

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

RECEIVED
U.S. COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
2009 JUN -8 PM 8:02
FILING DEPOSITORY

No. 08-5110

GUADALUPE L. GARCIA, JR., G.A. GARCIA AND SONS FARM, ET AL.,

Plaintiffs-Appellants,

v.

**THOMAS VILSACK, Secretary,
United States Department of Agriculture,**

Defendant-Appellee.

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

No. 08-5135

ROSEMARY LOVE, ET AL.,

Plaintiffs-Appellants,

v.

**THOMAS VILSACK, Secretary,
United States Department of Agriculture,**

Defendant-Appellee.

**Appeal from the United States District Court
For the District of Columbia
(No. 1:00-cv-02502-JR)**

APPELLANTS' CORRECTED PETITION FOR REHEARING *EN BANC*

INTRODUCTION

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Circuit Rule 35, Plaintiffs-Appellants Guadalupe L. Garcia, *et al.* and Plaintiffs-Appellants Rosemary Love, *et al.*, petition this Court to rehear *en banc* their petitions for review of the district court's November 30, 2007 Orders dismissing their Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA") claims based upon the failure of the United States Department of Agriculture ("USDA") to investigate their discrimination complaints. Plaintiffs-Appellants request rehearing *en banc* because the panel based its affirmance of the district court's dismissals of the APA failure-to-investigate claims on this Court's interpretation of 5 U.S.C. § 704 ("APA 704") first announced in *Council of & for the Blind of Delaware County Valley Inc. v. Regan*, 709 F.2d 1521 (1983) (*en banc*), that conflicts with the Supreme Court's authoritative interpretation of that section in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). *See* slip op. at 3, 6 and 10 (Addendum 2).¹ In addition, the panel's decision cannot be reconciled with this Court's decision in *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984), and concessions made on brief by the government with respect to that decision.

For years, the USDA has denied minority farmers equal access to farm credit in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, *et seq.* ("ECOA"), and non-credit benefit programs in violation of the APA, while urging farmers to complain to it of such discrimination. In the early 1980s, USDA secretly dismantled its civil rights enforcement capability, making any pretense of civil rights enforcement a total sham. Thereafter, USDA, in contravention of its own regulations, refused and still refuses to investigate their complaints.

¹ The panel issued a single opinion for the *Garcia v. Vilsack* ("Garcia") and *Love v. Vilsack* ("Love") appeals.

Eventually, African American, Hispanic, Native American and women farmers filed virtually identical suits in the United States District Court for the District of Columbia to remedy USDA's unlawful discrimination.² The district court certified classes in the African American (*Pigford*) and Native American (*Keepseagle*) cases on the basis of USDA's failure to investigate the discrimination complaints of African American and Native American farmers and, with the approval of this Court,³ those cases proceeded.⁴ In the Hispanic and women

² *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (Friedman, J.) (African-American farmers); *Keepseagle v. Veneman*, No. 99-3119 (EGS), 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001) (Sullivan, J.) (Native-American farmers); *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (Robertson, J.) (Hispanic farmers); *Love v. Veneman*, 224 F.R.D. 240 (D.D.C. 2004) (Robertson, J.) (women farmers).

³ In fact, in *Keepseagle* 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 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).

⁴ *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000) (approving consent decree); *Pigford v. Veneman*, 355 F. Supp. 2d 148, 151 (D.D.C. 2005); *Pigford v. Glickman*, 182 F.R.D. 341, 343 (D.D.C. 1998) (certifying class to pursue claims that "USDA failed properly to investigate those complaints" of discrimination in farm credit and non-credit farm benefit programs); *Keepseagle*, 2001 U.S. Dist. LEXIS 25220, at *29 (certifying class); *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) (dismissing government petition challenging *Keepseagle* class certification).

farmers' cases, however, Judge Robertson ruled that such allegations do not state a cause of action under ECOA or the APA and hence refused to certify those cases as class actions. Previously, this Court affirmed the district court's dismissals of Plaintiffs-Appellants' failure-to-investigate claims based on ECOA and remanded for further development those same claims based upon the APA. *Garcia v. Johanns*, 444 F.3d 625, 637 (D.C. Cir. 2006); *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006). On remand, the district court reaffirmed its dismissals of the APA failure-to-investigate claims. See Memorandum Order in *Love v. Veneman*, C.A. No. 00-2502 dated November 30, 2007 ("11/30/07 Order"); Order in *Garcia v. Veneman*, C.A. No. 00-2445 dated November 30, 2007. On April 24, 2009, in a *per curium* order and opinion by Judge Rogers ("4/24/09 Opinion"), a panel of this Court affirmed the district court's dismissals of the APA failure-to-investigate claims.

ARGUMENT

I. THE PANEL'S CONSTRUCTION OF APA 704 CONFLICTS WITH THE SUPREME COURT'S AUTHORITATIVE CONSTRUCTION OF THAT SECTION.

A. The Bowen Court Narrowly Defined APA 704 To Avoid Duplication Of Review Procedures Existing At The Time The APA Was Enacted.

APA 704 provides, in relevant part, that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." In its 4/24/09 Opinion, the panel acknowledged that "[i]n *Bowen* . . . the Supreme Court interpreted § 704 as precluding APA review where Congress has otherwise provided a 'special and adequate review procedure.'" Slip op. at 6 (quoting *Bowen*, 487 U.S. at 904). Significantly, however, the panel selectively quoted

from *Bowen* and completely ignored *Bowen*'s explicit description of “the special and adequate review procedures.”

The panel concluded that Section 741 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-31 (codified at 7 U.S.C. § 2279 note) (“Section 741”), which extended the applicable statutes of limitations and purported to give aggrieved farmers the option of filing suit in district court or resubmitting their complaints to USDA, and more generally ECOA provided the “special and adequate” review procedures that *Bowen* held would preclude an APA claim. Slip op. at 7-8. The panel also faulted plaintiffs, some of whom had waited for nearly twenty years to have their complaints heard, for not attempting to use Section 741's optional administrative process despite what the panel concedes was unrebutted evidence that USDA had sabotaged the process and thus resorting to it was utterly futile. Slip op. at 8-9 & n.5. According to the panel, because at some indeterminate point years in the future judicial review might be available, the sabotaged and utterly futile optional process constitutes an adequate remedy in a court within the meaning of APA 704. Slip op. at 9.

The panel's conclusions are clearly at odds with *Bowen*, which makes clear that, despite its apparent breadth, APA 704's “other adequate remedy in a court” language was merely intended to make certain that the APA would not provide additional judicial review of agency actions in those circumstances where Congress, prior to the APA's enactment, had already enacted special administrative review provisions for specific agencies. *Bowen*, 487 U.S. at 901-02 n.32 (quoting 5 U.S.C. § 704). *Bowen* also made clear that “[t]he exception that was intended to avoid such duplication 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 903-04 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-141 (1967)) (emphasis added and footnotes omitted). Five years later, the Supreme Court expressly reiterated its construction of APA 704 stating that “Congress intended by that provision simply to avoid duplicating previously established special statutory procedures for review of agency actions.”⁵ *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (emphasis added).

B. The Panel Erred In Relying Upon This Court’s Construction Of APA 704 That Predates And Contradicts The *Bowen* Court’s Construction Of That Section.

In affirming the dismissals of Appellants’ APA failure-to-investigate claims, the panel relied upon this Court’s construction of APA 704 set forth in *Council of & for the Blind* and its progeny. This Court, however, decided *Council of & for the Blind* five years before *Bowen* and, with the exception of *El Rio Santa Cruz Neighborhood Health Center v. HHS*, 396 F.3d 1265 (D.C. Cir. 2005) (“*El Rio Santa Cruz*”), none of the post-*Bowen* circuit opinions relied upon by the panel even cites *Bowen*, despite the fact that, as the panel recognized (slip op. at 6), the *Bowen* Court authoritatively defined APA 704. While the panel contends that this Court confirmed in *El Rio Santa Cruz* that its construction of APA 704 “is consistent with the Supreme Court’s construction of the APA in *Bowen*” (slip op. at 11), even a cursory comparison of the two opinions belies that claim. In purporting to construe *Bowen*, this Court in *El Rio Santa Cruz* wrote:

⁵ The Supreme Court’s construction of the statute is reinforced by a review of the APA as enacted by Congress because the relevant portion of APA 704 was set forth in § 10(c) of the APA, while the effect of future legislation on the APA was set forth in § 12, which, in pertinent part, provided that “no subsequent legislation shall be held to supersede or modify the provisions of [this] Act except to [the] extent that such legislation shall do so expressly.” See 5 U.S.C. § 559 note 4; see *Bowen*, 487 U.S. at 904; accord *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955).

In *Bowen* . . . the Supreme Court addressed the meaning of “adequate remedy” under § 704 of the APA. While observing that § 704 was not intended to provide additional judicial remedies “where the Congress has provided special and adequate review procedures,” the Court explained that “the exception that was intended to avoid such duplication should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action.” In that case, the Court concluded that relief in the Claims Court “is plainly not the kind of ‘special and adequate review procedure’ that will oust a district court of its normal jurisdiction under the APA.”

396 F.3d at 1270 (citation omitted).

Significantly, the full quote from *Bowen* is as follows:

However, although the primary thrust of § 704 was to codify the exhaustion requirement, the provision as enacted also 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. As Attorney General Clark put it the following year, § 704 “does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.” *At 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 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.*

Bowen, 487 U.S. at 903 (emphasis added and footnotes omitted). The foregoing explicit description of the “special and adequate review procedures” by which the

Supreme Court narrowly construed APA 704 is completely missing from this Court's discussion of *Bowen* in *El Rio Santa Cruz*.⁶

Furthermore, despite the panel's contrary contention, this Court, in *El Rio Santa Cruz*, expressly acknowledged that its definition of "'adequate remedy' under § 704 of the APA" had, through a series of cases beginning with *Council of & for the Blind*, diverged from the *Bowen* Court's definition by "focus[ing] on whether a statute provides an independent cause of action or an alternative review procedure"⁷ 396 F.3d at 1270 (citing cases), rather than the "special and adequate review procedures" on which the Supreme Court focused in *Bowen*. As this Court explained, "[s]uccinctly put, where a statute affords an opportunity for *de novo* district-court review, the court has held that APA review was precluded because 'Congress did not intend to permit a litigant challenging an administrative denial . . . to utilize simultaneously both [the review provision] and the APA.'" *Id.* (quoting *Env'tl. Def. Fund v. Reilly*, 909 F.2d 1497, 1501 (D.C. Cir. 1990)). Significantly, USDA's discriminatory denial of credit and non-credit farm benefits is not the

⁶ The repeated failure of the Court even to acknowledge the *Bowen* Court's authoritative construction of APA 704 and to rely instead upon its own earlier construction, at a minimum, should have suggested that the Court's construction of that section might be problematic.

⁷ *El Rio Santa Cruz* also demonstrates that this Court, by its own admission, has also strayed from "congressional intent" as the following quote makes clear:

While originally deferring to congressional intent to provide a remedy for an acknowledged problem, this court later embraced the doctrinal view disfavoring suits directly against federal enforcement authorities administering anti-discrimination laws, holding that remedies against the discriminating entity were of "the same genre" as that which the court in Council had held were adequate so as to preclude APA review

396 F.3d at 1271 (emphasis added and citations omitted).

same administrative denial as the dismantlement of its civil rights investigatory apparatus and its refusal, contrary to its own regulations, to investigate any discrimination complaints. And, as discussed more fully *infra*, the “opportunity for *de novo* district-court review” under the sabotaged and futile Section 741 optional administrative process was illusory.

Aside from *El Rio Santa Cruz*, there are only two other post-*Bowen* circuit opinions construing APA 704 that cite *Bowen*, *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), and *National Wrestling Coaches Ass’n v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004). In *Esch*, this Court followed *Bowen* and expressly acknowledged *Bowen*’s narrow reading of APA 704, observing that “[g]iven the limited purposes for Section 704’s enactment, the Court said, it is to be read narrowly.” 876 F.2d at 982.⁸ In *National Wrestling Coaches*, not mentioned by the panel, Judge Williams cited *Bowen* and *Esch* in his dissent 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.’” 366 F.3d at 958 (Williams, J. dissenting) (quoting *Bowen*, 487 U.S. at 903-04). Thus, two of the three post-*Bowen* circuit opinions construing APA 704 that cite *Bowen* (*Esch* and *National Wrestling Coaches*) do so in terms

⁸ The panel dismisses *Esch* as merely holding that “the potential availability of a [Tucker Act] cause of action in the Claims Court was not an adequate remedy because that court lacked equitable jurisdiction and it was doubtful that court had jurisdiction over the plaintiffs claims.” Slip op. at 13. In essence, the panel dismisses *Esch* because it reaches the same substantive conclusion as the Supreme Court in *Bowen* and despite the fact that it is on all fours with *Bowen* in terms of its construction of APA 704, focusing directly on the critical passage in *Bowen* (487 U.S. at 903) where the Supreme Court explicitly described the “‘special and adequate review procedures’ that would constitute an ‘adequate remedy in a court’ within the contemplation of Section 704.” *Esch*, 876 F.2d at 982 (citation omitted).

that expressly recognize the narrow reading of that section mandated by *Bowen*. The third such circuit opinion (*El Rio Santa Cruz*) enabled the panel to contend that this Court and the Supreme Court had consistently construed APA 704 only by so selectively quoting from *Bowen* as to alter its plain meaning -- a meaning that the Supreme Court expressly reaffirmed in *Darby*, 509 U.S. at 146.

C. The Panel Erred In Holding That ECOA Constitutes An Adequate Remedy In A Court For Plaintiffs-Appellants' Failure-To-Investigate Claims Based Upon USDA's Discriminatory Administration Of Its Non-Credit Farm Programs.

The panel also noted that “[t]wo *Garcia* appellants filed administrative complaints with the USDA regarding discrimination occurring after 1999” that were not “covered by Section 741,” but that was “of no significance because we hold that all of the appellants have an adequate remedy at law in the ECOA for their failure-to-investigate claims.” Slip op. at 5 n.3. In so holding, the panel clearly erred.⁹ First, the record before the Court demonstrates that at least eight *Garcia* appellants filed discrimination complaints with USDA after 1996 concerning USDA’s non-credit disaster benefit programs.¹⁰ ECOA does not cover such non-credit claims, as the district court clearly recognized. *Garcia v. Veneman*, No. Civ.A. 00-2445 (JR), 2002 WL 33004124 at 2 (D.D.C. Mar. 20, 2002). Hence, those *Garcia* Appellants who, by the panel’s own admission, are

⁹ Indeed, the panel fundamentally misapprehends appellants’ claims, noting that “[appellants] alleged that the USDA had discriminated against them with respect to credit transactions *and disaster benefits in violation of the ECOA. . . .*” Slip op. at 5 (emphasis added). Appellants’ disaster benefit claims are based on USDA’s discriminatory administration of *non-credit* farm benefit programs in violation of the APA, not ECOA.

¹⁰ See *Garcia* Joint Appendix at 410-15, 437-38, 442-48 (Addendum 3).

not covered by Section 741, cannot possibly have, even under the panel's reading of APA 704, "an adequate remedy at law in the ECOA for their failure-to-investigate claims" based upon discrimination in USDA's non-credit farm benefit programs. Slip op. at 5 n.3.

The panel's decision is also contrary to a long line of Supreme Court precedent "instruct[ing] that the 'generous review provisions' of the APA must be given 'a hospitable interpretation' such that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.'" *El Rio Santa Cruz*, 396 F.3d at 1269-70 (quoting *Abbott Labs.*, 387 U.S. at 141 (quoting *Shaughnessy*, 349 U.S. at 51)). While the panel asserts that "there is clear and convincing evidence that in enacting Section 741 Congress did not intend for complainants who choose to proceed in the district court on their ECOA claims to pursue their failure-to-investigate claims under the APA simultaneously in the same lawsuit" (slip op. at 7-8), the panel does not identify and the record is bereft of any such evidence, much less "*clear and convincing evidence.*" In the absence of such "clear and convincing evidence," this Court, as it expressly acknowledged in *El Rio Santa Cruz*, is "instructed that the '*generous review provisions*' of the APA must be given '*a hospitable interpretation*'" to permit "*access to judicial review.*" 396 F.3d at 1269-70 (emphasis added and citations omitted).

D. The Long Delay In Refusing To Process Plaintiffs-Appellants' Discrimination Complaints Constituted Final Action For APA Purposes And The "Option" Of Pursuing An Admittedly Sabotaged And Futile Administrative Process Could Not Constitute An Adequate Remedy In A Court Under Any Reasonable Construction Of That Term.

The fact that Section 741, like other statutory schemes that routinely give parties to administrative proceedings the option of seeking rehearing, gave farmers

the option of resubmitting their complaints to USDA did not preclude farmers from seeking review of USDA's failure to investigate their complaints under the APA. Under settled authority of this Court, the long passage of time during which USDA has refused to process or investigate discrimination complaints rendered those refusals final agency actions for purposes of APA 704,¹¹ and APA 704 expressly provides that "[e]xcept as otherwise expressly required by statute, agency action otherwise is final for the purposes of this section whether or not there has been presented or determined an application . . . for any form of reconsideration" 5 U.S.C. § 704.

The panel did not challenge the finality of USDA's failure to investigate discrimination complaints for purposes of reviewability pursuant to APA 704. Instead, the panel concluded that because at some indeterminate point years in the future a court might review USDA's refusal to investigate resubmitted discrimination claims under the optional Section 741 administrative process, an adequate remedy in a court exists within the meaning of APA 704 sufficient to bar appellants' APA claims. Slip op. at 9. The panel's conclusion is problematic in at least three respects. First, *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), cited by the government and relied upon by the panel, does not provide clear guidance on what constitutes unreasonable delay. *Id.*

¹¹ See, e.g., *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (twenty year pendency of petition constituted agency action unreasonably delayed); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003) ("a five year delay smacks of unreasonableness on [its] face") (internal quotation marks omitted); *In re Bluewater Network & Ocean Advocates*, 234 F.3d 1305, 1376 (D.C. Cir. 2000) (nine-year delay unreasonable); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1033-1035 (D.C. Cir. 1983) (eight-year delay unreasonable); *Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) (ten year delay unreasonable).

at 80. Second, this Court has found unreasonable delays ranging from five to twenty years. *See* n. 11. Third, the panel’s suggestions to the contrary notwithstanding (slip op. at 9), there is no basis for any uncertainty about what might have happened in terms of having their complaints investigated, if farmers had “chosen” the Section 741 optional administrative process.

As the panel noted, the testimony of Rosalind Gray, the former director of USDA’s Office of Civil Rights, is unrebutted concerning (1) USDA’s intentional efforts to sabotage the implementation of Section 741, which calls into question the supposed “choice” made by farmers to whom USDA intentionally denied notice of the program, and (2) the utter failure of that optional process. As former Director Gray testified,

[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. . . . Ultimately, OCR staff was simply not prepared to do the work of the office. In the final analysis . . . 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.

Second Supplemental Declaration of Rosalind Gray, dated September 12, 2007, ¶ 10 (*Love* Joint Appendix 368-69)(Addendum 4).

For farmers who had already waited years to have their complaints heard, it cannot be reasonably maintained that an intentionally sabotaged and dysfunctional administrative process – that might require them to wait an additional five to twenty years before possibly obtaining judicial review of their claims – constitutes an adequate remedy in a court under any reasonable interpretation of that term. Moreover, for the panel to invoke this sabotaged and failed process that USDA actively sought to conceal from plaintiffs to claim that an adequate remedy in a

court existed and then to fault plaintiffs for not utilizing it elevates form over substance in a way that is contrary to *Bowen* and even this Court's holding in *El Rio Santa Cruz*. See *Bowen*, 478 U.S. at 905 (noting the inadequacy of relief in the Court of Claims under the Tucker Act); *El Rio Santa Cruz*, 396 F.3d at 1273 (examining the manner in which the statute was actually implemented in determining whether the statute constituted an adequate remedy in a court for purposes of APA 704).

E. The Panel Erred In Concluding That This Court's Decision In *McKenna v. Weinberger* Does Not Support Plaintiffs-Appellants' Claims

Finally, the panel concluded that this Court's opinion in *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984), is of no assistance because (1) it is distinguishable from the instant case and (2) "[i]n *McKenna* the court simply assumed without deciding that Title VII procedures did not constitute an adequate remedy at law." Slip op. at 12-13. The panel's conclusions are problematic on both counts.

First, like the district court, the panel sought to draw a distinction between the regulations at issue in *McKenna* and the regulations at issue here. It did so by suggesting that USDA's alleged failure to follow its regulations in refusing to investigate complaints of discrimination is somehow more inextricably linked to the underlying discrimination violation than the government's failure to follow its regulations in discriminatorily firing the plaintiff in *McKenna*. Slip op. at 12-13; 11/30/07 Order at 10. If anything, the rule violation in *McKenna* was more inextricably linked to the alleged discriminatory firing than is the rule violation in the instant case to alleged discrimination.

Second, the claim that "[i]n *McKenna* the court assumed without deciding that Title VII procedures did not constitute an adequate remedy at law" was flatly

contradicted at oral argument by Judge Edwards, who was a member of the panel that decided *McKenna*, as the following colloquy makes clear:

MR. SCARBOROUGH: Well, as I think you pointed out, Your Honor, I really think that's inapposite. *McKenna*, first of all, doesn't have a 704 component to it at all, so it really didn't consider that aspect.

JUDGE EDWARDS: Well, we did consider without citing 704, because I went back and read it, we absolutely did consider.

MR. SCARBOROUGH: But it doesn't appear --

JUDGE EDWARDS: Whether or not Title VII foreclosed the possibility of the APA relief, that's the same question, you know, we're not that dumb. We understand what the law requires, and I was actually concerned that maybe we were that dumb, we were not that dumb, we absolutely understood --

MR. SCARBOROUGH: Sure

JUDGE EDWARDS: -- the question.

MR. SCARBOROUGH: Sure

JUDGE EDWARDS: And we answered the question.

MR. SCARBOROUGH: Sure.

JUDGE EDWARDS: We said VII, Title VII did not foreclose the APA because they were different.

Transcript of Oral Argument at 50-51 (Addendum 5).

Indeed, on brief, the government conceded that “*McKenna* simply confirms the unexceptional principle that, in the context of a suit challenging discrete agency action (there a firing), a plaintiff may challenge the agency’s failure to follow mandatory procedures.” *Garcia* Brief for the Appellee at 40. That is precisely what Plaintiffs-Appellants seek to the instant case. Each plaintiff-appellant alleges that he or she is the victim of specific, discrete agency actions violative of the anti-discrimination provisions of ECOA and the APA and each plaintiff-appellant also challenges USDA’s failure to follow mandatory procedures that required USDA to process and investigate complaints of discrimination brought by producers such as Plaintiffs-Appellants. Ultimately, if farmers such as Plaintiffs-Appellants are to

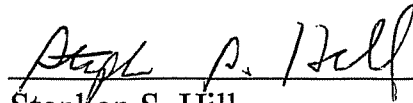
have any hope of maintaining their existence as farmers, they must have equal access to USDA credit and non-credit programs; and when that access is unlawfully denied, they must have meaningful access to the administrative complaint process that USDA's regulations mandate. The vindication of such rights clearly requires this Court to reverse the panel's affirmance of the district court's dismissals of Plaintiffs-Appellants' APA claims. Moreover, there is no principled basis upon which Hispanic or women farmers can be denied the same right to pursue their claims as African American and Native American farmers. That the remedies available to African American farmers in *Pigford* and Native American farmers in *Keepseagle* have received this Court's approval adds considerable weight to the Hispanic and women farmers' claims for the same remedies for the same pervasive discrimination. Indeed, to do otherwise would implicate basic questions regarding the administration of justice. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (noting the importance of fairness which gives "the feeling, so important to a popular government, that justice has been done") (quoting *Joint Anti Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951)).

CONCLUSION

For the foregoing reasons, this Court should grant rehearing *en banc* of Plaintiffs-Appellants' petition for review of the district court's 11/30/07 Orders dismissing *Garcia* and *Love* Plaintiffs-Appellants' APA failure-to-investigate claims.

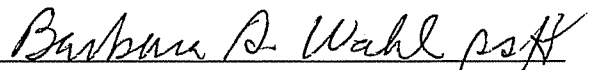
Respectfully submitted,

Of Counsel:
Alan M. Wiseman
Robert L. Green
Kenneth C. Anderson
Howrey LLP
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004



Stephen S. Hill
HOWREY LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

COUNSEL FOR PLAINTIFFS-APPELLANTS GUADALUPE L. GARCIA, JR.,
ET AL.



Marc L. Fleischaker, # 004333
Barbara S. Wahl, # 297978
Kristine J. Dunne, #471348
Jennifer A. Fischer, #502963
ARENT FOX LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
Phone (202) 857-6000
Facsimile (202) 857-6395

Roderic V.O. Boggs
Susan E. Huhta, #453478
WASHINGTON LAWYERS'
COMMITTEE FOR CIVIL RIGHTS
AND URBAN AFFAIRS
11 Dupont Circle, N.W., Suite 400
Washington, D.C. 20036
Phone (202) 319-1000
Facsimile (202) 319-1010

Alexander John Pires, Jr., # 185009
4401 Q Street, N.W.
Washington, D.C. 20007
Phone (202) 338-0382

Phillip L. Fraas, # 211219
818 Connecticut Avenue, NW

12th Floor
Washington, D.C. 20006
Phone (202) 223-1499
Facsimile (202) 223-1699

COUNSEL FOR PLAINTIFFS-APPELLANTS ROSEMARY LOVE ET AL.