No. 22-8079

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Leisl Carpenter,
Plaintiff-Appellant,

v.

Thomas Vilsack, United States Department of Agriculture Secretary, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Wyoming
No. 21-cv-00103-NDF, The Honorable Nancy D. Freudenthal

REPLY BRIEF OF PLAINTIFF-APPELLANT LEISL CARPENTER

Oral Argument Requested

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INTRODUCTION

Appellees concede that they succeeded in paying out at least $160,218 under Section 1005, before it was halted by the District Court for Eastern District of Wisconsin on June 10, 2021. And they do not contest the District Court's characterization of Section 1005: "Suffice to say that Section 1005 provided debt relief to farmers and ranchers based on race." [ER 293] Furthermore, they have never disputed that Appellant Leisl Carpenter (Carpenter) would have met all eligibility requirements for debt relief under Section 1005, but for her race. Last, they do not seriously challenge Carpenter's argument that there is no "*de minimis*" exception to the Constitution's guarantee of equal protection, such that either the amount of the aggregate payments, or the number of payment recipients, is relevant to the question of mootness.

Instead, Appellees focus on what we already know: Section 1005 was repealed by Congress in August 2022, as one provision of the Inflation Reduction Act. That fact alone, they assert, entails that Carpenter's lawsuit is moot, and that there is no redress for the racially discriminatory payments that were made under Section 1005.

The breadth of Appellees' argument is troubling. It would apply equally to any racially discriminatory payments made by any state actor, including states and localities. And it would create perverse incentives, such as encouraging state actors

to obfuscate the fact that racially discriminatory payments will soon be made, and then rushing out payments prior to courts enjoining them. Once enjoined, state actors could simply repeal that specific program, relying on Appellees' theory of mootness.

For this Court to offer such a roadmap would also place an incredible amount of stress on the judiciary, forcing it to swiftly entertain motions for temporary restraining orders, brought by parties trying to prevent as many racially discriminatory payments as possible from being made. And it would mean that the vagaries of judges' individual schedules—when briefs can be read, when hearings can be set, and when opinions may be written—would determine how many irremediable constitutional violations occurred before an injunction were entered. Moreover, it goes without saying that individuals of any race may be the victims of racial discrimination, in a world where state actors are immune from legal challenge, so long as a payment program is repealed once it is enjoined.

This Court should reject such a conclusion, and reverse the District Court's ruling, to determine, at a minimum, what remedy is available to address Appellant's ongoing injury.

I. There is an Ongoing Equal Protection Injury that May Still be Redressed.

"This dispute is still very much alive." *Chafin v. Chafin*, 568 U.S. 165, 173 (2013); *see also Powell v. McCormack*, 395 U.S. 486, 489 (1969) (rejecting mootness arguments regarding House member who was excluded from 90th

Congress, even though he was seated in the 91st Congress, because of a claim for backpay); *see also Milliken v. Bradley*, 433 U.S. 267, 287-88 (1977) ("Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures.").

Notably, Appellees do not contend that they have ever undone their partial implementation of Section 1005, or that the Inflation Reduction Act has led to the USDA taking any action with respect to the payments that occurred under Section 1005. Indeed, save for an argument about her residency in Wyoming, Appellees do not even seriously contest that when payments were made pursuant to Section 1005, they unconstitutionally injured Carpenter, because she was denied the equal protection of the laws.

The fact is that mere repeal of Section 1005 is insufficient to correct that injury, and there is still a judicial order available that would have a concrete effect on the real world. *See Milliken*, 433 U.S. at 290 ("[T]he victims of Detroit's de jure segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct."); *Lorance v. Commandant, U.S. Disciplinary Barracks*, 13 F.4th 1150, 1164 (10th Cir. 2021) (reversing dismissal of habeas challenge even after a Presidential pardon because "a case becomes moot only when it is impossible for a

court to grant any effectual relief whatever to the prevailing party.") (internal bracket and quotation marks omitted). This Court should thus reverse the District Court's dismissal of Carpenter's Complaint.

a. Repeal of a Program Does Not Eliminate a Pre-Existing Equal Protection Injury.

Carpenter was injured when payments were made pursuant to Section 1005, because her differential treatment based on race could never have satisfied strict scrutiny. *See, e.g.*, *Faust v. Vilsack*, 519 F. Supp. 3d 470, 475 (E.D. Wisc. 2021) ("Defendants lack a compelling interest for the racial classifications."); *id.* at 476 ("Defendants have not established that the remedy is narrowly tailored."); *Holman v. Vilsack*, No. 21-1085-STA-jay, 2021 WL 2877915, *10 (W.D. Tenn. Jul. 8, 2021) ("However important the goal of eliminating the vestiges of prior race discrimination, and it is important, the government's efforts cannot withstand strict scrutiny."). Appellees have never disputed that Section 1005 was in fact unconstitutional. The inequality stemming from a partial implementation of that program remains.

Appellees misunderstand the point by litigating whether Carpenter can prove that the government intends on reenacting Section 1055. [Answer Brief at 20.] First, Carpenter does not allege a future injury from the reenactment of the program, but rather an ongoing injury from the repealed program. Second, Carpenter is not asking this Court to *assume* that the government engaged in "gamesmanship" to moot this case. The government has publicly announced that the repeal of Section 1005 was

based on the difficulty of overcoming its legal challenges. *See* Ellyn Ferguson, The Hill, *Civil rights lawyer Crump sues US over repealed aid to Black farmers* (Oct. 12, 2022) ("[T]he $5 billion that was intended to help farmers was frozen by three nationwide injunctions that prevented USDA from getting payments out the door. … This litigation would likely have not been resolved for years," Perry said in a statement.") (quoting Melissa Perry, Spokeswoman for USDA).[1]

Moreover, Appellees' arguments that Carpenter's injury has ended, and that she has no continuing stake in the outcome of this litigation, are contrary to settled law. The Supreme Court's school desegregation cases, for instance, could not exist in a regime where past constitutional injuries were moot, so long as the underlying policy triggering the injury is repealed. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."); *id.* at 28 ("The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some."); *Louisiana v. U.S.*, 380 U.S. 145, 154 (1965) ("We bear in mind that the court has not merely the power but the duty to render a decree which will *so far as possible eliminate the*

[1] https://rollcall.com/2022/10/12/civil-rights-lawyer-crump-sues-us-over-repealed-aid-to-black-farmers/

discriminatory effects of the past as well as bar like discrimination in the future.") (emphasis added).

While *Swann* was issued in the specific context of the gross evil of race-based school segregation, Appellees have never contended that the case is *sui generis*. Indeed, *Swann* expressly announced that its application of equity principles did "not fundamentally differ from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann*, 402 U.S. at 15-16. And the Tenth Circuit has confirmed this reading of its own cases. *See Dowell by Dowell v. Bd. of Educ. of Okla. City Pub. Sch., Indep. Dist. No. 89, Okla. City, Okla.*, 890 F.2d 1483, 1489 n. 8 (10th Cir. 1989) (reversed on other grounds in *Bd. of Educ. of Okla. City Pub. Sch., Indep. Sch. Dist. No. 89, Okla. Cnty., Okl. v. Dowell*, 498 U.S. 237 (1991)) (rejecting the argument that "the usual standards applicable to federal law on injunctive remedies are inapposite" in school desegregation cases); *see also Ayala v. Armstrong*, No. 1:16-cv-00501-BLW, 2017 WL 3659161, *2 (D. Id., 2017) (applying desegregation equitable principles in post-*Obergefell* gay marriage context); *Ruiz v. Scott*, No. CIV.A. H–78–987, 1996 WL 932104, *9 (S.D. Tex., 1996) (applying desegregation equitable principles in Prison Litigation Reform Act context). Lest there be any doubt: it will be far easier to apply equitable principles to remedy the discriminatory effects of Section 1005 than system-wide discrimination that was perpetuated for decades.

In response, Appellees raise the specter that if Carpenter is injured, there is nothing to stop future plaintiffs from emerging based on discriminatory treatment that occurred generations ago. Appellees fail to cite a single case to demonstrate that this has ever been a problem, nor do they answer how equitable principles could realistically apply in such situations. And Appellees ignore settled law around laches. *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y*, 544 U.S. 197, 217 (2005) ("It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief.").

b. Carpenter's Residence in Wyoming, as Opposed to New Mexico, Does Not Alter Her Injury.

"The injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on an equal footing." *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 211 (1995) (internal bracket and quotation marks omitted). "The aggrieved party need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.* at 211 (internal quotation marks omitted).

In a footnote in their Reply brief before the District Court, the government threw out the idea that Carpenter could not maintain her claim because she lived in Wyoming, and the recipients of the test payments all lived in New Mexico, based on non-statutory, internal agency decision-making. [ER 288, n. 5.] Carpenter has never had a chance to depose the individual who asserted such facts, nor has discovery been taken to determine what other actions were taken under Section 1005, besides

at least four test payments. Nor does the website cited by Appellees make any mention of where the recipients lived. [Answer Br. at 6.]

In any event, even crediting Appellees' arguments, that is simply not how the injury in an equal protection context works. *See, e.g.*, *Eng'g Contractors Ass'n of South Fla. Inc. v. Metro. Dade Cnty.*, 122 F.3d 895, 906 (11th Cir. 1997) ("When the government loads the dice that way, the Supreme Court says that anyone in the game has standing to raise a constitutional challenge."); *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1248 (4th Cir. 1996) ("[T]he injury Appellees suffered is the ignominy and illegality of the City's erecting a racial bar to promotions…"); *see also Sullivan v. Benningfield*, 920 F.3d 401, 408 (6th Cir. 2019) ("Plaintiffs need not show the denial of an independent right to make out an Article III injury in fact.").

To be clear, there is no dispute that Carpenter would have been eligible for debt relief under Section 1005, other than the fact that she is Caucasian. Again, Appellees' own evidence shows that eligibility turned on Carpenter's skin color, noting that recipients of Section 1005 "[*d]o not need to apply*. …" [Answer Br. at 6, citing to SAM.gov (failing to mention state residency, and merely noting that: "Payments are limited to those direct and guaranteed FSA loan borrowers who had debt outstanding as of January 1, 2021, *and are a racial or ethnic minority*.") (emphasis added).]

Yet Appellees assert that non-statutory, intra-agency considerations defeat her injury-in-fact. They cite no legal authority for the proposition that even where a statute's text gives rise to an equal protection violation, a narrow implementation of the statute nevertheless defeats standing. Case law is to the contrary. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a *discriminatory policy* prevents it from doing so on an equal basis.") (emphasis added); *see id.* at 667 (referring to "discriminatory classifications"); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 493 (10th Cir. 1998) ("[I]t is clear that defendant's *stated policy* 'caused' the plaintiff to compete at a disadvantage vis-a-vis long-term residents…") (emphasis added).

Any other rule would lead to bizarre outcomes, given that federal agency officials have no inherent authority to act without congressional delegation based on the text of statutes. Clever bureaucrats could easily evade legal challenges through arbitrary administrative choices. This is not the law, and if it were, it would invite gamesmanship through informal modifications of unconstitutional programs, to avoid pending suits for injunctive relief, based on the identity and location of existing plaintiffs. In other words, Appellees' argument would entail that the Secretary of Transportation could have mooted *Adarand* itself, merely by post-hoc

limiting highway contract bids to subcontractors outside of Colorado. That cannot be.

II. Because Carpenter Maintains a Redressable Injury, the Case is not Moot.

Appellees rely on hornbook law regarding general principles of mootness. But they cite no case supporting the proposition that courts disregard prior and ongoing equal protection injuries merely because the underlying statute that authorized those injuries is subsequently repealed. Indeed, settled case law confirms the opposite. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010) (a case is moot only when "events have completely and *irrevocably eradicated the effects of the alleged violation*"); *Galvez-Letona v. Kirkpatrick*, 3 Fed. Appx. 829, 832 (2001) (rejecting INS's mootness argument where the Court's ruling determined whether an immigrant became a citizen in 1999, or after Congress amended federal law in 2000); *see also Equal Emp't Opportunity Comm'n v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1173 (10th Cir. 2017) (rejecting a claim of mootness where the Court's decision would potentially affect a separate state law claim raised in state court).

By contrast, Appellees' cases are unpersuasive. Appellees rely most heavily upon *Cnty. of Suffolk, N.Y. v. Sebelius*, where an Administrative Procedure Act challenge was brought against the allocation of certain funds by the Department of Health and Human Services. 605 F.3d 135, 137 (2010). The Second Circuit held that

the challenge was moot, because the funds at issue had already been spent. But importantly, *County of Suffolk* was not an equal protection case, where a possible remedy is the recoupment of the illegally-disbursed funds, and the plaintiff did not allege that HHS's distribution of funds was unconstitutional. Indeed, the only reason that the Second Circuit affirmed on the issue of mootness was because of sovereign immunity. *Id.* at 141 ("A claim seeking the former type of relief [of compensation] falls outside the scope of the waiver of sovereign immunity arising from § 702 of the APA.").

Appellees do not, however, contend with the cases cited by Carpenter in her Opening Brief, which all fall into the context of equal protection claims. [Opening Brief, at 16-18.] Nor do they address the case law establishing that there is no bar to relief in this case based on sovereign immunity. [Opening Brief, at 18-19.][2]

Appellees cite only a handful of cases involving mootness where the underlying injury was connected to equal protection principles. For instance, in *U.S*

[2] For what it is worth, the Solicitor General of the United States recently articulated the distinction between remedial responses to APA injuries and equal protection injuries: General Prelogar: "I think that the equal protection cases are fundamentally different because, there, your injury is your complaint of unequal treatment. And so, whether you level up or level down, your injury is being redressed. You're no longer being subject to unequal treatment, and, instead, everyone is being subject to the same treatment." *See* Oral Argument before the U.S. Supreme Court in *Department of Education v. Brown*, No. 22-535, 7:23-8:5 (Feb. 28, 2023), at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-535_4g15.pdf

Dep't of Treasury, Bureau of Alcohol, Tobacco, and Firearms v. Galioto, 477 U.S. 556 (1986) (*Galioto*), the Supreme Court held that a challenge to a firearms law that prevented formerly involuntarily committed mental patients from purchasing firearms was moot. *Id.* at 558 ("[A]ppellee brought suit in the United States District Court for the District of New Jersey, challenging the constitutionality of the firearms legislation."). When a new statutory scheme was adopted that permitted some former patients to obtain firearms, it fairly mooted the District Court's findings that former patients were "singled out" by the new law, or that there was an "irrebuttable presumption" against such former patients.

In other words, the new statute in *Galioto* fully leveled the playing field, and the plaintiff obtained all of the relief that he sought. *Id.* at 559 ("The new approach affords an administrative remedy to former mental patients *like that Congress provided for others prima facie ineligible to purchase firearms*.") (emphasis added). By contrast to *Galioto*, when a change in the law merely prevents future harm from occurring, courts reject the idea of mootness. *See Sullivan*, 920 F.3d at 410 ("Where the changes in the law arguably do not remove the harm or threatened harm underlying the dispute, the case remains alive and suitable for judicial determination.") (cleaned up); *Haitian Refugee Ctr. v. Civiletti*, 503 F.Supp. 442, 467 (S.D. Fla. 1980) ("[T]his court can see no possible constitutional or prudential rationale for holding that this case has been rendered moot by INS's amendment of

its own regulations."); *cf. In re A.H.*, 999 F.3d 98, 107 (2d Cir. 2021) ("Having concluded that the petitioners suffered status-based discrimination when the school districts denied their TTP funding requests, the district court was required to provide a remedy that would restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.") (internal quotation marks omitted). [3]

Galioto would be a valuable precedent for Appellees here only if Section 1005's repeal in the Inflation Reduction Act had also *included* a remedy for the injuries that Section 1005 already caused before it was halted in June 2021. But a simple repeal, without more, does not put Carpenter in the same place she was before Section 1005. Moreover, even in *Galioto*, the Court did not dismiss the entire case as moot. Instead, it remanded to the District Court for further proceedings. *Id.* at 560 ("[S]ince appellee's complaint appears to raise other issues best addressed in the first instance by the District Court, we also remand the case for further proceedings consistent with this opinion.").

[3] Again, the Solicitor General recently touched on this issue: General Prelogar: "[I]n the equal protection context, you don't know ex ante what the remedy is going to be. But the Court has determined that doesn't affect standing because, either way, no matter what remedy occurs, based on the equal protection injury, it's going to fix the nature of the harm of providing unequal treatment."). *See* Oral Argument before the United States Supreme Court in *Department of Education v. Brown*, No. 22-535, 9:8-15.

The same analysis holds in Appellees' other case involving equal protection principles, *United Bldg. & Constr. Trades Council of Camden City & Vicinity v. Mayor & Council of Camden*, 465 U.S. 208 (1984) (*United Building*). In that case, the Supreme Court analyzed a challenge to a Camden, New Jersey law requiring that at least 40% of the employees of contractors and subcontractors working on city construction projects be residents of Camden. The challenge was brought by "an association of labor organizations…." *Id.* at 212.

Initially, the law required that a "Camden resident" be someone who had lived in the city for at least one year. *Id.* at 211. But that provision was repealed during the course of the litigation, and the Court mentioned in passing that the change mooted the "equal protection challenge based on that durational requirement." *Id.* at 213. In other words, the challenge to the residency requirement was moot because the exact residency requirement that was being challenged was repealed. Once again, the plaintiff fully obtained the relief that it sought.

That is a far cry from the instant matter, where Appellant is seeking to remedy the equal protection violation that occurred in June 2021, and for which the Inflation Reduction Act offered no remedy. Indeed, for *United Building* to be relevant in this context, it would have had to involve the loss of a city contract, or some other lingering injury that was not remedied, after the residency requirement was repealed. Without that, it bears little relevance to this dispute. *See also Sullivan*, 920 F.3d at

411 ("[T]he statute fails to stop the differential treatment Plaintiffs continue to suffer: not receiving the sentencing credit that was awarded to inmates who forfeited their fundamental right to procreate.").

III. The Court Could Issue an Order that Has Real-World Effect.

The "knotty questions" surrounding the proper remedy for an equal protection violation are not unheard of. *See Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2354 (2020). But that is not the same thing as saying that a remedy does not exist. "[E]ven the availability of a 'partial remedy' is sufficient to prevent [a] case from being moot." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (quoting *Church of Scientology of Cal. v. U.S.*, 506 U.S. 9, 13 (1992)). Indeed, Appellees do not squarely deny that clawing back the funds they rushed to unconstitutionally disburse in the face of litigation is an available remedy. *Accord Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 247 (1931) ("The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced."); *C.M. ex rel. Marshall v. Bentley*, 13 F. Supp. 3d 1188, 1204 (M.D. Ala. 2014) ("But the requested injunction is an acknowledged (though mean-spirited) remedy, if in fact the AAA's enforcement violates Plaintiffs' equal protection rights."). Appellees implicitly acknowledge that this is an available remedy, couching their objections instead in pleading formalities, estoppel, and other equitable concerns.

For instance, with respect to a claw back or recoupment of funds, the government has a "long-established right to sue for money wrongfully or erroneously paid from the public treasury." *Modoc Lassen Indian Hous. Auth. v. U.S. Dep't of Hous. and Urban Dev.*, 881 F.3d 1181, 1193 (10th Cir. 2017) (quoting *United States v. Wurts*, 303 U.S. 414, 416 (1938)). Appellees may find this option unpalatable, but this is a mess of its own making. And while the parties dispute whether Carpenter is eligible to receive a payment to be "leveled up," Appellees do not deny that they argued to district courts across the country—in opposing motions for preliminary injunction—that the judiciary may re-write congressional statutes to achieve constitutional compliance. [Opening Br. at 31-32.]

There are, perhaps, other options. Appellees do not deny that Carpenter has welcomed suggestions for other forms of relief, if they believe that such relief would address Carpenter's injury. [Opening Brief, at 16 ("Courts have long held that it is plainly permissible to order government officials to undo the constitutional damage that they have done in the past.").] Should this case reach the remedies stage, Carpenter continues to welcome further suggestions. But that is different from asserting that Carpenter may never have her day in court, despite plainly having an injury. *Chafin*, 568 U.S. at 174 (An "argument—which goes to … the legal availability of a certain kind of relief—confuses mootness with the merits.").

Appellees' position that Carpenter has yet to suggest the perfect remedy amounts to no more than asking to be spared from making the hard choices attendant in remedying the injury caused by the "sordid business" of "divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (opinion of Roberts, C.J.).

As a last resort, Appellees attempt to invoke "prudential" standing, for the first time. [Answer Br. at 29-30.] This is an argument that was never raised below, and Appellees do not attempt to satisfy the elements of plain-error review. This Court should therefore treat this argument as forfeited. *See Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127, 1130-31 (10th Cir. 2011) ("Our adversarial system endows the parties with the opportunity—and duty—to craft their own legal theories for relief in the district court.").

In any event, the Supreme Court has cast significant doubt on the scope of the prudential standing doctrine. *See Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (prudential standing is a "doctrine not derived from Article III"). What remains of the doctrine can be summarized in three limitations: (1) the general prohibition on a litigant's raising another person's legal rights; (2) the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches; (3) and the requirement that a plaintiff's complaint

fall within the zone of interests protected by the law invoked. *Lexmark*, 572 U.S. at 126. None of Appellees' assertions fall into any of these three categories.

Certainly, the equitable concerns raised by Appellees are not a basis for dismissal when Article III jurisdiction is not in doubt. *See Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (courts have a "virtually unflagging" obligation to resolve cases falling within their jurisdiction). Appellees, for instance, tell us that the New Mexico recipients "acted in reliance" on the payments, and that the funds were "very likely spent." [Answer Br. at 29.] But we don't know anything about these recipients. The District Court never possessed competent proof that these farmers were even in New Mexico, or how they were paid. Appellees cite merely to a declaration of a witness submitted in another case (who has never been deposed), and a government website that says nothing about where the recipients were located, as support for their claim that the payments "were made by electronic transfer to the recipients' bank accounts and reported as taxable income to the Internal Revenue Service." [Answer Br. At 6.]

Perhaps the recipients of Section 1005 payments farmers were wealthy ranchers. Perhaps they have not spent the money. Perhaps they were even part of prior settlement awards for farmers who were actually discriminated against. *See Pigford v. Glickman*, 206 F.3d 1212, 1219 (D.C. Cir. 2000) (calling settlement for victims of USDA "an indisputably fair and reasonable resolution of the class

complaint."). Even if equitable considerations *could* mean that a court should not order this remedy, it is premature to draw that conclusion prior to discovery calculated to show whether it *is* equitable. *See LeBlanc-Sternberg v. Fletcher*, 104 F.3d 355, *3 (2d Cir. 1996) (Table) ("In the past, this and other circuits have allowed federal district courts to make changes to, and even strike whole portions of, statutory codes to cure constitutional violations by local municipalities and ensure that the municipality did not violate the Constitution in the future.").

IV. Carpenter is Not Estopped from Seeking Relief.

Nor is Carpenter estopped from mentioning the possibility of clawback as a remedy, simply because of how other attorneys representing other plaintiffs in other Section 1005 cases argued, when seeking an injunction that this plaintiff never requested. It is true that the *Miller* plaintiffs argued that, as a practical matter, clawing back $5 billion in USDA funds spread throughout the country was not realistic. This argument, however, did not succeed in *Miller*; instead, the court found an irreparable harm on other bases. [*See* ER 090-091 (*Miller* order at 20-21 (ruling that a constitutional deprivation is inherently irreparable)]. Without more, that is enough to avoid any form of estoppel. *See Eastman v. Union Pac. R.R.,* 493 F.3d 1151, 1156 (10th Cir 2013) (the party must "succeed[] in persuading a court to accept that party's former position"). And even though Carpenter was forced into the *Miller*

class, she was not the "party" who made the clawback argument that she is allegedly estopped from making now.

Moreover, it would be bizarre to apply estoppel here. *See New Hampshire v. Maine*, 532 U.S. 742, (2001) (estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (internal quotation marks omitted). It would be anything but equitable to estop Carpenter from merely suggesting potential remedies now, based on losing arguments made by attorneys she has never spoken to in *another* case, when she unsuccessfully opposed a stay before the district court in *this* case on the very grounds that she did not wish to have her fate determined by "different counsel" with "no control over its pace or *legal theories*." [ER 100.]

V. The Court Should Reject Appellees' Alternative Argument that Carpenter's Suit is Moot Based on the Relief Pleaded in the Complaint.

Once again, Appellees did not argue before the District Court that Carpenter's Complaint did not adequately plead the relief she seeks. [ER 289 (only arguing that demanding reimbursement lacks a legal basis).][4] This Court should therefore treat

[4] Note that Carpenter even flagged for Appellees that they had not raised this issue before the District Court, and yet they still chose not to argue before this Court that they have satisfied the "plain error" standard. [*See* Opening Brief, at 33 ("Appellees did not make any argument for the District Court that Appellant insufficiently pleaded her injury in her complaint.").]

this argument as forfeited. *See Richison*, 634 F.3d at 1130-31. Here, Appellees have not even attempted to satisfy the elements of plain error review.

In any event, Appellees' argument is a non-starter. The question of mootness does not turn on the plaintiff's specific request for relief. *See Rezaq v. Nalley*, 677 F.3d 1001, 1010 (10th Cir. 2012) ("A case is not moot when there is *some* possible remedy, even a partial remedy *or one not requested by the plaintiff*.") (emphasis added); *Igiebor v. Barr*, 981 F.3d 1123, 1129-30 (10th Cir. 2020) (same); *see id.* at 1129 ("This court concluded redress was still possible because the plaintiffs had not been returned to the condition they were in prior to their transfer to the maximum-security facility.").

Moreover, Carpenter was absolutely entitled to relief under Fed. R. Civ. P. 54(c), which allows parties to obtain relief "even if the party has not demanded that relief in its pleadings." Appellees impliedly concede that the District Court could have held in her favor, given that Carpenter identified this relief below. [ER 244-45 ("Nevertheless, the prayer for relief in her complaint fairly encompasses the unwinding of the implementation of Section 1005.").] However, Appellees argue now that Carpenter's request for "such other and further relief as the Court deems appropriate" is an insufficient basis to request this remedy on appeal. But the cases it cites are to the contrary.

For instance, Appellees rely on *Town of Portsmouth, R.I. v. Lewis*, 813 F.3d 54, 61 (1st Cir. 2016). That case, however, squarely recognized that "a district court may grant relief not sought in the complaint" and that Rule 54(c) "could apply" to cases where "a general prayer for relief" is made. *Id.* at 61. It also recognized that despite a repeal of a specific road toll provision, "the Town would seem to have a sufficiently continuing interest in the restitution of the illegally collected tolls." *Id.* at 60; *id.* at 61 ("[A]n adequately pled claim for restitution would not be moot."). Consistent with these holdings, the First Circuit held that the request for restitution failed because it was conditioned the claim on "now moot claims for injunctive and declaratory relief," and because the plaintiff raised new arguments in its reply brief, forfeiting its theory. *Id.* at 62 ("Whatever merit this argument may have in the abstract, we do not ordinarily consider arguments raised for the first time in an appellant's reply brief.") (internal citations omitted). For these reasons, *Town of Portsmouth* is entirely inapposite to this matter.

Similarly, Appellees rely on *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1977). But that case, in which the plaintiff left her employment during the course of the appeal, is even further afield. The plaintiff alleged that her case remained a live controversy because she sought a retrospective damages award against a state under 42 U.S.C. § 1983, despite that being a legal impossibility. *Id.* at 69 ("The stopper was that § 1983 creates no remedy against a State."). Appellees'

reference to a "close inspection" of a general prayer of relief "extracted late in the day" was merely a reference to a collusive effort between the plaintiff and a friendly intervening state to try and save an otherwise moot claim, by strategically waiving sovereign immunity. [Answer Br. at 26]; s*ee Arizonans for Official English*, 520 U.S. at 71 (describing "the federal courts' lack of authority to act in friendly or feigned proceedings"); *Chicago United Industries, Ltd. v. City of Chicago*, 445 F.3d 940, 948 (7th Cir. 2006) (distinguishing *Arizonans for Official English* in its case "because the litigation had barely begun before it came to us."). The case has no bearing, however, on whether Rule 54(c) permits Carpenter to request a specific remedial measure that addresses the injury that she has already properly alleged.

In the same vein, Appellees' reliance on *Peterson v. Bell Helicopter Textron, Inc*., 806 F.3d 335, 340-41 (5th Cir. 2015), is misplaced. *Peterson* was a monetary damages suit, where injunctive relief was not requested until after a verdict was rendered. The court merely held that allowing injunctive relief would unfairly prejudice defendants. *Id.* at 340 (rejecting that Rule 54(c) could be used strategically to provide for "trial by ambush"). By contrast, Carpenter has never gotten out of the gate, unquestionably requested injunctive relief in some form in the complaint, and, in opposing the motion to dismiss (of a case that was stayed at the outset), Carpenter specifically suggested the possibility of fund recoupment. [ER 244-45 ("Plaintiff was trying to prevent Section 1005 from unlawfully discriminating against her, in

any form.")].[5] Appellees do not begin to argue that Carpenter's lawsuit has "ambushed" them.

While Appellees' cases regarding Rule 54(c) are all inapposite, to be clear, Carpenter still contends that she adequately pleaded for relief in this context, regardless. [*See* Opening Brief, at 33-35; ER 244-45]; *see also Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus. … A declaratory judgment can then be used as a predicate to further relief, including an injunction."). If this Court chooses to reach the merits of this argument, it may still hold that the prayer for relief, as written, logically includes relief that remedies her equal protection injuries.

In any event, if this Court is truly concerned about Carpenter's prayer for relief, the proper route is to hold that the dispute is not moot and reverse the District Court with instructions to allow the amendment of the complaint. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires."); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482 (1990) ("[I]n instances where the

[5] Another case cited by Appellees, *Whitehead v. Marcantel*, 766 F. App'x 691, 702 (10th Cir. 2019) lacks any mention of Rule 54(c). It merely held that a litigant waived an argument for an official capacity suit by not raising it in his opening appellate brief. *Id.* at 702 ("[W]hile Mr. Whitehead requested injunctive relief in the district court, he did not argue this point in his opening brief. Therefore, this claim is waived."). *Whitehead* lacks any relevance to Carpenter's suit.

mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.").

VI. Affirming the District Court Would Provide a Judicial Roadmap to Race Discrimination.

This case is uniquely suited for resolution because it involves monetary payments that can, as two examples, either be matched with respect to Carpenter, or clawed back with respect to prior recipients. And the Court need not address issues regarding the equitableness of dislodging prior actions that were taken generations ago. *Accord Church of Scientology of Cal. v. U.S.*, 506 U.S. 9, 12 (1992) ("While a court may not be able to return the parties to the status quo ante—there is nothing a court can do to withdraw all knowledge or information that IRS agents may have acquired by examination of the tapes—a court can fashion some form of meaningful relief in circumstances such as these.").

While Section 1005 has been repealed, it will not be the last program where state actors make racially discriminatory payments. *See, e.g.*, Anisha Kohli, TIME MAGAZINE, *California Could Set the Standard for a Historic Reparations Program* (May 11, 2023) ("A team of politicians, academics and legal experts in California voted to move forward with a proposal on establishing reparations, including

compensation, for millions of Black Californians this week.")[6]; PBS NEWS HOUR, *What are the next steps for Black reparations in San Francisco?* (Mar 16, 2023); Aaron Sibarium, FREE BEACON, *Universal Basic Income Hits the Bay Area—If You're Black* (Dec. 13, 2022)[7] ("At least three guaranteed income initiatives in the San Francisco Bay Area openly discriminate against white residents, limiting or entirely preventing their participation in programs that dole out no-strings-attached cash."); ("San Francisco supervisors have backed the idea of paying reparations to Black people ….")[8]; Editorial Board, WALL STREET JOURNAL, *Fannie Mae's New Racial Bias* (June 13, 2022) ("The government-sponsored housing giant embraces race-based subsidies.").[9]

In the end, Appellees' theory of mootness would immunize any and all payments made under these programs, even if the programs are enjoined part-way through implementation. Article III is not so limited. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to

[6] https://time.com/6279076/california-reparations-program-historic-standard/

[7] https://freebeacon.com/latest-news/universal-basic-income-hits-the-bay-area-if-youre-black/

[8] https://www.pbs.org/newshour/nation/what-are-the-next-steps-for-black-reparations-in-san-francisco

[9] https://www.wsj.com/articles/fannie-mae-freddie-mac-fhfa-housing-finance-agency-racial-favoritism-equity-biden-bubble-market-redlining-mortgage-lending-11655059365

deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *see also Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 66 (1992) ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court…").

CONCLUSION

This case is not moot. The Court should reverse the District Court, and remand for further proceedings.

DATED this 18th day of May 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the requirements of Fed. R. App. P. 27(d) and Circuit Rules 27-1(1)(d) and 32-3(2) because it has 6,442 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED this 18th day of May 2023.

/s/ William E. Trachman
William E. Trachman

CERTIFICATE OF ELECTRONIC FILING

In accordance with this Court's CM/ECF User's Manual and Local Rules, I hereby certify that the foregoing has been scanned for viruses with Sentinel One, updated May 18th, 2023, and is free of viruses according to that program.

In addition, I certify that all required privacy redactions have been made and the electronic version of this document is an exact copy of the written document to be filed with the Clerk.

DATED this 18th day of May 2023.

/s/ William E. Trachman
William E. Trachman

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2023, the foregoing **REPLY BRIEF OF PLAINTIFF-APPELLANT LEISL CARPENTER** was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system and that a PDF copy of this motion will be emailed to opposing counsel immediately after it is filed.

DATED this 18th day of May 2023.

/s/ William E. Trachman
William E. Trachman