*, C.A. No. 002502,

[o]f even more important concern, it seems to me, is trying to figure out what it is that holds this plaintiff class together. . . . Judges Friedman and Sullivan have held . . . [t]hat it is the failure or refusal of [USDA] to investigate and deal with . . . the plaintiff[s]’ claims that is the glue that holds those classes together. *But I have held in this case and I think it is now law in the case, that there’s no claim that arises out of that action. Because there’s no final agency action, because there is another remedy provided by law, that the [ECOA] is that remedy. And if that’s not a claim, then I’m not quite sure where the commonality is in this case that would distinguish this case as Judges Friedman and Sullivan distinguished their cases from Judge Flannery’s opinion in Williams.*

After the district court denied class certification on plaintiffs' alternative grounds (*see Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004)), plaintiffs moved for, and the district court granted, certification of its 3/20/02 Order pursuant to § 1292(b). Plaintiffs also petitioned this Court pursuant to Fed. R. Civ. P. 23(f) to review the district court's denial of plaintiffs' class certification motion. On appeal, this Court, after consolidating the Fed. R. Civ. P. 23(f) and § 1292(b) petitions, affirmed the denial of class certification and remanded for "further development" plaintiffs' APA claims. *Garcia v. Johanns*, 444 F.3d 625, 637 (D.C. Cir. 2006).

On remand, the district court, after additional briefing, dismissed plaintiffs' APA claims in its 11/30/07 Order. On December 14, 2007, plaintiffs filed a motion to amend and certify the 11/30/07 Order pursuant to § 1292(b). On January 16, 2008, following oral arguments, the district court granted the motion and entered an order certifying its 11/30/07 Order for interlocutory appeal. ("1/16/08 Certification Order") (Addendum D). The district court also directed that plaintiffs' "interlocutory appeal be accompanied by a motion for expedited appeal."⁴ 1/16/08 Transcript at 34 (Addendum E). This petition is filed pursuant to that order.

QUESTION PRESENTED AND RELIEF SOUGHT

This petition presents the following question: Whether plaintiffs' allegations of USDA's failure to investigate civil rights complaints with respect to USDA's farm credit and non-credit benefits programs and USDA's discriminatory denial of non-credit benefits to Hispanic farmers and ranchers state claims under the APA and, if not, do such allegations constitute a common issue of fact sufficient to satisfy Fed. R. Civ. P. 23(a)'s commonality and typicality requirements? Plaintiffs submit that this Court should reverse the district court's 11/30/07 Order.

⁴ Should this Court grant this petition, plaintiffs will promptly file a motion for expedited appeal.

STATEMENT

A. Regulatory Background

FSA is the lender of last resort for farmers and ranchers. It makes loans for a variety of purposes, including, *inter alia*, “farm ownership” loans to assist farmers in buying or improving farm property, 7 C.F.R. § 1943.2, “operating” loans to provide credit and management assistance to help farmers run their farms, 7 C.F.R. § 1941.2, and emergency loans to help farmers resume operations after an officially declared disaster. 7 C.F.R. § 1945.152. It also administers a number of non-credit farm benefit programs.

For most of the relevant period, county committees, acting pursuant to nationally prescribed regulations, administered these credit and non-credit benefit programs. Locally elected and predominately white and male, the county committees made the threshold eligibility determinations for participation in USDA farm credit and non-credit benefit programs. They, in turn, appointed the county loan supervisors, who processed and approved the loans once a farmer was determined to be eligible to participate in the loan program. Their unfettered discretion and the highly subjective eligibility criteria permitted the committees to reflect deep-seated regional prejudices and gave rise to a credit and non-credit approval process that discriminated against Hispanic and other minority farmers and ranchers as reported by USDA’s own Civil Rights Action Team (“CRAT”).⁵

B. Administrative Procedure Act

The APA provides in pertinent parts that “final agency action for which there is no other adequate remedy in a court” is “subject to judicial review.” 5 U.S.C. § 704. The APA further provides that “[t]he reviewing court shall . . . (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action . . . found to be . . .

⁵ The Civil Rights Action Team was a group of USDA officials appointed in late 1996 by then Secretary Glickman “to take a hard look at [USDA’s longstanding civil rights problems] . . . and make strong recommendations for change.” CRAT Report at 3. See *id.* at 4-8, 12-31, 46-57. (Addendum F)

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” 5 U.S.C. § 706.

USDA regulations provide that if a farmer believes that he has been the victim of proscribed discrimination in attempting to obtain farm credit or to participate in non-credit farm benefit programs, he may file a discrimination complaint with USDA. 7 C.F.R. § 15.6 (2004).⁶ However, while encouraging farmers to file discrimination complaints, USDA, in the early 1980s, secretly dismantled its civil rights investigatory unit.⁷ Consequently, for nearly twenty years Hispanic farmers who complained of discrimination in USDA’s farm credit and non-credit benefit programs had their complaints relegated to a bureaucratic black hole. Upon learning of this, Congress retroactively extended the limitations period for certain claims against USDA and allowed individuals who filed administrative complaints with USDA between January 1, 1981 and July 30, 1997 to sue on the basis of claims arising between January 1, 1981 and December 31, 1996 provided that they brought the action within two years of the legislation’s enactment, *i.e.*, by October 21, 2000 or pursue an optional administrative process. *See* Agriculture Rural Development, Food and Drug Administration and Related Agencies Appropriation Act, 1999, Pub. L. No. 185-277 § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297 note) (§ 741).

C. The *Pigford* Litigation

In *Pigford*, a putative class of African-American farmers, seeking damages and equitable relief, alleged that the USDA had (1) discriminated against them in the provision of farm credit and non-credit benefits and (2) systematically failed to investigate and process their administrative complaints of discrimination. In certifying a class action pursuant to Fed. R. Civ. P. 23(b)(2), Judge Friedman found that the “gravaman [*sic*] of plaintiffs’ complaint . . . is not just that they were subjected to discrimination when they applied for loans and subsidies but that

⁶ The regulations also provide that, once filed, “[t]he complaint *shall* be investigated” *Id.* (emphasis added).

⁷ As the district court acknowledged in its 11/30/07 Order at 1, “[t]here is little dispute that USDA dismantled its civil rights investigation program between the early 1980’s and the mid-1990’s, and did so without informing farmers that their discrimination complaints would be either ignored or summarily denied.”

when they filed complaints with the USDA regarding the alleged discrimination, the USDA failed properly to process and investigate those complaints.” *Pigford v. Glickman*, 182 F.R.D. 341, 344-45 (D.D.C. 1998), *aff’d*, 206 F.3d 1212 (D.C. Cir. 2000). Distinguishing a prior district court decision denying class certification,⁸ Judge Friedman stated that the “unifying pattern of discrimination at issue in this case is the USDA’s failure properly to process complaints of discrimination” *Id.* at 349. Although Judge Friedman initially held that the class was “certified only for purposes of determining liability,” (*id.* at 351), USDA subsequently entered into a consent decree resolving the discrimination claims. Because the consent decree “involve[d] primarily monetary relief,” Judge Friedman vacated his order certifying the class pursuant to Fed. R. Civ. P. 23(b)(2) and entered a new order certifying the class under Fed. R. Civ. P. 23(b)(3). *Pigford v. Glickman*, 185 F.R.D. 82, 94 (D.D.C. 1999). Thereafter, this Court held that he had not abused his discretion in approving the consent decree under Fed. R. Civ. P. 23(e). *Pigford v. Glickman*, 206 F.3d 1212, 1213 (D.C. Cir. 2000). To date, the government has paid nearly \$1 billion in damages to African-American farmers.

D. The Keepseagle Litigation

In *Keepseagle*, a putative class of Native American farmers, also seeking monetary damages and injunctive relief, alleged that USDA discriminated against them in its farm credit and non-credit benefit programs. Judge Sullivan certified a class pursuant to Fed. R. Civ. P. 23(b)(2) noting that “the systematic failure to process complaints of discrimination is a unifying characteristic of the class and raises common questions of fact and law.” *Keepseagle*, 2001 U.S. Dist. LEXIS 25220, at * 29; *accord Pigford*, 182 F.R.D. at 348-49. In dismissing the

⁸ In *Williams v. Glickman*, Civ. No. 95-1149, 1997 U.S. Dist. LEXIS 1683 (D.D.C. Feb. 14, 1997), Judge Flannery refused to certify a class of African-American and Hispanic farmers alleging discrimination by USDA in violation of ECOA. Even a cursory reading of *Williams* makes clear that the complaint in that case was so poorly pled that the district court found that case to be highly problematic. For example, plaintiffs included among the purported class a white man, plaintiffs who had separate suits pending in other district courts and plaintiffs who had already settled their claims or whose claims were time-barred. *Id.* at *15-*16. Judge Flannery held, *inter alia*, that “the plaintiffs’ bare allegation of a ‘common thread of discrimination’ does not satisfy the . . . requirement of a rigorous ‘specific presentation’” and consequently “plaintiffs have not shown the existence of a common legal question.” *Id.* at *21.

government's Fed. R. Civ. P. 23(f) petition, this Court held that it did not "see anything either novel or manifestly erroneous . . . about the district court's conclusion that the farmers' allegations concerning . . . [USDA's] 'failure to . . . investigate discrimination complaints,' which 'affected each class member,' satisfy Rule 23(a)'s commonality and typicality requirements." *In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002); *see also In re Veneman*, No. 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004) (denying petition for a writ of mandamus).

E. Proceedings In This Case

In this case, Hispanic farmers and ranchers allege that they have suffered the same discrimination by USDA that *Pigford* and *Keepseagle* plaintiffs experienced and are entitled to injunctive relief and monetary damages. Initially represented by the same attorneys who handled *Pigford* and filed *Keepseagle*, the Hispanic farmers and ranchers share with the African-American and Native-American farmers a complaint which is, for all practical purposes, identical to the *Pigford* and *Keepseagle* complaints. However, unlike *Pigford*, in which the consent decree focused almost exclusively on damages, the *Garcia* plaintiffs have focused primarily on substantial remedial relief aimed at the systemic discrimination that has infected USDA's farm credit and non-credit benefit programs. *See* Third Amended Complaint ¶¶ 113-117, filed June 30, 2006. (Addendum G).

Through a series of transfers, the case was ultimately transferred to Judge Robertson who also had *Love*. Prior to the transfer, Judge Robertson dismissed the *Love* plaintiffs' APA claims based upon the non-credit farm benefit programs, USDA's dismantlement of the apparatus for investigating discrimination complaints, and USDA's systematic failure to process such complaints with respect to farm loan programs. He based that decision in part upon the fact that the only named *Love* plaintiff who asserted a non-credit claim "was successful on her administrative appeal." 3/20/02 Order at 4 n.3 (Addendum H). At a subsequent *Love* scheduling

conference, Judge Robertson expressed concerns about the continued viability of that case as a class action. *See* n.3, *supra*.

In its 3/20/02 Order, the district court, having announced its intention to enter the same rulings in *Garcia* as it had entered in *Love*, held that “(1) the *Garcia* plaintiffs are entitled to bring ECOA claims for discrimination in lending transactions without administrative exhaustion; (2) at least some of the named plaintiffs’ lending claims satisfy the statute of limitations; and (3) plaintiffs’ allegations of failure to investigate civil rights complaints do not state claims under ECOA or the APA.” 3/20/02 Order at 3-4 (footnote omitted) (Addendum H). In contrast to *Love*, however, the district court held that one of the *Garcia* named plaintiffs “has satisfied the special statute of limitations approved by Congress and has standing to assert [a] claim [for discriminatory administration of disaster benefit programs]. . . .” *Id.* at 4. Although the district court concluded that (1) “[a] disaster benefit decision is not a ‘credit transaction’ within the meaning of ECOA,” and (2) “[a] final agency action denying a disaster benefit *is* . . . reviewable under the [APA],” it nevertheless held that the failure to investigate complaints of discrimination by farmers seeking such benefits did not state a claim under the APA and could not be a basis for a finding of commonality. *Id.* (emphasis added).

Consequently, plaintiffs filed supplemental memoranda with respect to their pending class certification motion urging alternative grounds for class certification. Ultimately, the district court rejected the alternative grounds for class certification. *Garcia*, 224 F.R.D. 8. In so doing, the district court expressly noted that its order

may present a “death-knell situation” for plaintiffs. . . . In any event, [it] . . . presents an “unsettled and fundamental issue of law relating to class actions, important both to [this] specific litigation and generally, that is likely to evade end-of-the-case review.”

Id. at 9 n.1 (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102, 105 (D.C. Cir. 2002)). In light of that order and its 3/20/02 Order, the district court stated that “[i]f asked to do so, [it] w[ould] also certify [its 3/20/02 Order] pursuant to 28 U.S.C. § 1292(b).” 224 F.R.D. at 9. Thereafter, plaintiffs moved for, and the district court granted, certification of its orders.

On appeal, this Court, affirmed the district court's denial of class certification and dismissal of the failure to investigate claim asserted under ECOA and remanded the APA claims for "further development." *Garcia*, 444 F.3d at 637. After additional briefing on remand, the district court dismissed plaintiffs' APA claims in its 11/30/07 Order. In that Order, the district court, after correctly noting that *Bowen v. Massachusetts*, 487 U.S. 879 (1988), provides "[t]he definitive interpretation of [§ 704]," concluded that § 741 provides an adequate remedy at law within the meaning of § 704 (11/30/07 Order at 5-6) and that this Court's decision in *Council of & for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983), and its progeny preclude plaintiffs' APA claims based on USDA's conceded failure to follow its own regulations to investigate discrimination complaints because ECOA provides a direct cause of action for discrimination. (11/30/07 Order at 7-10). The district court purported to distinguish this Court's decision in *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984), which held that a plaintiff could simultaneously bring a discrimination claim against an agency and an APA claim based on the agency's failure to follow its own regulations, on the grounds that Ms. McKenna's "claim of arbitrary treatment [was] entirely independent of her discrimination claim" and the same could not be said for plaintiffs' claims here. 11/30/07 Order at 10-11.

The district court concluded that none of the bases that allegedly precluded plaintiffs' APA claims regarding farm credit applied to the non-credit claims (11/30/07 Order at 11). It also concluded, however, that "there appears to be no mention in the [*Love*] third amended complaint of a plaintiff who actually suffered such discrimination" or a "proper motion pending to amend the complaint," hence "no reason to allow this additional APA cause of action to be maintained at this time." 11/30/07 Order at 12. Significantly, the district court summarily applied its 11/30/07 Order initially entered in *Love* to the *Garcia* plaintiffs' claims and dismissed all of their APA claims despite having previously found that the *Garcia* plaintiffs did in fact have standing to assert non-credit farm benefit claims. 3/20/02 Order at 4. (Addendum H)

**REASONS FOR GRANTING THE PETITION
AND PERMITTING AN INTERLOCUTORY APPEAL**

The district court found that its 11/30/07 Order “involve[s] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order[] may materially advance the ultimate termination of the litigation[.]”. 1/16/08 Order at 1. (Addendum D). Once the district court has certified an order for interlocutory review, this Court “may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order” certifying that order. 28 U.S.C. § 1292(b). This petition is timely filed because ten days from January 16, 2008 (excluding intervening weekends and holidays as required by Fed. App. R. 26(a)(1)-(4)) is January 31, 2008.

A. The Certified Order Addresses A Controlling Issue Of Law.

The certified order clearly addresses a controlling issue of law. A question constitutes a “controlling question of law” if its resolution could determine the outcome or future course of the litigation. *See Judicial Watch, Inc. v. Nat’l Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002) (citing *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 U.S. Dist. LEXIS 11405, at *2 (D.D.C. Jan. 28, 2000); and *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991)), *stay denied*, No. 02-5355, 2003 U.S. App. LEXIS 20078 (D.C. Cir. Sept. 30, 2003).

In light of this Court’s affirming the district court’s denial of class certification on plaintiffs’ alternative grounds, the district court’s 11/30/07 Order effectively eliminates plaintiffs’ only currently viable basis on which to move forward as a class. As a practical matter, the 11/30/07 Order sounds the death knell to hundreds, if not thousands, of valid claims of Hispanic farmers and ranchers who would be unable to pursue individual claims. Not surprisingly, then, courts have repeatedly treated class certification issues as controlling questions of law proper for certification for interlocutory appeal. *See, e.g., Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 447-48 (5th Cir. 1983) (dismissal of class action aspects of

discrimination suit reviewed under § 1292(b)); *Hewitt v. Joyce Beverages of Wisconsin, Inc.*, 721 F.2d 625, 626 (7th Cir. 1983) (decertification of class reviewed); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 721 (11th Cir. 1987) (denial of class certification reviewed); *Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 964 (2d Cir. 1978) (certification of class reviewed); *see also* 19 James Wm. Moore, *et al.*, Moore's Federal Practice § 203.31[2] (3d ed. 1997) (issue of whether action may be properly brought as a class action appropriate for appeal as controlling question of law). Significantly, the district court, in light of the *Pigford* and *Keepseagle* holdings affirmed by this Court, all but conceded that if plaintiffs' APA claims are viable, class certification is a foregone conclusion. *See Garcia* Transcript of June 28, 2006 Scheduling Conference at 18 ("If there's an APA claim, there's an APA claim, and it may follow almost automatically that there's class certification"). (Addendum I). Moreover, even assuming *arguendo* that USDA's failure to investigate does not create an independent APA cause of action, it nevertheless constitutes a fact sufficient to support a finding of commonality and typicality and a Fed. R. Civ. P. 23(b)(2) certification. *See In re Veneman*, 309 F.3d at 794.

B. The Certified Order Provides Substantial Grounds For Difference Of Opinion.

The question of whether plaintiffs' allegations of USDA's failure to investigate their discrimination complaints with respect to USDA's administration of its farm credit and non-credit farm benefit programs and USDA's discriminatory denial of non-credit benefits to plaintiffs state APA causes of action provides the substantial grounds for difference of opinion required by § 1292(b) because it gives rise to contrary, inconsistent, or unclear authority. *See Johnson v. Washington Metro. Area Transit Auth.*, 773 F. Supp. 459, 460 (D.D.C. 1991) (intra-circuit split justified § 1292(b) certification); *see also Virtual Dev. & Def. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 22 (D.D.C. 2001) (no § 1292(b) certification where no "disputed question of law"). At a minimum, courts have a "duty . . . to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute." *See In re Vitamins Antitrust Litig.*,

No. 99-197, 2000 U.S. Dist. LEXIS 17412, at *20-*21 (D.C. Cir. Nov. 22, 2000). Here, plaintiffs have consistently maintained, and provided authority for, the position that the USDA's failure to investigate discrimination complaints constitutes a violation of the APA and a basis for a finding of commonality pursuant to Fed. R. Civ. P. 23. Clearly, the defendant has presented a conflicting view.

In dismissing plaintiffs' APA claims, the district court concluded that USDA's wholesale failure to investigate discrimination complaints in violation of its own regulations does not constitute a cognizable APA violation. The district court reached this decision based upon its reading of 5 U.S.C. § 704. Although the district court recognized that the Supreme Court authoritatively defined § 704 in *Bowen*, 487 U.S. 879 (11/30/07 Order at 5), its analysis of § 704 is inconsistent with that definition. Thus, for example, while the district court concluded that § 741 provided the "special and adequate" review procedures defined by *Bowen* (11/30/07 Order at 5-6), the Supreme Court explicitly identified the "special and adequate review procedures" encompassed by § 704, noting that

[a]t the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action; for example, Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals, and Interstate Commerce Commission orders were subject to review in specially constituted three-judge district courts. *When Congress enacted the APA to provide general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies.*

Bowen, 487 U.S. at 903 (emphasis added and footnotes omitted); *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) ("Congress intended by that provision simply to avoid duplicating previously established special statutory procedures for review of agency actions.") (emphasis added); accord *Esch v. Yeutter*, 876 F.2d 976, 982 (D.C. Cir. 1989) ("Given the limited purposes for Section 704's enactment, the Court said, it is to be read narrowly.") (emphasis added).

Council of & for the Blind and its progeny relied upon by the district court in its 11/30/07 Order ruling that § 704 bars plaintiffs' APA claims impermissibly contradict the Supreme Court's authoritative definition of § 704 announced in *Bowen*, reaffirmed in *Darby* and acknowledged by this Court in *Esch* because § 741 and ECOA are not "previously established special statutory procedures" that were "to be followed in reviewing a particular agency's action" *Bowen*, 487 U.S. at 903 (emphasis added).⁹ Indeed, it is well settled that "[o]nce [the Supreme Court] ha[s] determined a statute's clear meaning, [it] adhere[s] to that determination under the doctrine of *stare decisis*." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). Moreover, lower courts cannot expand upon or alter that definition as that is a prerogative that the Supreme Court jealously guards even in instances where it later determines that its earlier ruling was clearly erroneous. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("the Courts of Appeal should . . . leav[e] to this Court the prerogative of overruling its own decisions").

Even under the district court's reading of § 704, the 11/30/07 Order provides grounds for a difference of opinion. Assuming, *arguendo*, that § 741 constituted the type of "special" procedure cited in *Bowen*, the implementation of the review process by USDA was every bit as flawed as the process it supposedly sought to correct and was, in fact, completely inadequate. Indeed, the unrebutted declaration of the then-director of the USDA Office of Civil Rights ("OCR") described the inadequacy of the optional procedure cited by the district court and USDA's efforts to ensure that it would be inadequate, noting that "information about the program was not disseminated in a way reasonably calculated to provide notice to all minority farmers covered by the special legislation" and ultimately "the complaint processing system

⁹ While the post *Council of & for the Blind* circuit opinions purporting to apply § 704 cited by the district court rely on that case, which was decided five years before *Bowen*, none of those post *Bowen* opinions, with the exception of *National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004), even cites *Bowen*, despite the fact that, as the district court recognized (11/30/07 Order at 5-6), the Supreme Court authoritatively defined § 704 in *Bowen*. Significantly, in *National Wrestling Coaches Ass'n*, Judge Williams cites *Bowen*, along with *Esch*, in his dissent for the proposition that "[a]s the Supreme Court explained in *Bowen* . . . , § 704 is to be read narrowly so as not 'to defeat the central purpose of providing a broad spectrum of judicial review of agency action.'" *Id.* at 958 (Williams, J. dissenting) (quoting *Bowen*, 487 U.S. at 903-04).

collapsed and complaints, whether submitted pursuant to the optional § 741 procedure or otherwise, were caught up in the dysfunction that characterized OCR.” Second Supplemental Declaration of Rosalind Gray ¶¶ 9-10, *see id* ¶¶ 7-8, Ex. 1 to Plaintiffs’ Brief In Response To Notice To Counsel, filed September 18, 2007 (Addendum J). To ignore the un rebutted evidence of the complete inadequacy of the supposed process and USDA’s efforts to insure its inadequacy elevates form over substance in a fashion that is clearly contrary to *Bowen*. *See Bowen*, 487 U.S. at 905 (noting the inadequacy of relief in the court of claims under the Tucker Act).

In addition, the district court conceded that (1) plaintiffs’ non-credit benefit “claims cannot be brought under ECOA because they are not related to credit transactions,” (2) “[s]ection 704 of the APA . . . does no appear to be implicated” and (3) “[t]he *Council of & for the Blind* cases are also inapplicable.” 11/30/07 Order at 11. Thus, the district court’s own analysis makes clear that there is no bar to certifying a class with respect to such non-credit benefit claims. The district court, however, summarily dismissed plaintiffs’ non-credit benefit claims despite having previously found that *Garcia* plaintiff Gloria Morales has asserted such claims. 3/20/02 Order at 4. *See Garcia* 11/30/07 Order (“[t]he APA cause of action with respect to such claims is therefore **DISMISSED**”) (Addendum B).

Moreover, this Court’s decision in *McKenna*, which was decided a year after *Council of & for the Blind* and has never been overruled,¹⁰ provides further grounds for a difference of opinion with respect to plaintiffs’ APA claims. In describing *McKenna*, the district court noted that “[t]he plaintiff in *McKenna* claimed that a government agency discriminated against her by firing her *and that it also failed to follow regulations related to her firing*” and pointed out that the *McKenna* court concluded that the “‘claim of arbitrary treatment [was] entirely independent of her discrimination claim.’” 11/20/07 Order at 10 (quoting *McKenna*, 729 F.2d at 791 (emphasis added)). The district court then concluded that *McKenna* is distinguishable “from the

¹⁰ Significantly, it has been cited with approval. *See, e.g., Nichols v. Agency for Int’l Dev.*, 18 F. Supp. 2d 1, 3 n.2 (D.D.C. 1998).

case at bar” because “plaintiffs’ APA claim . . . is certainly not ‘entirely independent’ of their claims of discrimination.” *Id.* at 11. Plaintiffs’ APA claims are, if anything, more independent of the discrimination at issue here than were the APA claims in *McKenna*. Here, plaintiffs allege that USDA discriminated against them in the administration of its farm credit and non-credit benefit programs and, in addition to that discrimination, USDA acted arbitrarily in violation of the APA by not complying with its own regulations to investigate the discrimination in the farm credit and non-credit benefit programs, while in *McKenna*, by the district court’s own analysis, the government agency discriminatorily fired plaintiff and “*failed to follow regulations relating to her firing.*” 11/30/07 Order at 10 (emphasis added). Simply put, the district court’s analysis contradicts the contrast which the district court attempts to draw between *McKenna* and this case.

The district court also noted that “[t]he government may even have implicitly conceded that the regulations did impose a duty to investigate” plaintiffs’ discrimination complaints. 11/30/07 Order at 5. It concluded, however, that “whether the regulations required an investigation and whether investigation decisions are unreviewable – are beside the point, because even if plaintiffs have an APA claim under the 1999 regulations, that claim is barred by the existence of an adequate alternative remedy at law.” *Id.* That conclusion is problematic in at least two respects.

First, § 704 does not bar claims where there is an “adequate alternative remedy at law.” 5 U.S.C. § 704. The section instead provides that “[a]gency action made reviewable by statute and final agency action for which there is *no other adequate remedy in a court* are subject to judicial review.” *Id.* (emphasis added). And, the Supreme Court has held that that language has a very specific and limited meaning. *Bowen*, 487 U.S. at 903; *Darby*, 509 U.S. at 146; *see also Esch*, 876 F.2d at 982.

Second, if “[t]he Government may even have implicitly conceded that the regulations did impose a duty to investigate,” that obligation is hardly “beside the point.” To the contrary, it is a basic tenet of law that an agency must comply with its own regulations. *See, e.g., Morton v.*

Ruiz, 415 U.S. 199, 235 (1974); *Esch*, 876 F.2d at 991 and n.163; *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (an agency must follow its own regulations); *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 552 (D.D.C. 2005). It is equally well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted policies that limit that discretion. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987). And, as in the instant case, “[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the . . . procedures are possibly more rigorous than otherwise would be required.” *Morton*, 415 U.S. at 235 (emphasis added). Indeed, the following observation of one of the panel members during the oral argument before this Court is wholly consistent with this basic tenet of law and further evidence of the substantial difference of opinion with respect to plaintiffs’ APA claims:

Mr. Scarborough: There are agency regulations that allow for people to make discrimination complaints.

The Court: And get investigation.

Mr. Scarborough: Well, Your Honor, yes, at some point.

The Court: And those are enforceable. . . . I mean, there are plenty of APA cases. The District Court is wrong. . . . The case law on that is clear, the District Court is wrong, it’s an enforceable claim. If the agency has prescriptions, you are supposed to follow them and a party who is the beneficiary of those prescriptions can seek them.

Transcript of Oral Argument, *Garcia v. Johanns*, Appeal No. 04-5448, at 17 (D.C. Cir. Feb. 6, 2006) (Edwards, J.) (Ex. 17 to Plaintiffs’ Brief In Support Of Claims That Defendant’s Unlawful Failure To Investigate Plaintiffs’ Discrimination Complaint And The Discriminatory Denial Of Benefits Are Reviewable Under The Administrative Procedure Act, filed August 28, 2006 (Addendum K)). In sum, far from being distinguishable from the instant case, *McKenna* is wholly consistent with plaintiffs’ APA claims and the basic tenet that an agency must comply

with its own regulations and in harmony with the Supreme Court's authoritative definition of § 704 in *Bowen*.

In addition, *McKenna* and the Supreme Court's authoritative definition of § 704 in *Bowen* can be applied without doing violence to the results reached in *Council of & for the Blind* and its progeny such as *Women's Equity Action League (WEAL) v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990), relied upon by the district court in dismissing plaintiffs' APA claims. See 11/30/07 Order at 7-10. In those cases, this Court confronted claims of discrimination by recipients of federal fundings, as distinguished from the federal agency itself, where plaintiffs attempted to use the APA to mount a broad challenge to the oversight of the federal agencies charged with monitoring the provision of such federal funds. The issue before this Court in those cases was whether under such circumstances Congress intended to create a cause of action against the federal agencies in addition to the cause of action that existed with respect to the discriminating federal fund recipients. After examining the relevant legislative history, this Court concluded that the statutory schemes at issue purposefully provided for private rights of action against the individual fund recipients rather than a single federal court overseeing the entire federal funding scheme and that no such relief should be inferred in the absence of a showing of approbation of such relief by Congress. See, e.g., *Council of & for the Blind*, 709 F.2d at 1523-25, 1531-33; *WEAL*, 906 F.2d at 750-51. Given Congress' clear intent to limit remedies and the Supreme Court's authoritative definition of §704, this Court, post *Bowen*, could have given effect to the former without doing violence to the latter by simply noting Congress' clear intent to limit plaintiffs' right of action to the discriminating fund recipients. By contrast, here, USDA is both the perpetrator of the discrimination and the violator of its own regulations as was the government agency in *McKenna*, and ECOA, unlike the statutes at issue in *Council of & for the Blind* and its progeny relied upon by the district court, expressly authorizes discrimination suits against the government. 15 U.S.C. §§ 1691(a)(1), 1691a(f), 1691e(a) and 1691e(c).

Finally, a substantial difference of opinion exists regarding the subject question even within this circuit. Two district court judges, faced with complaints that are virtually identical to

the initial complaint in this case, have certified a class of African-American and Native American farmers on the basis of USDA's failure to investigate their discrimination complaints. *See Pigford*, 182 F.R.D. at 348-49; *Keepseagle*, 2001 U.S. Dist. LEXIS 25220. Significantly, this Court denied the government's Fed. R. Civ. P. 23(f) petition to review the *Keepseagle* certification decision, holding that the USDA's failure to investigate was a proper basis for a finding of commonality and typicality. *See In re Veneman*, 309 F.3d at 794. At the very least, the existing decisions in virtually identical cases demonstrate that there is strong support in this circuit for plaintiffs' argument that commonality between the putative class members exists based on the USDA's failure to investigate their discrimination claims and the APA claims present a controlling question of law as to which there is substantial difference of opinion.

C. Certification Under 1292(b) Would Materially Advance The Disposition Of The Litigation.

An immediate appeal would materially advance the disposition of the litigation, particularly in light of this Court's affirmance of the district court's previous class certification rulings. At a minimum, an immediate appeal is necessary to resolve the internal conflict created by the district court's dismissal of all of plaintiffs' APA claims despite having concluded that (1) plaintiffs have standing to assert non-credit APA claims (3/20/02 Order at 4) and (2) none of the bases upon which it dismissed plaintiffs' credit-based APA claims apply to plaintiffs' non-credit APA claims.¹¹ (11/30/07 Order at 11). Moreover, resolution of the question presented will determine whether plaintiffs may proceed as a class action. Should this Court agree with the district court on the question presented, this action would end as a class action ending the valid claims of hundreds, if not thousands, of Hispanic farmers and ranchers.

The Hispanic farmers and ranchers who comprise the putative class represent an oppressed minority who are confronting a powerful governmental agency that has systematically stripped them of their land and, in some instances, their ability even to subsist as farmers and

¹¹ The logic of the district court's 11/30/07 Order suggests that at a minimum plaintiffs should have a class certified with respect to their non-credit APA claims.

ranchers. They are confronting an agency which reflects animus not just at the local level but at high levels within the bureaucracy,¹² destroys documents and intimidates those who would complain about discrimination.¹³ Such subsistence farmers would find it infinitely more difficult, if not impossible, to pursue individual claims, as the district court clearly recognized. *Garcia*, 224 F.R.D. at 9 & n.1.

Even with respect to the relatively few putative class members who might be able to proceed with individual claims, a resolution of this issue would guide the parties as to the manner in which to proceed, for example, whether they can proceed with their ECOA and APA claims in a single proceeding, thereby avoiding the possibility of duplicative proceedings and conserving both party and judicial resources. In addition, any settlement possibilities are inhibited by the existing uncertainty. Given the fact that this issue has arisen in other cases, uncertainty itself about what the appellate result might be will pose an obstacle as this and other cases progress. *See Washington Metro.*, 773 F. Supp. at 460 (clarification of law and conflicting authority would circumvent appeal and remand on issue, possibly saving additional cost and delay).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court, pursuant to 28 U.S.C. § 1292(b), permit an interlocutory appeal of the district court's 11/30/07 Order and the following question:

Whether plaintiffs' allegations of USDA's failure to investigate civil rights complaints with respect to USDA's farm credit and non-credit benefits programs and USDA's discriminatory denial of non-credit benefits to Hispanic farmers and ranchers state claims under the APA and, if

¹² *See* Declaration of Lou Anne Kling (Ex. 3 to Plaintiffs' Emergency Motion to Stay Proceedings, filed December 9, 2002) (Addendum L).

¹³ *See* Declaration of Rosalind Gray ¶ 20 (Ex. 7 to Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion for Class Certification, filed April 2, 2002) (Addendum M).

not, do such allegations constitute a common issue of fact sufficient to satisfy Fed. R. Civ. P. 23(a)'s commonality and typicality requirements?

Respectfully submitted,

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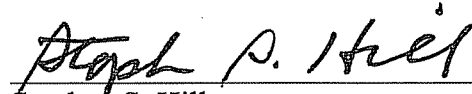
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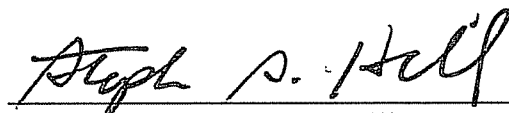
CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2008, I have caused Plaintiffs' Petition For Permission To Take An Interlocutory Appeal Under 28 U.S.C. § 1292(b) to be served by hand upon the following counsel:

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