No._____

In the Supreme Court of the United States

LEISL M. CARPENTER,

Petitioner,

v.

THOMAS J. VILSACK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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March 11, 2024

QUESTIONS PRESENTED

Section 1005 of the American Rescue Plan Act of 2021 established a debt relief program for "socially disadvantaged" farmers and ranchers. The United States Department of Agriculture (USDA) subsequently issued a Notice of Funds Availability defining "socially disadvantaged farmers and ranchers" based on race. Carpenter was ineligible for Section 1005 debt relief because she is Caucasian. Multiple lawsuits followed, including Carpenter's. Before Section 1005 was enjoined, at least four payments were made to recipients in New Mexico.

In 2022, Congress repealed Section 1005, but did not address the payments that USDA made before the repeal. In short, Congress has never fixed the imbalance between those who received a Section 1005 payment based on their race and those who did not.

Carpenter's suit was dismissed, based on (1) Carpenter's residence in Wyoming, not New Mexico, and (2) the government's argument that the repeal of Section 1005 mooted Carpenter's case.

This petition thus presents the following questions:

1. Whether, when a statute treats individuals differently based on race, a federal agency can defeat a plaintiff's standing after their complaint is filed by adding non-statutory factors to benefit distributions that are purportedly race neutral.

2. Whether the voluntary cessation doctrine applies when Congress repeals a statute, but when the government does not contend that it has eradicated the effects of its previous racially discriminatory conduct.

PARTIES TO THE PROCEEDING

Petitioner Leisl Carpenter was the plaintiff-appellant in the lower court proceedings in the Tenth Circuit and the U.S. District Court for the District of Wyoming.[1]

Respondents were defendants-appellees in the courts below. They are Thomas J. Vilsack, in his official capacity as Secretary of the United States Department of Agriculture; and Zach Ducheneaux, in his official capacity as Administrator of the Farm Service Agency (collectively, USDA or the USDA Respondents).

[1] Another plaintiff, Sara Rogers, also brought suit against Section 1005, and the parties agreed before the Tenth Circuit Court of Appeals to consolidate briefing, and that Rogers would be bound by the ultimate ruling in Carpenter's case.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case under Rule 14.1(b)(iii):

United States District Court (D. Wyo.):

- *Carpenter v. Vilsack,* No. 21-CV-0103-F (D. Wyo.), judgment entered on October 7, 2022.

United States Court of Appeals (10th Cir.):

- *Carpenter v. Vilsack*, No. 22-8079 (10th Cir.), petition for rehearing en banc was denied on December 12, 2023;
- *Carpenter v. Vilsack*, No. 22-8079 (10th Cir.), judgment entered on October 16, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Leisl Carpenter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Alternatively, Carpenter asks that this Court hold the petition, vacate the Tenth Circuit's decision, and remand in light of a case currently pending before this Court that will address mootness questions in the context of the voluntary cessation doctrine. *See Fed. Bureau of Investigation, et al., v. Yonas Fikre*, 22-1178.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 2023 WL 6810960 (not reported in the Federal Reporter), and reproduced at App. at 5a. The District Court's opinion for plaintiff-appellee Carpenter is reported at 2022 WL 20813305 (not reported in the Federal Supplement), and reproduced at App. at 33a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 2023. Petitioner timely filed for rehearing en banc, which was denied on December 12, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1005 of the American Rescue Plan Act of 2021 (ARPA) is reproduced in the appendix at App. 40a.

Carpenter seeks relief under the equal protection principles of the Fifth Amendment to the United States Constitution, as incorporated against the federal government. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). The Fifth Amendment to the U.S. Constitution is reproduced at App. at 42a.

STATEMENT OF THE CASE

I. Legal Framework

"It is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring). It is hard to imagine a more straightforward effort to discriminate than explicitly apportioning federal debt relief based on the color of one's skin. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 220 (2023) (*SFFA*) ("We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those who may have little in common with one another but the color of their skin.") (internal quotation marks omitted).

The Sixth Circuit recognized the irrationality of relying on race for COVID-19-related benefits in the context of another race-based subsidy program contained within ARPA. *See Vitolo v. Guzman*, 999 F.3d 353, 364 (6th Cir. 2021) ("[I]ndividuals who trace their ancestry to Pakistan and India qualify for special treatment. But those from Afghanistan, Iran, and Iraq do not. Those from China, Japan, and Hong Kong all qualify. But those from Tunisia, Libya, and

Morocco do not."); *accord SFFA*, 600 U.S. at 216 ("When asked at oral argument 'how are applicants from Middle Eastern countries classified, such as Jordan, Iraq, Iran, and Egypt,' UNC's counsel responded, 'I do not know the answer to that question.'") (cleaned up); *id.* at 291 ("Where do these boxes come from? Bureaucrats.") (Gorsuch, J., concurring).

Moreover, if race is even just one portion of the government's decision-making process, a plaintiff establishes an injury that suffices to meet the standing requirement under Article III. *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."); *see also Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (describing the holding of *Northeastern Florida* that a business was not required "to show that one of its members would have received a contract absent the ordinance in order to establish standing").

In other words, an equal protection injury is not simply the unfair outcome that might result, but rather "a discriminatory classification [that] prevents the plaintiff from competing on an equal footing." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995); *Fisk v. Bd. of Trs. of California State Univ.*, No.: 22-CV-173 TWR (MSB), 2023 WL 2919317, *9

(S.D. Cal. Apr. 12 2023) (characterizing the injury in *Regents of the Univ. of California, v. Bakke*, 438 U.S. 265 (1978), as "the medical school's decision not to permit him to compete for all 100 spots in the class . . . regardless of whether he could prove that he would have been admitted had he been allowed to compete for all 100 spots"). Put simply, Carpenter has standing to challenge Section 1005 if she suffered an injury even in part based on her race.

Separately, as for mootness, courts generally reject a defendant's mootness argument where, if the court entered the requested relief, it would impact the parties. "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted). By contrast, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* at 172 (emphasis added); *id.* at 176 ("However small that concrete interest may be due to potential difficulties in enforcement, it is not simply a matter of academic debate, and is enough to save this case from mootness.").

And where a defendant relies on its own voluntary cessation to establish mootness, the general rule is that courts may accept a showing of mootness if the government can satisfy two factors: first, there must be no reasonable expectation that the alleged violation will recur, and second, interim relief or events must have completely and irrevocably

eradicated the effects of the alleged violation. *See, e.g.*, *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979) (setting out two-part test); *see id.* at 631 ("When *both* conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.") (emphasis added).

In the context of voluntary cessation, the government bears a heavy burden in meeting the two-part standard to show that it has mooted a claim. *See West Virginia v. EPA*, 597 U.S. 697, 719 (2022) ("That burden is 'heavy' where, as here, the only conceivable basis for a finding of mootness in the case is the respondent's voluntary conduct.") (internal brackets and quotation marks omitted); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) ("It is no small matter to deprive a litigant of the rewards of its efforts . . . . Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.") (emphasis added).

II. Factual Background

President Biden signed ARPA on March 11, 2021. Section 1005 of its text was blunt. It provided up to 120% debt relief for certain "socially disadvantaged" farmers and ranchers. App. at 8a. That term was given the same meaning as it was in the Food, Agriculture, Conservation, and Trade Act of 1990. *See* 7 U.S.C. § 2279(a)(5) ("The term 'socially disadvantaged farmer or rancher' means a farmer or

rancher who is a member of a socially disadvantaged group."); 7 U.S.C. § 2279(a)(6) ("The term 'socially disadvantaged group' means a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.").

In USDA's Notice of Funds Availability, it specifically identified which racial demographics were therefore eligible for 120% debt relief: American Indians or Alaskan Natives, Asians, Blacks or African Americans, Native Hawaiians or other Pacific Islanders, and Hispanics or Latinos.

> *Socially Disadvantaged Farmer or Rancher* means a farmer or rancher who is a member of a socially disadvantaged group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities, as defined by section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a)). Members of socially disadvantaged groups include, but are not limited to:
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> American Indians or Alaskan Natives;
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> Asians;
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> Blacks or African Americans;
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> Native Hawaiians or other Pacific Islanders; and

Hispanics or Latinos.

See App. at 8a-9a; *see also* Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28329 (May 26, 2021).

Section 1005 was one of the most brazen race-based federal benefits programs in modern American history. For that reason, it was swiftly enjoined. *See Faust v. Vilsack*, 519 F. Supp. 3d 470, 476 (E.D. Wis. 2021) ("The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin.").

Petitioner Leisl Carpenter, a cattle rancher of Norwegian ancestry in Wyoming, had a qualifying loan but was ineligible for debt relief under Section 1005 based on her race. She brought suit in the United States District Court for the District of Wyoming on May 24, 2021, alleging that Section 1005 violated the equal protection principles of the Fifth Amendment to the United States Constitution.

Despite Carpenter's pending complaint, and motions for injunctive relief before the United States District Court for the Eastern District of Wisconsin and in other pending lawsuits, in June 2021, USDA began implementing Section 1005 by making test payments to farmers and ranchers in New Mexico. According to a USDA official, the choice of New

Mexico was based on the fact that "it had a relatively large volume of direct loan borrowers eligible for ARPA [debt relief] and a high level of experienced staff." App. at 9a.[2] Furthermore, USDA selected the specific individuals who were chosen to receive payments based on two other factors: (1) the borrowers being sole proprietors, rather than entities, and (2) "past interactions with [the Farm Service Agency] that reflected a willingness to be part of pilot initiative." App. at 9a. None of these factors were mentioned by Congress in ARPA, and none were even included in the USDA's Notice of Funds Availability.

After USDA began making payments, Section 1005 was halted by a Temporary Restraining Order entered by the Eastern District of Wisconsin on June 10, 2021. *See e.g., Faust*, 519 F. Supp. at 475 ("Here, Defendants lack a compelling interest for the racial classifications."); *see id*. at 478 ("Defendants are enjoined from forgiving any loans pursuant to § 1005 until the Court rules on Plaintiffs' motion for a preliminary injunction.").

Respondents conceded below that they paid out at least $160,218 under Section 1005. App. at 25a. And they did not contest the district court's characterization of Section 1005: "Suffice to say that § 1005 provided debt relief to farmers and ranchers based on race." App. at 34a. They also never disputed

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[2] Note that this factor is not race-neutral, since eligibility for ARPA was itself based on race. However, the district court and Tenth Circuit Court of Appeals considered the choice to select New Mexico as outcome-determinative for Carpenter's standing.

that Carpenter would have been eligible for relief under the statutory text of Section 1005, but for her race.

Following the Temporary Restraining Order, Section 1005 was subject to three preliminary injunctions. *See Holman v. Vilsack*, No. 21-1085-STA-jay, No. 21-1085-STA-JAY, 2021 WL 2877915, at *1 (W.D. Tenn., Jul. 8, 2021) ("Plaintiff will be irreparably harmed if he is denied his constitutional right to equal protection."); *Wynn v. Vilsack*, 545 F. Supp. 3d 1271 (M.D. Fla. 2021) ("To allow the perpetuation of discrimination in such a manner would undermine the Supreme Court's ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race.") (internal quotation marks omitted); *Miller v. Vilsack*, No. 4:21-cv-0595-O, 2021 WL 11115194, at *9 (N.D. Tex., Jul. 1, 2021) ("[T]he loan forgiveness program is simultaneously overinclusive and underinclusive: overinclusive in that the program provides debt relief to individuals who may never have experienced discrimination or pandemic-related hardship, and underinclusive in that it fails to provide any relief to those who have suffered such discrimination but do not hold a qualifying FSA loan.").

Rather than continuing to defend a race-based program that no less than four federal courts determined unlikely to survive, Congress repealed the program as a provision of the Inflation Reduction Act of 2022. Pub. L. No. 117-169 § 22008, 136 Stat. 1818,

2023 (2022). USDA asserts that this fact alone renders Carpenter's lawsuit moot, and that there is no redress for the racially discriminatory payments that were made under Section 1005 before it was repealed.

But it is also undisputed that the new statute never addressed the payments that were issued before Section 1005 was halted. Thus, the unequal treatment that Carpenter suffered, and continues to suffer, was never remedied.

In other words, there is an order that a court could issue to remedy Carpenter's injury address the payments that were made before Section 1005 was repealed. And in the same vein, with respect to the voluntary cessation doctrine, USDA has never argued that it "completely and irrevocably eradicated the effects" of Section 1005.

As it stands today, Carpenter remains as unequally treated as when the discriminatory payments were first made. As a result, Carpenter remains injured, even if the elimination of the program means she will not suffer further injuries in the future.

III. Procedural history

Carpenter filed her lawsuit on May 24, 2021, asserting an equal protection violation. The suit was stayed on August 16, 2021, pending the outcome of *Miller v. Vilsack*, in which Carpenter was an unnamed class member. After *Miller* was dismissed, the government sought to dismiss Carpenter's case as well, arguing that the repeal of Section 1005 caused her case to be moot.

Carpenter opposed the motion to dismiss, pointing out that the Inflation Reduction Act did not address USDA's pre-repeal payments under Section 1005, and thus her case was not moot. The government argued in a footnote in its reply brief that even if Carpenter's case were not moot, she lacked standing because there was an independent, race-neutral reason why she was not eligible for Section 1005 benefits: she lived in Wyoming, while all of the Section 1005 payments went to farmers or ranchers in New Mexico.

The District Court held that Carpenter lacked any interest in her case because Section 1005 was repealed. It also agreed with the government that because all of the payments went to New Mexico farmers or ranchers, Carpenter was not within the "playing field" of those injured by Section 1005. App. at 39a ("Completely apart from any considerations of race, Plaintiff was never within that so-called 'playing field' for the simple reason that her property is in Wyoming.").

On appeal, the Tenth Circuit affirmed the dismissal of Carpenter's lawsuit. It concluded that Carpenter's standing was defeated by the fact that Section 1005 payments were made only to New Mexico farmers. Additionally, the Tenth Circuit rejected the application of the voluntary cessation doctrine, finding no indication of Congress being likely to re-enact Section 1005. However, the Tenth Circuit stopped there and rested its analysis solely on the fact that Section 1005 was not likely to reoccur. It saw no need to ask whether interim relief or events *had*

completely and irrevocably eradicated the effects of the alleged violation.

Carpenter timely files this petition for a writ of certiorari, challenging the Tenth Circuit's dismissal and seeking redress for her ongoing equal protection injury.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

Leisl Carpenter suffered an equal protection injury when similarly-situated farmers and ranchers received federal benefits under a congressional program for which she was not eligible, solely based on her race. That injury was not alleviated when Congress repealed the underlying federal benefits program on a forward-looking basis only.

The Tenth Circuit's opinion creates two strange incentives for federal agencies: (1) engage in as much unconstitutional conduct as possible, as swiftly as possible, before a lawsuit can be filed or an injunction obtained; and (2) make non-statutory internal administrative decisions that "pick off" plaintiffs who have already filed complaints against a federal program, so as to defeat their standing and avoid judicial review.

Having an appellate precedent establishing that the government may strategically engage in these two actions to avoid challenges to its race-based programs works a disservice to justice and to equality under the law.

The issues raised herein are not just important to the petitioner but apply to a host of federal benefits programs that increasingly rely on race for eligibility determinations. Given the substantial legal questions presented and the far-reaching implications of the Tenth Circuit's decision, Carpenter respectfully submits that this petition merits the Court's consideration. It is an opportune moment for the Court not only to rectify the immediate injustice faced by the petitioner, but also to guide the lower courts and federal agencies in adhering to the constitutional principles that safeguard equality and prevent discrimination.

1. The Decision Below Creates a Roadmap for Federal Agencies to Engage in Invidious Race Discrimination and Creates a Split of Authority.

a. An Individual Should Not Lose Standing to Sue Based on Internal Agency Administrative Decisions Made *After* a Complaint is Filed.

Under Article III, a plaintiff possesses standing if she can demonstrate: (1) an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant, and (3) which is likely to be redressed by a favorable decision. *SFFA*, 600 U.S. at 191. In her complaint, Carpenter pled that Section 1005 injured her by creating a racial classification that excluded her for the purpose of federal benefits, and that prospective relief to address this discrimination would

remedy the injury that was fairly traceable to Section 1005's racial classification. App at 11a ("In the Complaint, Ms. Carpenter alleges she would be eligible for loan forgiveness under § 1005, and for future FSA loans after such forgiveness, if she were not white.").

Section 1005 and USDA's published Notice of Funds Availability (NOFA) made clear that Carpenter's race disqualified her from participating in the debt relief program. No one disputes that payments were made under Section 1005 after the NOFA was issued. No one disputes that they were based on race. Instead, the only non-racial distinction between Carpenter and those who received payments is the fact that she lived in Wyoming, and that USDA chose to first send payments to New Mexico recipients—an irrelevant and arbitrary administrative choice that was not based on anything in the statute or NOFA.

Yet the Tenth Circuit made clear that it was relying on this incidental geographic difference when it affirmed the lower court's holding based on the idea that Carpenter was not within the "playing field" of those who were eligible for Section 1005 benefits. App. at 23a ("If Appellees' administration of test payments can be said to have excluded Ms. Carpenter from consideration at all, it was because she lives in Wyoming rather than New Mexico."); *id.* ("Even if she were not white, Ms. Carpenter would have been excluded from the test payments."); *id.* ("The test payments to four New Mexico farmers therefore do not

constitute an injury to Ms. Carpenter based on the racial distinctions in § 1005.").

But Carpenter's injury stems from a racially discriminatory *policy* implemented on a national level, as shown by the statutory language of Section 1005. The essence of her equal protection claim does not turn on some self-imposed internal criteria for prioritizing where USDA would first send the money. That USDA officials opted to implement Section 1005 in New Mexico before other states is immaterial in the context of equal protection analysis. Such administrative choices, while perhaps relevant to the program's rollout logistics, do not alter the fundamental nature of Carpenter's constitutional injury—an injury that is rooted in the nationwide application of a race-based eligibility criterion.

It is the written word that is law, and it is the law that discriminates—not the incidental methods that public officials may implement written policies. The Tenth Circuit's decision therefore creates a split in authority regarding the scope of the "playing field" for equal protection injuries. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am.*, 508 U.S. at 666 ("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 also Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (describing the holding of *Northeastern Florida* that a business was not required "to show that one of its

members would have received a contract absent *the ordinance* in order to establish standing.") (emphasis added); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 706 (1997) ("Monterey Mechanical was prevented *by the statute* from competing on an equal footing with general contractors in the designated classes.") (emphasis added).

Compare, by contrast, the Tenth Circuit's focus on the initial geographic distribution of benefits: "But it is precisely because the decision to do the test in New Mexico was *unrelated to the statutory language* that Ms. Carpenter cannot claim an injury based on § 1005's racial distinctions." App. at 23a (emphasis added).

Yet fact that USDA officials opted to start with New Mexico when they began implementing Section 1005 is a non-sequitur. They could just as easily have started with borrowers whose last names started with "A" or "B." But plaintiffs whose names start with "C" should not be deprived of the right to challenge unconstitutional race discrimination in such circumstances.

Notably, living in New Mexico was not one of the textual criteria of Section 1005, nor could bureaucrats have made it so. *Accord Boyd v. U.S.*, No. 22-1473C, 2023 WL 3118132, *5 (Fed. Ct. Cl., Apr. 27, 2023) ("In this case, however, no official was conferred with contracting authority by ARPA § 1005."). And simply put, Carpenter could never have received payments under Section 1005, regardless of which state she lived in, due to her race.

Moreover, the Tenth Circuit's logic would not just stop at geography. There were two other factors that USDA officials considered when deciding to start with New Mexico:

- The borrowers being sole proprietorships rather than entities; and
- Past interactions with [the Farm Service Agency] that reflected a willingness to be part of a pilot initiative.

See App. at 8a-9a. The Tenth Circuit's logic would mean that even Carpenter did live in New Mexico, she would also still need to meet these qualifications, too, to have standing.

But the idea that USDA could rely on making these distinctions among non-Caucasian recipients of Section 1005 funds—a group that Carpenter was not a part of, of course—in order to defeat her lawsuit for lack of standing, would be truly anomalous. (That is especially true since USDA was knew, at the time of the payments, that no plaintiff in New Mexico had challenged Section 1005.) Congress never mentioned any of these qualifications when it enacted Section 1005, and none were in place when Carpenter brought her suit on May 24, 2021.

In other words, Carpenter possessed a concrete injury under Article III when she filed her complaint on May 24, 2021. Binding Supreme Court case law—and a wealth of appellate precedents—contradicts the Tenth Circuit's decision that she somehow lost that standing based on the subsequent internal

administrative decisions of USDA employees that purportedly narrowed who was truly injured under ARPA.

The Tenth Circuit's conclusion also fundamentally overlooks the broader constitutional question at hand: whether the federal program's design and implementation, in its entirety, violated the Constitution by considering race as one factor in discriminating against individuals. As this Court and numerous lower courts have recognized, race need only be *one* factor that is part of the decision-making process, for a plaintiff to have standing. *See, e.g., Gratz*, 539 U.S. at 262 ("The 'injury in fact' necessary to establish standing in this type of case is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.") (cleaned up); *Ne. Fla. Chapter of Gen. Contr. of Am.*, 508 U.S. at 664 ("[O]ur holding [in *Turner v. Fouche*, 396 U.S. 346 (1970)] did not depend upon an allegation that he would have been appointed to the board but for the property requirement. All that was necessary was that the plaintiff wished to be considered for the position.").

Numerous lower courts have followed this Court's clear precedents, which are now all in tension with the Tenth Circuit. *See Eng'g Contractors Ass'n of S. 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."); *Bras v. California Public Utilities Comm'n*, 59 F.3d 869, 873 (9th Cir. 1995) ("[P]laintiffs alleging equal protection violations need not demonstrate that rigid quotas make it impossible for them to compete for any given benefit. Rather, they need only show that they are forced to compete on an unequal basis."); *Holman*, 582 F. Supp. 3d at 577 ("[A]ny classification that makes it more difficult for members of one racial group to obtain a benefit is an injury sufficient to confer standing.") (cleaned up).

In sum, the Tenth Circuit's reliance on the geographic specificity of the program's test payments in New Mexico as a factor in evaluating Carpenter's injury overlooks the national scope of Section 1005, and misapplies equal protection principles. The injury that Carpenter alleges is tied to the discriminatory nature of the program itself—a national policy from which she was excluded based on race, rendering the location of initial payments immaterial to the determination of her constitutional injury. Put simply, payments were made under a discriminatory national policy, therefore, Carpenter has suffered an injury.

Worse, the Tenth Circuit's decision will distort a host of legal outcomes, given that federal agency

officials have no inherent authority to act without congressional delegation arising from the text of statutes. In that sense, the mere administrative choices of bureaucrats do not and cannot undermine the Court's conventional analysis of when classes are similarly situated. If the decision stands, clever bureaucrats could easily evade legal challenges through arbitrary administrative choices. *Accord Day v. Bond*, 500 F.3d 1127, 1135 (10th Cir. 2007) ("[T]he plaintiff must show he is not disqualified from competing because of nondiscriminatory eligibility criteria.").

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. *Accord SFFA*, 600 U.S. at 257 (Thomas, J., concurring) ("This judicial skepticism is vital. History has repeatedly shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct.").

b. Carpenter's Suit is Not Moot, Because There Remains an Order that Could Have Real-World Effect.

There is no legal doctrine establishing that courts cannot correct past mistakes. Indeed, courts possess significant power to address bona fide equal protection violations. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("[D]ecree[s] … must be

designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.") (internal quotation marks omitted).

The Tenth Circuit's decision in this case contrasts with decisions from this Court and other circuits, where courts have rejected mootness arguments in the context of unremedied past injuries. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (past harm can constitute an injury-in-fact for purposes of pursuing injunctive relief if it causes continuing, present adverse effects); *Sullivan*, 920 F.3d at 411 (prisoner suit was not moot despite plaintiffs' release from prison, and despite the repeal of a statute, because "the statute fails to stop the differential treatment Plaintiffs continue to suffer"); *accord Zukerman v. U.S. Postal Serv.*, 64 F.4th 1354, 1363 (D.C. Cir. 2023) ("[T]he customized postage program has already been shuttered. … [Yet] Zukerman was injured the moment the Postal Service refused to print and recognize his stamp. The effects of that past injury remain unremedied…").

In short, when the government gives some people the benefit of a program based on their race and not others, an injury remains to be redressed even after the government abandons its discriminatory policies. *See New York State Rifle & Pistol Ass'n, Inc. v. City of New York, NY*, 140 S. Ct. 1525, 1528 (2020) (Alito, J., concurring) ("[T]he changes in City and State law do not provide petitioners with all the injunctive relief they sought.").

Courts have long held that it is permissible to order government officials to undo the constitutional damage that they have done in the past. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). This is especially true in the equal protection context. *Id.* at 16-17 ("[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.").

What that remedy looks like for Carpenter is, at this stage, a premature question. But for this Court's purposes, the critical point is that there is no per se bar to courts correcting ongoing injuries merely because the injury had its genesis in the past. *See Heckler v. Mathews*, 465 U.S. 728, 740 (1984) ("[T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.") (internal citations omitted); *United States v. Paradise*, 480 U.S.

149, 191 (1987) (Stevens, J., concurring) ("In this case, the record discloses an egregious violation of the Equal Protection Clause. It follows, therefore, that the District Court had broad and flexible authority to remedy the wrongs resulting from this violation.").

Indeed, in numerous contexts, lower courts have held that government actors owe a duty to correct the wrongs of the past, if an injury lingers. *See Thomas S. by Brooks v. Flaherty*, 902 F.2d 250, 255 (4th Cir. 1990) ("If the present conditions under which class members live do not meet constitutional requirements as explained in Youngberg, or if a patient is presently suffering from unconstitutional conditions imposed while in the hospital, the decree provides appropriate prospective relief."); *see id.* at 255 ("The decree addresses the present needs of the patients."); *Ayala v. Armstrong*, No. 1:16-cv-00501-BLW, 2017 WL 3659161, *2 (D. Idaho, Aug. 24, 2017) ("Here, the State of Idaho's past unconstitutional acts have led to 'continuing conditions of inequality' for same-sex couples who desired to marry but were unconstitutionally denied that right by the State of Idaho."); *Hunter v. U.S. Dep't of Educ.*, No. 6:21-cv-00474-AA, 2023 WL 172199, *7 (D. Ore., Jan. 12, 2023) (students who had graduated from college still had standing under Title IX because "the Court can redress the stigmatic, emotional, and procedural injuries that Plaintiffs are experiencing now.") (emphasis added); *In re Circuit City Stores, Inc.*, No. 19-03091-KRH, 2022 WL 17722849, *3 (E.D. Va. Bankr., Dec. 15, 2022) ("[T]he Court rejects the Defendants' argument that correcting the

assessments on a going-forward basis is sufficient in and of itself to provide adequate relief."); *C.M. ex rel. Marshall v. Bentley*, 13 F. Supp. 3d 1188, 1203 (M.D. Ala. 2014) (injury was redressable by court if "other students are no longer allowed to enjoy the benefits that Plaintiffs are being denied.").

While this Court need not figure out at this junction *how* to remedy the ongoing violation of Petitioner's rights, courts are certainly institutionally capable of addressing an equal protection violation. *See Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2354 (2020) ("When the constitutional violation is unequal treatment, as it is here, a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all.") (citing *Heckler*, 465 U.S. at 740; *Moritz v. C. I. R.*, 469 F.2d 466, 470 (10th Cir. 1972) ("Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverage of the statute.").

To be sure, sometimes these cases can raise "knotty questions" about whether to "extend benefits or burdens," *id.*, but ultimately the onus should be on USDA to "come forward with a plan that promises realistically to work" *Swann,* 402 U.S. at 12-13, and that courts can review for constitutional compliance.

Moreover, the "real-world" effect of an order correcting past constitutional harm need not be earth-

shaking. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 n.3 (1986) (rejecting mootness argument based on intervening events when a party merely "would be more likely to have an operating franchise now," but for the government's unconstitutional conduct.); *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 881 (10th Cir. 2019) ("A defendant's corrective actions that do not fully comport with the relief sought are also insufficient."); *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006) ("That burden is 'heavy'; a case is not moot where any effective relief may be granted.") (original emphasis).

c. Carpenter Seeks Prospective Relief That a Court Could Order With Respect to the USDA Respondents—Compelling USDA to Correct its Previous Racial Discrimination.

In rejecting the injury that Carpenter pled, the Tenth Circuit focused on the fact that future discriminatory payments would not occur. App. at 20a ("The injunctions against implementation of § 1005 and the section's eventual repeal rendered any equal protection injury impossible."). But that holding does not address payments made before Section was repealed by Congress.

The fact that the USDA Respondents are Executive Branch agency officials is immaterial to Carpenter's claim. A court may freely impose duties on public officials to prospectively comply with the

Constitution, even if that means correcting past mistakes. *See Milliken v. Bradley*, 433 U.S. at 290 ("That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment."); *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007) ("Here, the injunctions Flint seeks as related to past violations serve to expunge from University records the 2003 censure and 2004 denial of his Senate seat, which actions may cause Flint harm."); *State Emp. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96 (2d Cir. 2007) ("We are specifically required by *Ex parte Young* to examine whether there exists an ongoing violation of federal law. … Thus, it is relevant—in considering the existence vel non of an ongoing violation—to ask whether the claimed remedy is still available.") (internal citation omitted); *Clark v. Cohen*, 794 F.2d 79, 84 (3d Cir. 1986) ("Given the square holding in *Milliken II* that a federal court may order state officials to fund from the state treasury remedial measures found necessary to undo the harmful effects of past constitutional violations, we hold that the Commonwealth defendants' eleventh amendment argument is meritless."); *Heckler*, 465 U.S. at 740 ("[W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.").

Here, neither the District Court, the Tenth Circuit, or the USDA Respondents have ever contended that correcting prior race discrimination is not prospective relief, or that sovereign immunity shields them from having to address racially discriminatory monetary payments made under Section 1005. *Accord Graham v. Richardson*, 403 U.S. 365 (1971) (discriminatory welfare payment system was struck down as unconstitutional, despite involving monetary payments).

2. A Court Should Not Dismiss a Case Based on Mootness if the Defendant Failed to Eradicate the Effects of its Misconduct.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Env't Serv. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (cleaned up); *id.* ("[T]he standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent.").

The Tenth Circuit below alluded to the proper two-prong test to establish an exception to the voluntary mootness doctrine, App. 29a, but nevertheless dismissed Carpenter's case based merely on one prong. The Tenth Circuit held that the government had successfully met its burden merely by making a particularly strong showing on the first factor. App. at 31a ("There is no indication in the Complaint or any exhibit in this case that Congress intends to re-enact

the provisions of § 1005, nor is it plausible Congress would do so given that the emergency that prompted § 1005 in the first place—the sudden economic devastation caused by the COVID-19 pandemic—no longer exists.").

That was error. To establish mootness through voluntary cessation, the government must make a proper showing on *both* prongs, not just one:

> (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, *and*
>
> (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Los Angeles Cnty. v. Davis, 440 U.S. 625, 631 (1979) (cleaned up) (emphasis added); *Indiana Emp. Sec. Div. v. Burney*, 409 U.S. 540, 541-42 (1973) (remanding for consideration of whether other members of a class had been made whole, even if the named plaintiff Burney had been paid); *see also Lyons*, 461 U.S. at 101 (agreeing with Petitioner that the case was not moot since "[i]ntervening events have not irrevocably eradicated the effects of the alleged violation") (internal quotation marks omitted); *accord Golden State Transit*, 475 U.S. at 613, n.3 ("It therefore cannot be said that intervening events have . . . irrevocably eradicated the effects of the alleged violation. We conclude, therefore, that the case is not moot.") (cleaned up); *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) ("[H]e now has also been irrevocably

admitted to the final term of the final year of the Law School course.").

And with respect to both factors, it is the defendant's burden to establish mootness. *See Row 1 Inc. v. Becerra*, 92 F.4th 1138, 1144 (D.C. Cir. 2024) (describing the "formidable burden" that the government has in establishing mootness through voluntary cessation, and referring to both factors); 13A Charles A. Wright et al., Federal Practice and Procedure § 3533.1 n.22 (3d ed. 2023) ("If a plaintiff begins with standing, a defendant who asserts that voluntary cessation has mooted the action carries a heavy burden to prove mootness, a clear difference from the rule that a plaintiff has the burden to establish standing.").

Applying these principles to the instant case, the mere repeal of § 1005 does not irrevocably eradicate equal protection violations that occurred prior to the statute's repeal. The government has not even contended that it tried to irrevocably eradicate the effects of Section 1005.

While repealing Section 1005 prevented future discrimination, it failed to address or rectify the past unequal treatment that Carpenter suffered. *See Swann,* 402 U.S. at 15 ("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 discriminatory effects of the past *as well as bar like discrimination in the future*.") (emphasis added).

In that vein, strict application of the voluntary cessation doctrine plays a crucial role in the judicial system's oversight of constitutional violations, particularly in cases where defendants may seek to avoid judicial review by ceasing illegal conduct once challenged. *DeFunis*, 416 U.S. at 318 (there is a "public interest in having the legality of the practices settled"). This doctrine ensures that mootness is not merely a tool for evasion, but a genuine and lasting resolution of the issues at hand. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) ("The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.").

The Tenth Circuit's decision therefore creates a split of authority with lower courts that have agreed that *both* of the *Davis* prongs must be met to satisfy the mootness standard. *See, e.g.*, *U.S. Commodity Futures Trading Comm'n v. Escobio*, 946 F.3d 1242, 1251 (11th Cir. 2020) ("Escobio's adherence to the new payment structure does not negate the possibility that he will fail to pay in the future nor has it 'completely and irrevocably' paid off the restitution award."); *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1040 (9th Cir. 2018) ("[W]e note that Fikre's removal from the No Fly List does not completely and irrevocably eradicate the effects of the alleged

violations.") (cleaned up); *Cleveland Branch of the N.A.A.C.P. v. City of Parma, Oh.*, 263 F.3d 513, 533 (6th Cir. 2001) (second prong not satisfied in discrimination case where the lingering effects of discrimination remained in municipal employment); *Johnson v. Jones*, 42 F.3d 1385, *2 (4th Cir. 1994) (Table) (dismissing a discrimination claim based on voluntary cessation only because "[t]he Citadel has represented that the accommodations that will be made for the 78 male veterans who had been enrolled in the veterans program would also be made for women").

Likewise, many decisions support the position that mootness can only be determined after reaching the second prong. *See Davis*, 440 U.S. at 633 (the government satisfied the second prong because it "completely cured any discriminatory effects" of its prior policy); *Rio Grande Silvery Minnow v. Bureau of Reclamatio*n, 601 F.3d 1096, 1120 (10th Cir. 2010) (dismissing as moot where there were "no lingering effects from the federal agencies' alleged violations of the ESA in connection with the issuance of the 2001 and 2002 biological opinions"); *see also Ghailani v. Sessions*, 859 F.3d 1295, 1302 (10th Cir. 2017) (dismissing case as moot only after concluding "there is no evidence that any of the former SAM restrictions are currently affecting Mr. Ghailani").[3]

[3] Note that despite the intra-circuit split of authority within the Tenth Circuit, Carpenter's request for en banc review was denied. App. at 4a.

The Tenth Circuit's holding here therefore represents a significant deviation from the voluntary cessation doctrine as articulated by this Court. The Tenth Circuit relied exclusively on the government's showing on the first *Davis* prong and never analyzed the second prong. But the doctrine requires not just a halt in the challenged conduct and the unlikeliness of its further implementation, but also a comprehensive remedy for its effects. This gap in the Tenth Circuit's analysis overlooks the enduring impact of the discrimination Carpenter faced, an impact that remains unaddressed by the legislative repeal alone.

Interestingly, USDA has never even contended that the discriminatory payments made under § 1005 have actually been eradicated or unwound. Instead, they simply point to the statute's repeal. This is insufficient to satisfy the second prong of the voluntary cessation test for mootness under this Court's jurisprudence. It is imperative that the Court take up this matter to rectify the Tenth Circuit's flawed voluntary cessation analysis.

3. This Case is an Ideal Vehicle to Resolve the Questions Presented.

This case presents the relatively straightforward question of whether a plaintiff's constitutional claim based on racially discriminatory treatment must be dismissed when payments are made to similarly situated individuals who nevertheless have some incidental difference with the plaintiff—such as their geographic residence. Secondarily, it presents the

question of whether monetary payments that were made prior to the repeal of a racially discriminatory program may be left unaddressed, once the program is halted through injunction or repeal.

Neither the District Court, nor the Tenth Circuit, questioned in their opinions whether Carpenter adequately pled her claims; nor did they suggest that Carpenter might lack standing for any other reason. Moreover, there is no factual disagreement regarding the payments that were made prior to Section 1005's repeal that is material to the legal questions in this petition. Last, neither the District Court nor the Tenth Circuit questioned whether some remedy might exist, if a constitutional violation is found to have occurred. Indeed, USDA has never contended that no relief is possible in this case.

4. At a Minimum, the Court May Consider Holding the Petition for Subsequent Vacatur and Remand Until After it Issues an Opinion in *FBI v. Fikre*, 22-1178.

In *Federal Bureau of Investigation, et al., v. Yonas Fikre*, 22-1178, this Court is considering whether a claim regarding an individual's placement on the "No Fly List" is moot. In *Fikre*, the Respondent was taken off of the No Fly List after bringing suit, but the Ninth Circuit Court of Appeals held that the suit was not yet moot. This Court granted a writ of certiorari on September 29, 2023—after briefing and oral argument had already occurred Carpenter's appeal—and the Court heard argument on January 8, 2024.

The Court's discussion of the doctrine of voluntary cessation in *Fikre*—regardless of whether it affirms or reverses the Ninth Circuit Court of Appeals—may shed light on whether Carpenter's claim for relief is moot, given that her ongoing unequal treatment has never been remedied. *See* Transcript of Oral Argument at 20, *FBI v. Fikre*, 22-1178, (Justice Jackson: "So I understand here that what we're really talking about is the extent to which the government can rely on voluntary cessation to claim that he no longer has a—a claim."); *see id.* at 38 (Justice Kagan: "Well, that suggests— . . . that we're not committed to our voluntary cessation rule, which I think we've given every indication we are extremely committed to.").[4] For that reason, this Court may opt to hold this petition, and vacate and remand once its decision has been issued in *Fikre*.

CONCLUSION

This Petition for a Writ of Certiorari presents constitutional questions that warrant this Court's attention. The Tenth Circuit's dismissal of Petitioner's claims, based on a narrow interpretation of equal protection injuries and the voluntary cessation doctrine, fails to recognize the enduring harm inflicted by racially discriminatory policies under Section 1005 of ARPA.

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[4] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-1178_7lhn.pdf

Moreover, the Tenth Circuit's approach, if left unchallenged, sets a dangerous appellate precedent that undermines the judiciary's role in safeguarding constitutional rights against governmental discrimination. The decision below not only lets stand the injuries suffered so far by Carpenter, but also provides federal agencies with a roadmap to evading judicial review.

Therefore, Petitioner respectfully urges the Court to grant this petition, reverse the Tenth Circuit's decision, and reaffirm the primacy of equal protection rights in the face of racial discrimination by federal programs.

Alternatively, Petitioner respectfully requests that the Court hold the petition, and vacate and remand upon issuing its opinion in *Federal Bureau of Investigation, et al., v. Fikre*, 22-1178.

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