

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

Nos. 08-5110

GUADALUPE L. GARCIA, JR., ET AL.,

Plaintiffs-Appellants,

v.

**ED SCHAFER, Secretary,
United States Department of Agriculture,**

Defendant-Appellee.

**Appeal from the United States District Court
For the District of Columbia
(Civ. No. 00-2445)**

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GLOSSARY

- APA:** Administrative Procedure Act, 5 U.S.C. §§551, *et seq.* (2002)
- Appellants' Br.:** Appellants' Opening Brief
- CRAT:** The United States Department of Agriculture Civil Rights Action Team. A group of officials appointed in 1996 by then Secretary Glickman to investigate USDA's civil rights problems and make recommendations for change.
- ECOA:** Equal Credit Opportunity Act, 15 U.S.C. §§1691, *et seq.* (2002)
- FmHA:** Farmers Home Administration, a former component of the United States Department of Agriculture, which became the Farm Service Agency following a departmental reorganization in 1994.
- FSA:** Farm Service Agency, a component of the United States Department of Agriculture.
- Gov't Br.:** Appellee's Brief
- OCR:** The United States Department of Agriculture's Office of Civil Rights
- OGC:** The United States Department of Agriculture's Office of General Counsel
- NAD:** The United States Department of Agriculture's National Appeals Division
- USDA:** United States Department of Agriculture
- §741:** Pub. L. No. 105-277, 112 Stat. 2681-30, Title VII, Section 741 (codified at 7 U.S.C. §2279 Note)

INTRODUCTION

Unrebutted evidence demonstrates that “systemic exclusion of minority farmers remains the standard operating procedure for FSA (J.A. 187 (¶28)) and when Hispanic farmers complained to USDA about discrimination, USDA, having surreptitiously dismantled its civil rights investigatory apparatus and acting contrary to its own regulations, did not investigate and still does not investigate their complaints. Indeed, the district court expressly found that “[t]here is little dispute that USDA dismantled its civil rights investigation programs . . . and did so without informing farmers that their discrimination complaints would be either ignored or summarily denied.” J.A. 530.

As the Hispanic farmers’ opening brief explained, in the wake of this admitted, well-documented and long history of unlawful discrimination against minority farmers and USDA’s systematic failure to investigate complaints about such discrimination, plaintiffs and other victimized minority farmers filed four virtually identical lawsuits. Appellants’ Br. 1. But these identical lawsuits received drastically different treatment in the district court.¹ In *Pigford* and *Keepseagle*, as

¹ *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (Robertson J.); *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Friedman, J.) (African American farmers); *Keepseagle v. Veneman*, No. 99-03119, 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001) (Sullivan, J.) (Native American farmers); *Love v. Veneman*, 224 F.R.D. 240 (D.D.C. 2004) (Robertson, J.) (women farmers).

the government concedes, Judges Friedman and Sullivan certified classes with respect to USDA's administration of its farm credit and non-credit farm benefit programs based on allegations that "USDA failed properly to investigate [farmers'] complaints" of discrimination in those programs. *Pigford v. Glickman*, 182 F.R.D. 341, 343 (D.D.C. 1998); *Keepseagle*, 2001 U.S. Dist. LEXIS 25220, at *3, *29. This Court approved the subsequent *Pigford* consent decree² and dismissed the government's Fed. R. Civ. P. 23(f) petition challenging *Keepseagle*'s class certification.³ However, in this case and in *Love*, Judge Robertson ruled that the allegations upon which Judges Friedman and Sullivan certified classes in *Pigford* and *Keepseagle* (i.e., that USDA systematically failed to investigate discrimination complaints) did not state a cause of action and could not serve as a basis for class certification. J.A. 27-31. Hispanic farmers merely seek the same opportunity to pursue their claims as were afforded African-American and Native American farmers, who, on the basis of USDA's conceded and ongoing failure to investigate their complaints of discrimination in the administration of those programs, were

² *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000).

³ *In re Veneman*, 309 F.3d 789 (D.C. Cir. 2002), *mandamus petition denied*, No. 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004).

permitted to pursue their ECOA and APA claims as class actions.⁴ There is no principled basis for denying Hispanic farmers the same remedies that have been afforded to African American and Native American farmers who have suffered the same discriminatory treatment by USDA and the government offers none.

SUMMARY OF ARGUMENT

There is no merit to the government's argument regarding plaintiffs' APA claims based on USDA's refusal to investigate complaints of discrimination in its

⁴ The government's contention that by upholding the denial of class certification in *Garcia v. Johanns*, 444 F.3d 625, 636 (D.C. Cir. 2006), "the Court strongly suggested that the 'failure to investigate' claim could not provide a common issue for class certification" (Gov't Br. 13 n.6) is unfounded. There, the Court considered, pursuant to Fed. R. Civ. P. 23(f), a petition for review of the district court's order denying class certification on the basis of the alternative grounds urged by plaintiffs following the district court's rulings in *Garcia* and *Love* granting summary judgment on the APA claims and refusing to certify classes on the basis of USDA's failure to investigate their discrimination complaints -- the same basis upon which Judges Friedman and Sullivan certified classes in *Pigford* and *Keepseagle*. Indeed, following his rejection of the alternative grounds for class certification, Judge Robertson stated that "If asked to do so, I will also certify my [3/20/02 Order] pursuant to 28 U.S.C. §1292(b)." *Garcia v. Veneman*, 224 F.R.D. at 9. The government's contention is also belied by this Court's holding denying the government's Fed. R. Civ. P. 23(f) petition in *Keepseagle*. *In re Veneman*, 309 F.3d at 794 ("Nor do we see anything either novel or manifestly erroneous . . . about the district court's conclusion that the farmers' allegations concerning the Department's 'failure to properly process, account for, and/or investigate discrimination complaints,' which 'affected each class member,' satisfy Rule 23(a)'s commonality and typicality requirements."). Moreover, on remand, Judge Robertson expressly acknowledged the obvious nexus between an APA claim and class certification noting that "[i]f there's an APA claim . . . it may follow almost automatically that there's class certification." J.A. 108.

farm programs. A central flaw in the government's brief is its failure to address squarely or even acknowledge the Supreme Court's authoritative construction of the "adequate remedy in a court" provision of APA §704 in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), and its implications for this case. Instead, the government relies upon this Court's opinions that either predate *Bowen* or fail to appreciate *Bowen*'s import to argue that §741 constitutes such an "adequate remedy" and therefore bars plaintiffs' APA claims. Indeed, it is telling that, in so arguing, the government scarcely relies upon *Bowen* and does not even cite *Darby v. Cisneros*, 509 U.S. 137 (1993), in which the Supreme Court explicitly reaffirmed its authoritative construction of APA §704, or *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), in which this Court explicitly acknowledged that statutory construction.

Similarly without merit is the government's argument regarding plaintiffs' APA claims based upon the discriminatory denial of non-credit farm benefits and USDA's failure to investigate complaints of discrimination in those programs. While the government concedes that the district court's order dismissing plaintiffs' APA claims is unclear (Gov't Br. 44), it nevertheless argues that dismissal of the non-credit APA claims was proper because (1) plaintiffs failed to exhaust their administrative remedies and (2) it is improper to combine individual credit and non-credit discrimination claims. The government's contention that

plaintiffs allegedly failed to exhaust their administrative remedies (Gov't Br. 45) is premised on a fundamental understating of the jurisdiction of USDA's National Appeals Division ("NAD"). USDA's regulations expressly preclude NAD from considering farmers' discrimination claims. 7 C.F.R. §11.1(10). The government's contention that it is improper to combine farm credit and non-credit discrimination claims reflects a lack of understanding of USDA's role in assisting farmers and the discrimination that has victimized Hispanic farmers in this case.

ARGUMENT

I. APA §704 DOES NOT BAR PLAINTIFFS' APA CLAIMS BASED ON USDA'S FAILURE TO INVESTIGATE THEIR COMPLAINTS OF DISCRIMINATION IN ITS FARM PROGRAMS.

No where in its brief does the government contend that plaintiffs have not satisfied the requirements of APA §§701, 702 and 706. Instead, the government argues that APA §704 bars plaintiffs' claims based upon USDA's failure to investigate their complaints of discrimination in its farm credit and non-credit programs because §741 (7 U.S.C. §2279 Note) constitutes an "other adequate remedy in a court" within the meaning of §704. The government's argument, however, must fail because §741 does not constitute an "other adequate remedy in a court" as the Supreme Court authoritatively defined that provision of §704 in *Bowen*.

A. The Supreme Court Has Held That APA §704 Has A Very Narrow And Limited Meaning.

The Supreme Court explained that APA §704 was intended simply to bar additional judicial review where Congress had already enacted special administrative review provisions. *Bowen*, 487 U.S. at 902-903 (“[§704] as enacted . . . makes it clear that Congress did not intend the general grant of review in the APA to duplicate *existing procedures for review of agency action*”) (emphasis added).

In construing §704, the Supreme Court left no doubt as to the meaning of “other adequate remedy in a court,” *Bowen*, 487 U.S. at 902 n.32, or what it considered to be the “special statutory [review] procedures relating to specific agencies.” *Id.* at 903. Indeed, the Supreme Court explicitly identified those “special and adequate review procedures” 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 [“FTC”] and National Labor Relations Board [“NLRB”] 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.” *Id.* (footnote omitted). Moreover, the Supreme Court expressly held that “[w]hen Congress enacted the APA to provide

a 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.” *Id.* (emphasis added). In other words, §704’s “general authorization for review of agency action” was not intended to duplicate “the previously established” review procedures existing at the time of the APA’s enactment such as review of FTC and NLRB actions by the regional courts of appeals.

In narrowly construing §704, the Supreme Court also made clear that it “should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action” and “that the [APA’s] ‘generous review provisions’ must be given a ‘hospitable’ interpretation.” *Bowen*, 487 U.S. at 903-904 (quoting *Abbott Labs. v. Gardener*, 387 U.S. 136, 140-141 (1967) (footnote omitted).

The Supreme Court expressly reaffirmed its authoritative construction of §704, noting that “Congress intended by that provision simply *to avoid duplicating previously established special statutory procedures for review of agency actions.*” *Darby*, 509 U.S. at 146 (emphasis added). Moreover, this Court expressly acknowledged the Supreme Court’s authoritative construction of §704, noting that “[g]iven the limited purposes for Section 704’s enactment, the Court said, it is to be read narrowly.” *Esch*, 876 F.2d at 982.

As authoritatively construed by the Supreme Court in *Bowen*, reaffirmed in *Darby* and expressly acknowledged by this Court in *Esch*, APA §704 does not bar plaintiffs' APA claims because §741, which was enacted decades after the APA, is not a "previously established special statutory [review] procedure[]" that Congress did not intend to duplicate by "enact[ing] the APA to provide a general authorization for review of agency action in the district courts" *Bowen*, 487 U.S. at 903.

B. The Government's Heavy Reliance Upon *Council Of & For The Blind And Its Progeny* Is Misplaced In Light Of The Supreme Court's Authoritative Construction Of APA §704.

Much of the government's argument (Gov't Br. 24-38) reflects its adamant refusal to acknowledge the Supreme Court's authoritative definition of the "other adequate remedy" provision of APA §704 and instead relies to varying degrees upon *Council of & for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983), and its progeny. The nub of the government's argument is set forth in the assertion that "[t]he key principle[] that emerge[s] from *Council of & for the Blind* and its progeny [is] that . . . Section 704 precludes an APA suit where Congress has provided a remedy that it considers adequate. . . ." Gov't Br. 27. Given the Supreme Court's authoritative construction of the "other adequate remedy" provision of APA §704, the government's reliance on those

cases is clearly misplaced. First, *Council of & for the Blind* was decided five years before the Supreme Court construed §704 in *Bowen*. Thus, to the extent that *Council of & for the Blind* is inconsistent with the Supreme Court's construction, *Bowen* has overruled it. As for the cases decided after *Bowen*, the Supreme Court has made clear that "[o]nce [it] 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), and courts of appeals cannot alter that determination. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); see also Appellants' Br. 30-31.

C. Even Assuming *Arguendo* That The Supreme Court Had Not Authoritatively Construed APA §704, This Case Is Clearly Distinguishable From *Council Of & For The Blind* And Its Progeny.

In *Council of & for the Blind* and *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990) ("*WEAL*"), this Court confronted claims of discrimination by recipients of federal funding where plaintiffs attempted to use the APA to mount very broad challenges to the oversight of federal agencies charged with monitoring the provision of such funds. Key to the decision in those cases was whether, given the statutory schemes at issue, Congress intended to create a cause of action against the federal agencies in addition to claims against

the discriminating federal fund recipients. In each instance, this Court found that the relevant legislative history made clear that Congress did not intend that the federal agencies bear the burden of lawsuits where plaintiffs could sue the actual perpetrators of the discrimination. *See, e.g., Council of & for the Blind*, 709 F.2d 1528-1531; *WEAL*, 906 F.2d at 747. Accordingly, the Court rejected the proposed across-the-board federal court supervision of executive enforcement in the absence of clear Congressional approval of such relief. *Council of & for the Blind*, 709 F.2d at 1523-1525, 1530-1533; *WEAL*, 906 F.2d at 750-752.

Although noting that the private rights of action offered adequate remedies and that the APA claim therefore could not be entertained, this Court did so in the very specific context where Congress had made crystal clear its intention to limit remedies to private rights of action against the fund recipients that actually perpetrated the discrimination rather than the government. Here, however, ECOA, by its express terms, applies its remedies, including broad equitable relief, directly to the government, as the perpetrator of the credit discrimination that has victimized plaintiffs. 15 U.S.C. §§1691(a)(1), 1691a(f), 1691(e)(a) and 1691e(c).

The government's reliance upon *Coker v. Sullivan*, 902 F.2d 84 (D.C. Cir. 1990), and *National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004), is also misplaced. Like *Council of & for the Blind* and *WEAL*, they involve statutory schemes that opt for direct claims against the federal

fund recipients that are the actual perpetrators of the alleged discrimination rather than the funding federal agency charged with monitoring the fund recipients. Moreover, both simply adopt *Council of & for the Blind's* construction of the “adequate remedy” provision of §704. See, e.g., *Coker*, 902 F.2d at 90 n.5; *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 946.

Coker is also distinguishable because, unlike the specific regulations here that mandate investigation of discrimination complaints, the statute that the *Coker* plaintiffs sought to enforce lacked enforceable standards and thus the claim was barred by APA §701, not §704. See 902 F.2d at 88-89. *Coker* involved the Emergency Assistance (“EA”) program which “is an optional component of the multicomponent Aid to Families With Dependent Children (“AFDC”). *Id.* at 86. In *Coker*, this Court held that “APA does not provide a right of action for plaintiffs to demand from a court an order directing HHS to monitor and enforce the Social Security Act’s purported command that states comply with the provisions of state EA plans” because “Congress has not limited HHS’ discretion to control its enforcement of the EA component of the AFDC program.” *Id.* at 88. The Court noted that “[u]nless Congress has provided ‘meaningful standards for defining the limits of that discretion,’ the APA does not permit the courts to interfere” and concluded that neither the Social Security Act nor HHS’ regulations imposed any “meaningful . . . limitation[s] on the Department’s enforcement

discretion. . . .” *Id.* at 88-89 (quoting *Heckler v. Chaney*, 470 U.S. 821, 834 (1985)). Significantly, the Court observed that “[p]laintiffs have not charged that HHS has failed to regulate state AFDC plans altogether” 902 F.2d at 89. Here, unlike the situation in *Coker*, USDA has, in effect, regulations that require it to take precise actions in connections with discrimination complaints and thus provide courts with ample guidance for crafting appropriate injunctive relief. And *Coker* is further distinguished from the instant case because, unlike the situation in *Heckler*, USDA completely abdicated its self-imposed regulatory responsibility to investigate discrimination complaints. Appellants’ Br. 10-11, 38-41.

In *National Wrestling Coaches Ass’n*, the majority held that plaintiffs lacked standing and “therefore affirm[ed] the District Court’s dismissal of appellants’ claims for lack of jurisdiction.” 366 F.3d at 945. While the majority also held as an alternative basis for affirmance that the availability of a direct suit against the universities constituted an adequate remedy at law with meaning of that term in APA §704, it did so largely relying upon *WEAL* and *Council of & for the Blind*. *Id.* at 946. Indeed, the majority opinion, like all of the cases purporting to construe §704 cited by the district court and government, never once mentioned the Supreme Court’s authoritative construction of that section in *Bowen*. Significantly, only Judge Williams, in his dissent in *National Wrestling Coaches Ass’n*, cited *Bowen*, as well as *Esch*, noting 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 903-904).

All of the third party cases cited by the government and the district court are distinguishable because USDA is both the perpetrator of the discrimination suffered by plaintiffs and the agency which, contrary to its explicit rules, refuses to investigate complaints of discrimination in the administration of its farm programs. There is no more direct actor to sue than USDA. Nor is there any jurisprudential or fiscal basis for contending that Congress did not intend for USDA, in defending an ECOA claim based upon its discrimination in its credit programs or an APA claim based upon its discrimination in its non-credit programs, to answer for its admitted discrimination and for its well-documented refusal to follow its own regulations requiring it to investigate plaintiffs’ complaints of discrimination. Indeed, permitting plaintiffs to assert such claims is wholly consistent with the Supreme Court’s authoritative construction of APA §704 in *Bowen* and this Court’s holding in *McKenna v. Weinberger*, 729 F.2d 783, 791 (D.C. Cir. 1984) (“*McKenna*”).⁵

⁵ The instant case is also distinguishable from *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), because plaintiffs are not asking the court to compel compliance with broad statutory mandates or to create from whole cloth

D. The Government's Attempt To Distinguish *McKenna* Is Without Merit.

There is no merit to the government's argument that this Court's decision in *McKenna* cannot be squared with APA §704 (Gov't Br. 35). Nor is there merit to the government's contention that *McKenna*, in any event, is "distinguishable . . . on its own terms." *Id.* at 40. Indeed, as demonstrated in the opening brief, *McKenna* is wholly consistent with the Supreme Court's authoritative construction of APA §704 and the basic tenet of administrative law that an agency must comply with its own regulations. Appellants' Br. 40-43.

Even under the district court's erroneous reading of §704, plaintiffs -- like the plaintiff in *McKenna* -- should be able to pursue their discrimination claims and their separate claims for the agency's failure to follow its own regulations. The government's assertion to the contrary notwithstanding (Gov't Br. 40-41), the discriminatory denial of credit in violation of ECOA or the discriminatory denial

standards to which it would require USDA to adhere. To the contrary, plaintiffs merely seek to compel USDA to adhere to self-imposed, specific regulations prescribing how USDA is to investigate discrimination complaints in order to carry out its statutory obligation to prohibit discrimination in the administration of its farm programs. *See, e.g.*, J.A. 398-402. Inasmuch as USDA has promulgated these rules itself, requiring USDA to adhere to its own rules does not raise any separation of powers issues. Gov't Br. 23. To the contrary, requiring USDA to adhere to its own regulations, especially where those regulations impact the rights of individuals such as plaintiffs is a basic tenet of administrative law and wholly consistent with the Court's decision in *McKenna*. *See* Appellants' Br. 36-41.

of a non-credit benefit in violation of the APA is not the same administrative denial as the agency's refusal to follow its own regulations that require it to investigate discrimination complaints filed with it.⁶ See Appellants' Br. 32-33.

While asserting that *McKenna* is distinguishable from the instant case (Gov't Br. 40-41), the government merely repeats the district court's failed attempt to distinguish that case. As demonstrated in plaintiffs' opening brief, the APA claims in this case are, if anything, far more independent of the discrimination claims than were the APA claims in *McKenna*. In *McKenna*, plaintiff alleged that the government had discriminatorily discharged her and had violated its rules by failing to follow the proper procedures in discharging her. Appellants' Br. 37-38. By contrast, here, local FSA personnel, acting pursuant to national regulations, discriminated against Hispanic farmers in the administration of USDA's farm credit and non-credit programs. When these farmers complained of that discrimination as USDA encouraged them to do, officials in USDA's Office of Civil Rights ("OCR") and its predecessors refused to investigate those complaints and in doing so violated USDA regulations that required those officials to investigate the complaints. See Appellants' Br. 10-11, 38-39.

⁶ Indeed, the Court's holding that USDA's failure to investigate discrimination complaints does not constitute an ECOA violation confirms the separate nature of the two administrative denials. *Garcia v. Johanns*, 444 F.3d at 637.

E. Even Assuming *Arguendo* That The Interpretation Of §704 Urged By The Government Were Correct, §741 As Actually Implemented Could Not Constitute An Adequate Remedy In Court.

The government simultaneously argues that (1) plaintiffs lack standing to complain about the undisputed flaws in the implementation of the optional §741 procedure, including USDA's intentional efforts to sabotage its effectiveness, and (2) §704 bars plaintiffs' APA claims because Congress enacted §741. *See* Gov't Br. 35.

Rosalind Gray, the Director of USDA's OCR from July 13, 1998 to January 20, 2001, was responsible for working with USDA's Office of General Counsel ("OGC") "to formulate and implement the procedures promulgated at 7 C.F.R. Part 15f in response to the enactment of . . . §741. . . ." J.A. 526 (¶7). She was thus in a unique position to witness the intentional efforts to thwart the effectiveness of the optional procedure and USDA's ultimate failure in implementing the program. As Ms. Gray affirmed, the implementation of those regulations "took place against the backdrop of the on-going *Pigford* litigation, the certification of a class in that litigation, and a struggle between OGC and OCR regarding how to carry out the remedial intent of the legislation," and "[i]n terms of addressing fully the problems that gave rise to the special legislation extending the statute of limitations, the regulations were fatally flawed." *Id.*

For example, “until 1997 the FSA and its predecessor, FmHA . . . , processed their civil rights complaints” and, as Director Gray affirmed, “many complaints were destroyed, not accepted or not recorded at all even though FSA provided for a verbal complaint to be filed in person or through the telephone.” J.A. 526-527 (¶8). Similarly, “the Civil Rights Action Team (“CRAT”), appointed by Secretary Glickman . . . to investigate civil rights enforcement within USDA, noted that it ‘was unable to gather historical data on program discrimination complaints at USDA because record keeping on those matters has been virtually nonexistent.’” J.A. 527 (quoting J.A. 215).

In addition, Lloyd Wright, Director Gray’s predecessor at OCR, affirmed that following the dismantlement of USDA’s civil rights enforcement apparatus,

files were left in an unsecured room, where anyone could walk in, take a file and no one would ever know the file was missing. OCR had not assigned anyone to manage the files in the file room. An example of how bad the situation was, several days after becoming OCR Director, I walked into the room containing the complaint files and no one ever questioned or stopped me from accessing the files There were files thrown on top of file cabinets and some lying in the corner.

J.A. 298 (¶11).

Moreover, at the time the regulations implementing §741 were promulgated, USDA regulations expressly provided that farmers could file verbal complaints. *See, e.g.*, J.A. 406; *see also* J.A. 526 (¶8). Furthermore, in January 1997, six

months before the cutoff for filing eligible complaints pursuant to §741, Secretary Glickman represented that USDA would investigate all civil rights complaints made verbally during the recorded listening sessions that the CRAT conducted around the country. J.A. 527 (¶8). Despite all of these facts “OGC insisted that the regulations require a complainant to have a written discrimination complaint on file with USDA in order to invoke the optional procedure . . . , a limitation more narrow than the special remedial statute, more narrow than the definition of the class certified in the *Pigford* litigation and inconsistent with representations made by Secretary Glickman that oral complaints made during the recorded listening sessions conducted by the CRAT . . . would be fully investigated.” J.A. 527 (¶8).

Implementation of the process was also problematic. For example, “[i]n determining who would be eligible to receive notification letters . . . , all members of the *Pigford* class as defined were eliminated.” J.A. 527 (¶9). Consequently, “only 194 notification letters were sent . . . and of that number only 111 involved FSA programs.” *Id.* Moreover, given FSA’s pre-1997 role in handling its own civil rights discrimination claims, OCR requested that FSA “review its databases and records to determine whether additional eligible complaints were still lodged with the local FSA offices.” J.A. 527 (¶9). “Characteristic of the apparent

indifference of USDA to civil rights enforcement,” that request was met with a “complete lack of response from FSA” *Id.*

USDA “placed the burden upon those complainants who had not received a notification letter to contact OCR in order to find out how to participate in the statute of limitations process.” *Id.* As Director Gray makes clear, “information about the program was not disseminated in a way reasonably calculated to provide notice to all minority farmers” *Id.* Indeed, according to Director Gray, “the outreach effort consisted of contacting the 1890 historically black agricultural schools, black farmer organizations and state FSA offices, *which was particularly ironic inasmuch as black farmers who fit within the Pigford class definition were deemed to be ineligible to receive the §741 notification letter. . . .*” *Id.* (emphasis added). Director Gray is “not aware of any efforts to inform Hispanic or women farmers or any organizations representing such farmers of the optional §741 procedure.” J.A. 527-528.

In such circumstances, requiring complainants whose complaints were, unbeknownst to them, destroyed, lost or never submitted by local FSA officials, to contact OCR in order to participate in the optional procedure was a prescription for failure; just as it was to expect that the very local officials who had discriminated against minority farmers would inform them of the optional procedure. Indeed, USDA has a long history of not informing minority farmers of

its programs and services, including those designed to assist minority farmers. As the CRAT Report noted,

[l]ack of diversity in the FSA county office delivery system directly affects participation of minority and female producers in USDA programs. Under-representation of minorities on county committees and on county staffs means minority and female producers hear less about programs and have a more difficult time participating in USDA programs because they lack specific information on available services.

J.A. 217; *see also* J.A. 218-219, and 222.

The lack of USDA outreach to minority producers was particularly acute among Hispanics. According to the CRAT Report, “Hispanic and Asian-American farming communities . . . express[ed] a perception that USDA has begun to recognize the shortcomings in its outreach to African-American and American Indian customers, but that it has yet to even identify that there is an unmet need in the Hispanic and Asian-American communities.” J.A. 219. Certainly, the way in which USDA sought to notify minority producers of the optional procedure demonstrated the accuracy of that perception. *See* J.A. 527-528 (¶19).

Predictably, the optional §741 procedure suffered from the same dysfunction that had plagued and continues to plague OCR and complaint processing. As Director Gray put it,

[f]or the few farmers that opted for the §741 administrative procedure, their complaints and the staff initially designated to process them were soon merged into the processing of existing

and new complaints that poured into OCR. . . . [A]fter substantially reducing the backlogged cases that I encountered when I assumed the position of OCR Director, OCR received 1261 new cases filed in 1999 and another 671 cases in fiscal year 2000 and many of the filings were more than a year old before the initial processing began. Ultimately, OCR staff was simply not prepared to do the work of the office. In the final analysis . . . “[c]ivil rights procedures were developed and published, but were not and are not followed,” and despite my best efforts to make the system work properly, the complaint processing system collapsed and complaints, whether submitted pursuant to the optional §741 procedure or otherwise, were caught up in the dysfunction that characterized OCR.

J.A. 528 (¶10); *see also* J.A. 470-471 (¶¶6-7).

Director Gray’s unrebutted testimony belies any contention that the optional §741 procedure as actually implemented could conceivably constitute an “adequate remedy” under even the district court’s reading of §704. Indeed, given the undisputed record in this case, the government’s contention that the optional §741 process would “ultimately culminate[] in a judicial review” means that it “provides an ‘adequate remedy in court’ [*sic*] within the meaning of 5 U.S.C. 704” (Gov’t Br. 20) is at best disingenuous. Director Gray’s unrebutted testimony concerning the complete dysfunction of the OCR is corroborated by numerous reports (*see, e.g.*, J.A. 270-292, 299-380; *see also* Appellants’ Br. 9 n.13) as well as the declarations of Hispanic farmers who filed discrimination complaints long before USDA purported to implement the optional §741 procedure, during the

time of the purported implementation and subsequent thereto. All of the farmers have in common the fact that USDA still has not investigated their complaints. J.A. 407-465. To ignore the reality described by Director Gray, as the government urges, would elevate form over substance in a manner that could not be squared with *Bowen*. See *Bowen*, 487 U.S. at 905 (noting the inadequacy of relief in the court of claims under the Tucker Act).

II. THE GOVERNMENT’S ARGUMENTS IN SUPPORT OF THE DISMISSAL OF PLAINTIFFS’ NON-CREDIT APA CLAIMS LACK MERIT.

In suggesting that it is unclear whether the non-credit APA claims are properly before this Court, the government selectively quotes from the cryptic order in this case and completely ignores the district court’s discussion of the non-credit APA claims in *Love* that was predicate for the order. Gov’t Br. 44-45. In its 11/30/07 Order, the district court, in considering plaintiffs’ non-credit claims, conceded that none of the bases for dismissing plaintiffs’ failure-to-investigate claims based on discrimination in the administration of USDA’s farm credit program applied to the non-credit claims. J.A. 540. However, because the *Love* third amended complaint did not “mention . . . a plaintiff who actually suffered such discrimination” and there was no “proper motion pending to amend the complaint,” there was “no reason to allow this additional APA cause of action to

be maintained at this time.” J.A. 541. However, unlike the *Love* plaintiffs, the *Garcia* plaintiffs did in fact have a plaintiff with standing to assert non-credit APA claims, as the district court expressly found in its 3/20/02 Order. J.A. 30.

Significantly, even under the government’s reading of the order, the district court erred. First, plaintiffs’ claims that USDA discriminated against them in the administration of its non-credit farm benefit program are clearly actionable under the APA. *Id.* ECOA cannot possibly constitute an alternative remedy for such claims under any definition of that term. For the same reason and because there is no third party perpetrator interposed between USDA and plaintiffs, *Council of & for the Blind* and its progeny in no way bar such claims. Moreover, as the preceding section demonstrates, §741 could not constitute an “adequate remedy in a court” for plaintiffs’ APA claims based on discrimination in USDA’s non-credit programs. Thus, inasmuch as plaintiffs can bring their non-credit discrimination claims against USDA under the APA, there is no sound jurisprudential or fiscal reason for preventing plaintiffs from also asserting their claims based upon USDA’s failure to follow its own rules that require it to investigate farmers’ complaints of discrimination. Indeed, permitting plaintiffs to pursue both sets of claims is wholly consistent with this Court’s holding in *McKenna* as well as the Supreme Court’s authoritative construction of APA §704 in *Bowen*.

The government's argument that the district court was nevertheless correct in dismissing all of plaintiffs' APA claims because, with respect to their non-credit claims, plaintiffs had failed to exhaust their administrative remedies is based upon a fundamental misapprehension of the jurisdiction of USDA's NAD. Gov't Br. 45-46. The government contends that plaintiffs are required to exhaust their administrative remedies by filing an appeal with NAD. USDA's regulations, however, expressly preclude NAD from considering complaints alleging discrimination in USDA programs. 7 C.F.R. §11.1(10); *see also* J.A. 215.

Moreover, the district court expressly found in its 3/20/02 Order that "Ms. Moralez has satisfied the special statute of limitations approved by Congress and has standing to assert her claim before this court." J.A. 30 (citing 7 U.S.C. §2279 Note). Furthermore, as plaintiffs explained in their opening brief, §741 gave plaintiffs such as Ms. Moralez the option of proceeding directly to court and, under well-settled precedent, the long delays in investigating plaintiffs' discrimination complaints more than satisfied the "final agency action" requirement of §704 and the option of, in effect, reopening the process did not alter the finality of the agency action resulting from the long delay. *See* Appellants' Br. 25-28. Given the undisputed evidence of the utter dysfunction of the §741 optional administrative process, it would indeed be Kafkaesque to suggest, as the government does (Gov't Br. 45-46), that plaintiffs must submit to a

hopelessly dysfunctional administrative process that for untold thousands of farmers has yet to yield a result after decades of delay in order to obtain judicial review. *See supra* at 16-22; *see also* Appellants' Br. 27.

Finally, the assertion that no basis exists for allowing plaintiffs to pursue individual claims for non-credit discrimination under the APA in conjunction with individual claims of credit discrimination under ECOA betrays a profound lack of understanding of farming and the relationship between USDA's farm credit and non-credit programs. The ability of farmers to have equal access to farm credit and non-credit benefit programs is critical to their ability to survive as farmers and minority farmers have been systematically denied access to both programs. *See, e.g., Pigford v. Glickman*, 185 F.R.D. at 86 (noting the vagaries of crop prices, weather and other conditions beyond farmers' control causing "many farmers [to] depend heavily on [USDA] credit and benefit programs . . . to take them from one year to the next" and noting that "decisions to approve or deny applications for credit or benefits are made locally at the county level" by the county committee).

As the CRAT Report noted,

[r]ecent studies . . . have found lower participation and lower loan approval rates for minorities in most FSA programs. Participation rates . . . in 1994 in programs of the former Agricultural Stabilization and Conservation Service . . . , particularly commodity programs and disaster programs, were disproportionately low for all minorities.

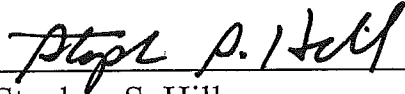
J.A. 212. Indeed, named plaintiff Gloria Moralez who, as the district court found in its 3/20/02 Order (J.A. 30), had standing to assert non-credit discrimination claims was also a victim of credit discrimination perpetrated by USDA. J.A. 128-131; *see also* J.A. 435.

CONCLUSION

For the foregoing reasons and for the reasons set forth in plaintiffs' opening brief, the district court's 11/30/07 Order should be reversed.

Respectfully submitted,

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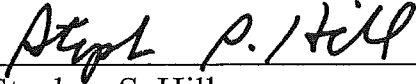
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Dated: November 12, 2008

CERTIFICATE OF COMPLIANCE

Counsel for Guadalupe L. Garcia, *et al.*, hereby certifies that the foregoing brief satisfies the requirements of Fed. R. App. P. 32(a)(7) and D.C. Cir. Rule 32(a) as follows: the brief was prepared in 14-point Times New Roman font and the computer word count is 6,040.



Stephen S. Hill