

Equity in Agricultural Production & Governance



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Farm Bill on the Horizon

Two years in, the COVID-19 pandemic has shown just how critical it is for the United States to invest in a robust, diverse, and well-integrated food system. The country faced a formidable challenge in striving to help people meet their nutritional needs, connecting agricultural producers to markets, creating safe environments for our food system's essential workforce to continue feeding the country, and providing local options for securing food. In many cases, Congressional action to increase funding for farm bill programs and authorize new initiatives and flexibilities staved off some of the most devastating potential impacts, proving that increased investment in the country's agricultural and food system reverberates through the economy and strengthens our country's resilience to crises. The next farm bill, anticipated in 2023, offers the opportunity to solidify these lessons through legislation.

The pandemic and other events—increasingly destructive natural disasters, trade disputes— that have transpired since the last farm bill passed in 2018 have also underscored the need to regard the food and agriculture sector as a public good. Doing so means aligning federal investments through the farm bill with sound public policy that considers the long-term needs of society. The climate crisis at our doorstep requires that public dollars support programs and policies designed to mitigate and adapt to this reality rather than exacerbate the food system's contribution to the problem. Advancing racial justice requires centering equity in farm bill programs and agricultural governance and regarding food system workers as a core constituency in food system policy. And, strengthening our nation's food system requires supporting the growth of local and regional food systems equipped to meet the nutritional needs of the community, while providing economically stable, decentralized business opportunities for existing and new producers. Public funds that flow through farm bill programs should be dedicated to creating and reinforcing a food system that upholds and furthers these collective goals.

The Recommendations contained in this Report are an early attempt to infuse policy ideas into the next farm bill conversation. Although we discussed and vetted these ideas among our Farm Bill Law Enterprise members and many other stakeholders in order to write the Reports in this series, we know that many more organizations, stakeholders, and communities will have thoughts, constructive critique, and perspectives to offer that should ultimately shape the policies enacted in the farm bill. We offer these ideas as a starting point to generate further discussion and are eager to collaborate with other stakeholders to further develop and refine these ideas and set priorities for the coming farm bill cycle.



The Farm Bill Law Enterprise

FBLE is a national partnership of law school programs working toward a farm bill that reflects the long-term needs of our society, including economic opportunity and stability; public health and nutrition; climate change mitigation and adaptation; public resources stewardship; and racial and socioeconomic justice. We strive to advance justice and equity in accomplishing each of these goals. We accomplish our mission through joint research, analysis, and advocacy and by drawing on the experience of our members, collaboratively building deeper knowledge, and equipping the next generation of legal practitioners to engage with the farm bill.

- **Economic Opportunity and Stability**, including equitable access to capital, scale-appropriate risk management, market stability, a viable livelihood for diverse production systems and diverse producers, expanded worker-ownership, and a vibrant agricultural sector.
- **Public Health and Nutrition**, including a robust and secure food supply that meets the present and future nutritional needs of all communities, improves population-level health, reduces inequalities, and prioritizes production of healthful foods.
- **Climate Change Mitigation and Adaptation**, including the transformation of agriculture into a net sink through reduced emissions and the use of soil and biomass as a carbon sink, as well as support for farmers adapting to climate impacts such as drought, extreme weather events, and changing growing seasons.
- **Public Resources Stewardship**, including agricultural practices that increase biodiversity and soil stability and fertility, while promoting public health and environmental justice by preserving community resources such as safe drinking water and clean air.
- **Racial and Socioeconomic Justice**, including labor rights, diverse and equitable opportunities in agriculture, robust competition that creates space for small and mid-size, new, and innovative participants and checks concentrated power, equitable distribution of agriculture's costs and benefits, and fair contracts and labor practices.

This Report belongs to a collection of reports based on the collaborative research of FBLE members. The subjects of these reports include **Climate & Conservation, Equity in Agricultural Production & Governance, Farm Viability, Farmworkers**, and **Food Access & Nutrition**. Each report will be available on our website, www.FarmBillLaw.org, along with background materials, an active blog, and timely resources for tracking the 2023 Farm Bill's progress through Congress.

FBLE is comprised of members from the following law school programs: Drake University Law School, Agricultural Law Center; Duke Law School, Environmental Law and Policy Clinic; Harvard Law School, Emmett Environmental Law and Policy Clinic; Harvard Law School, Food Law and Policy Clinic; Harvard Law School, Health Law and Policy Clinic; Elisabeth Haub School of Law at Pace University, Food Law Center; UCLA School of Law, Resnick Center for Food Law and Policy; University of Maryland Francis King Carey School of Law, Environmental Law Program; and Vermont Law and Graduate School, Center for Agriculture and Food Systems. The Recommendations in this Report series do not necessarily reflect the views of each individual member or their institutions.



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EXECUTIVE SUMMARY

The U.S. agricultural industry and its governance structures were born as some of the most unjust, oppressive, and racially exclusive systems in the United States. Today, 97% of U.S. farmland is held by non-Hispanic, white landowners. This extreme concentration is the outcome of generations of discrimination against communities of color by private and public agricultural service providers. The U.S. Department of Agriculture (USDA) has perpetuated this harm, even into the present day. Now, despite years of community advocacy, admirable policy wins, and establishment of critical programs, systemically marginalized producers continue to face barriers in access to credit and land. Further, many find themselves operating at a deficit relative to their white

counterparts due to decades of disinvestment and exclusion from farm support programs that helped white-owned farms amass wealth and resources over the 20th century.

Disproportionate investments in predominantly white land-grant educational institutions as compared to minority-serving institutions and delegations of power to local county committees have exacerbated these inequities, often preventing people of color from assuming leadership roles in the agricultural sector. The 2023 Farm Bill provides an opportunity to address these disparities and pave the way for a vibrant agricultural sector of equitable opportunities for all.



Goal I



Address Discrimination and Advance Equity Across USDA

USDA's programs and governance structures have continued to fall short on the promise of remediating discrimination and meaningfully advancing equity in agriculture. Changing this course demands intentional, comprehensive, and well-resourced actions across USDA's programs and governance structures to make equity a realizable goal. While each Goal of this Report seeks to advance equity in some respect, Goal I recommends actions to do so across Departmental programs as a whole.

► Priority for the Next Farm Bill

Build Upon, Extend, and Codify the Reforms Begun Through the Equity Commission and the Equity Action Plan

Established with funding authorized in the

American Rescue Plan Act, the 15-member Equity Commission and its Subcommittee on Agriculture are examining and advising USDA on its programs, policies, and other systemic structures contributing to barriers to inclusion, perpetuating systemic discrimination, and exacerbating racial, economic, health, and social disparities. USDA has also released an Equity Action Plan detailing initiatives USDA intends to take to promote equity and better support underserved communities. To ensure these efforts are sustained, Congress should extend the Equity Commission's charter and consider creating a permanent body for ongoing promotion of racial equity at USDA. It should also dedicate mandatory funds to sustain the various organizational partnerships into which USDA has entered to better serve systemically marginalized producers.

Additional Recommendations:

- Strengthen USDA's Programmatic Offerings for Systemically Marginalized Producers
- Enact Changes to Better Support Native American Farmers and Ranchers
- Incorporate a Commitment to Equity Throughout USDA Entities and Policies
- Collect Demographic Data to Ensure Accountability for Equity Reforms



Goal II



Mitigate Loss of Heirs' Property

Heirs' property results when land is passed between generations without clear title, often where no formal will has been established. The lack of clear title (sometimes called "cloudy title") can cause numerous problems for heirs, including risk of land loss. A single co-owner can bring an action to partition the property, resulting in a forced sale for much less than the actual value of the land. Predatory real estate speculators have taken advantage of this vulnerable form of ownership by purchasing a share from an heir and filing a partition action, asking the court to sell the property. Even where partition sales have not caused land loss, cloudy title restrains economic development. Some have estimated that 40 to 60% of Black-owned land is owned as heirs' property. Although the 2018 Farm Bill made some strides in addressing the issue, the next farm bill can build on that momentum and resolve remaining gaps.

► Priority for the Next Farm Bill

Create a New Program to Complement the Heirs' Property Relending Program

The 2018 Farm Bill authorized a new Heirs' Property Relending Program (HPRP) which will provide loans to eligible entities to relend to heirs that have inherited land without clear title so that they can pay for assistance to resolve ownership and succession issues, including by developing a succession plan. HPRP's reliance on loans presents practical challenges for some families; given historic and current discrimination, many will face financial barriers to obtaining credit and assuming new debt. In order to support those not in a position to take on loans, Congress should establish a complementary program that offers grants of financial and technical assistance to qualifying owners. The program could be designed to include income eligibility and reporting requirements to ensure that funds go to individuals in need for resolving title issues.

Additional Recommendations:

- Build Programmatic Infrastructure to Support Heirs' Property Owners
- Protect Heirs' Property Through Conservation Programs



Goal III



Facilitate Farmland and Ranchland Transitions to Systemically Marginalized and Beginning Producers

Rising agricultural land values, policies that structure farm profitability (such as by determining access to credit and crop insurance), and policies that incentivize land retention across multiple generations have anchored agricultural land in the hands of predominantly white owners. Further, trends in farmland consolidation towards larger and more concentrated business entities make it more difficult for smaller, less profitable farmers to find and retain land. These inflated costs of acquiring agricultural land result in that land, if ever sold, being most accessible to wealthy buyers and investors, effectively locking undercapitalized systemically marginalized and beginning farmers seeking land out of the market. In the next farm bill, Congress can support land access by directing resources and attention to study the current challenges and by bolstering incentives and tools to support land transfer to systemically marginalized and beginning farmers.

► Priority for the Next Farm Bill

Establish the Commission on Farm Transitions – Needs for 2050

In order to better understand how and to whom land will be transferred, and to identify policies that ensure viable agricultural land is accessible to a new generation of producers, Congress authorized a *Commission on Farm Transitions—Needs for 2050* in the 2018 Farm Bill. The Commission is tasked with studying several issues, including the availability of quality land and necessary infrastructure, affordable credit, adequate risk management tools, apprenticeship and mentorship programs, the state of current agricultural asset transfers, incentives to facilitate agricultural asset transfers to the next generation of farmers and ranchers, the efficacy of transition assistance programs and incentives, and other issues impacting the transition of farm operations to the next generation of farmers and ranchers.

Although the Commission was meant to be established within 60 days of the bill's passage in 2018, it has not yet been constituted. USDA should establish the Commission and Congress should expand its scope of study to include special emphasis on and specific objectives concerning systemically marginalized and beginning producers. Congress should also require the Commission to hear and consider perspectives from diverse stakeholders as it conducts research for its report, the submission deadline of which should be extended to account for the delay and expanded scope of inquiry.

Additional Recommendations:

- Use Tax Exclusions to Promote Land Transfers to Systemically Marginalized and Beginning Producers
- Leverage Buy-Protect-Sell to Facilitate Land Access



Goal IV



Increase Accessibility and Affordability of Agricultural Credit for Systemically Marginalized and Beginning Producers

Systemically marginalized farmers—who often operate smaller farms—and beginning farmers rarely have sufficient cash to purchase land and equipment outright or cover other agriculture-related expenses, making access to credit critical for these groups. To have a meaningful and beneficial impact, this credit must be both accessible and appropriate, recognizing that beginning, small, and mid-sized farmers need credit options that include smaller loan sizes, affordable interest rates, and reduced administrative burden. USDA’s Farm Service Agency (FSA)—which oversees a number of farm programs, including Farm Loans—offers both ownership and operating loans to farmers who are otherwise unable to obtain credit. Despite particular mandates to serve socially disadvantaged groups and beginning farmers

and ranchers, gaps remain in credit provision for these groups. The next farm bill offers an opportunity to better support these farmers through reforms to FSA loan programs as well as through new directives and programs to meet their needs.

► Priority for the Next Farm Bill

Reform FSA Loan Programs to Better Serve Systemically Marginalized and Beginning Producers

Although FSA holds a relatively small share of the market, it continues to be a valuable lending option for smaller farms. Several facets of its loan program put its borrowers at a disadvantage and should be reformed. Congress should authorize FSA to offer loan pre-approval for its borrowers, adjust FSA direct loan limits with regional inflation, and eliminate FSA loan utilization terms that cut off farmers from what may be their only affordable credit option. These changes will better equip producers unable to access commercial credit to build their enterprise and begin or continue farming.

Additional Recommendations:

- Introduce New Loan Program Features Targeted to Redressing the Effects of Discrimination
- Tie Debt Relief to Climate and Conservation Objectives



Goal V



Reinvent the County Committee System of Local Agriculture Governance

To help administer its programs USDA relies on county committees of farmers who are elected to oversee local implementation. Despite their original purpose, there is no clear picture of how these more than 2,000 committees actually operate today. While there are aspects of the committees that have received praise, such as their early attempts to foster agricultural democracy and their ability to better connect some farmers to USDA programs, there have also been damning criticisms of the committees based on, among other things, their racism and the fact that they are unknown even within some farming communities. In a universe of significant power, huge variation in how that power is exercised, a history of racial discrimination and abuse, and a present with

little scrutiny, it is time for Congress to seriously reconsider the role and even the existence of these committees.

► Priority for the Next Farm Bill

Begin a Transition Away from the Committee System

To begin, Congress should work toward eliminating the county committee system. The abuse and distrust run too deep to redeem the committees. Unfortunately, it may not be wise to repeal the committee structure immediately. There is too little public information about the full scope of committee authority. It is possible that an immediate repeal would leave farmers without critical resources. For this reason, Congress should require a very specific and limited study to better understand committee functions in the lead up to repeal and replacement. The study should occur on a strict timeline and Congress and USDA should take additional, interim steps to improve the committees while waiting on the results and ultimate repeal of the county committee system.

Additional Recommendations:

- Shift County Committees to an Interim Appointed Structure



Goal VI



Empower 1890 and 1994 Land-Grant Institutions

The Morrill Act of 1862 first established land-grant universities; these institutions continue to serve as a valuable resource to farmers and farming communities because of their diverse research and extension programs. However, land-grant institutions were founded in the context of deep racial injustices that continue to affect the communities they serve today. First-generation land-grant institutions, often called 1862 Institutions, are predominantly white, in part due to segregationist policies in place at their founding. In 1890, the Second Morrill Act required states to allow students of color to attend the land-grant college or create an institution of “like character,” leading to the establishment of multiple Historically Black Colleges and Universities as land-grant institutions, referred to as 1890 Institutions. Succeeding legislation has continued to expand the communities that land-grant universities serve. Tribal Colleges and Universities became eligible for land grant status in 1994 (1994 Institutions). The most well-funded land-grant institutions are still the predominantly white 1862 Institutions, which benefitted from receiving stolen land, early capital injections, and exclusive access to research and extension

funds for many years. These conditions, combined with the current disparities of funding allotments, continue to drive the inequities between types of institutions. Efforts to mitigate these disparities will provide resources to and empower communities which are disproportionately left out of agricultural policy and decision making.

► Priority for the Next Farm Bill

Secure Equitable Funding for 1890 and 1994 Land-Grant Institutions

For decades, there has been an unabated request, largely unanswered, from students and faculty at 1890 and 1994 Institutions for more equitable funding. Although ample empirical evidence demonstrates the academic and societal contributions that minority-serving educational institutions have made, reports show stark disparities in the resources provided to these schools compared to the predominantly white 1862 Institutions. To bridge the funding gap, Congress should further improve the state funding waiver structure to ensure states provide resources to 1862 and 1890 Institutions in an equitable manner. Congress should also provide direct endowment funding to minority-serving land-grant institutions, mirroring the early investment provided to the first generation 1862 Institutions.

Additional Recommendations:

- Capitalize on Expertise in the Cooperative Extension Programs



Cross-Cutting Recommendation

► Establish Citizen Suit Provisions to Hold USDA Accountable for Implementing Mandatory Programs

There are many examples of USDA failing or being slow to implement farm-bill directives, often to the material detriment of the constituents Congress intended those initiatives to benefit. Rarely do constituents have any avenue for recourse and are left to plead with the agency to follow through on promised changes. To address such inaction and empower stakeholders, Congress should incorporate one or more citizen suit provisions in the next farm bill. Other federal laws have such rights of action, providing precedent and potential models for this accountability mechanism.



Introduction

The typical American farmer is a white male in his late fifties.¹ Despite the non-Hispanic white population comprising less than two-thirds of the total U.S. population,² this group represents 95% of agricultural producers³ and owns 97% of U.S. farmland.⁴ This imbalance did not occur by chance. Historical and continuing discrimination has excluded members of other racial and ethnic groups from decision making for agricultural policy as well as land ownership and agricultural production.

Agricultural leadership and governance were born as some of the most unjust, oppressive,

and racially exclusive systems in the United States. Enslavement of Black people forced into agricultural labor is one of many injustices. Native American farmers and ranchers have also faced a long history of discrimination and suffered the consequences of federal removal, U.S. disregard for treaties, and reservation policies that have caused Native communities to lose their land and the food systems that had supported them for centuries.⁵ The land-grant colleges and universities were built on land stolen from Native Americans and funded with the proceeds of that theft.⁶ For decades these institutions were open only to white



people, and while today there are Black, Native American, Hispanic, and Asian American and Pacific Islander-serving institutions,⁷ many of these institutions are dramatically underfunded in comparison to the predominantly white schools.⁸

Locally elected agriculture committees⁹ responsible for implementing congressional and U.S. Department of Agriculture (USDA) policy were established in the 1930s and in many areas they were intentionally structured to exclude Black farmers, small farmers, and poorer farmers from agricultural leadership and to push them out of farming altogether.¹⁰ This discrimination remains in similar and different forms, and many farmers and communities have little or no trust in existing structures of agricultural governance.¹¹ Discrimination in administration of USDA programs has been rampant for decades, skewing the profile of the average American farmer today.

The effects of these decades of discrimination are stark and well-documented. Persistent and ubiquitous racial discrimination has plagued the administration of USDA programs that are crucial to protecting and supporting farmers, and has profoundly impacted rural communities of color. Importantly, disproportionately low access to programs and assistance crucial to many agricultural producers has persisted beyond historical discrimination and well into modern times.¹² For example, farmers of color received just 0.1% of the 2020 COVID-19 relief for farmers.¹³ Black-operated farms today are, on average, much smaller and generate a fraction of the income of their white-operated counterparts.¹⁴

Farmland consolidation, dispossession of Native nations' land, perpetual discrimination against farmers of color, and significant barriers faced by beginning farmers have resulted in inequities in land ownership. These inequities threaten the vitality of rural economies, the

health of our environment, and the security of our food system. Plainly, the social composition of farming and ranching for the next 100 years cannot look like the past 100 years, any more than the environmental effects of agricultural production can. Incremental changes will have meaningful effects for some systemically marginalized producers but bolder action is also required. The farm bill offers a valuable opportunity to promote the systemic change necessary to address the complex issue of disparities in governance, land access, and programmatic support.

The 2023 Farm Bill creates an opportunity for comprehensive reform at a crucial moment within a wider societal reckoning for racial justice. To its credit, Congress has recently recognized and has begun to respond to the history of racism and oppression within the agricultural system.¹⁵ The Biden Administration and USDA have also initiated reforms in agency governance and programming.¹⁶ Our goal is for Congress to fully articulate that history of oppression and the ways it continues today and do more to rectify it. The farm bill provides Congress a chance to cement these reforms into law and to promote its own vision for a just agriculture sector.



Terminology in this Report

This Report uses the term **systemically marginalized producers** to refer to agricultural producers belonging to groups that have been subject to ongoing racial or ethnic discrimination. These producers may have been marginalized through federal policy itself,¹⁷ inequitable applications of federal policy,¹⁸ or interpersonal racism within their communities.¹⁹ Many have faced a combination of all three. This marginalization is systemic because it pervades U.S. agriculture—instances of discrimination are not isolated occurrences but components of a longstanding pattern in both policy and culture of privileging white producers over others.

This Report also uses the terms **farmers of color** and **producers of color** to refer to Black, Native American, Latinx, Asian, and Pacific Islander farmers and ranchers where referring to such farmers as a group is appropriate. We recognize that these producers have distinct histories and experiences in the agricultural sector and do not mean to suggest that farmers or producers of color are a homogenous group.

This Report also uses the term **socially disadvantaged farmers and ranchers**, which is a statutory term defined in the singular as “a farmer or rancher who is a member of a socially disadvantaged group.”²⁰ Two alternative statutory definitions define socially disadvantaged farmers and ranchers for different programs; in one section of the U.S. Code, commonly referred to as the 2501 Program, a socially disadvantaged group is defined as “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,”²¹ while another section provides that socially disadvantaged farmers and ranchers refers to “a group whose members have been subjected to *racial, ethnic, or gender prejudice* because of their identity as members of a group without regard to their individual qualities.”²² Thus, the key difference between the two definitions is whether gender is included. Whether the 2501 Program or the alternative gender-inclusive definition applies depends on the relevant USDA program. Generally, programs relating to grants, energy, and conservation use the 2501 Program definition whereas programs relating to commodities, credit, crop assistance, and rural development apply the broader socially disadvantaged farmers and ranchers definition that includes women.

In this Report, we use the 2501 Program definition of socially disadvantaged farmers and ranchers, referring exclusively to groups whose members have been subjected to racial or ethnic prejudice. We use the term socially disadvantaged farmers and ranchers for ease of applying our recommendations to existing statutorily recognized groups, rather than as a statement of endorsement for the term itself.

Historical Context

This section provides a very brief summary of the historical circumstances that contributed to and shaped marginalization of racial and ethnic groups in the farming sector today. These summaries attempt to simplify complex histories and interactions. The groups discussed below are far from homogenous; the Asian

immigration experience differed greatly depending on the country of origin as the Native American experience differed greatly depending on the Native nation, region of the United States, and traditional foodways. Rather than provide a comprehensive history, these summaries are meant to illustrate the extent and means by which the U.S. government has actively disenfranchised producers of color



while providing land, financial support, and key services to enable white producers to amass the agricultural land and wealth that they disproportionately hold today.

Black Farmers

Forty acres and a mule. As the Civil War drew to a close, the United States government created the Freedmen's Bureau to provide assistance to former slaves. The government promised to sell or lease to farmers parcels of unoccupied land and land that had been confiscated by the Union during the war, and it promised the loan of a federal government mule to plow that land. Some African Americans took advantage of these programs and either bought or leased parcels of land. During Reconstruction, however, President Andrew Johnson vetoed a bill to enlarge the powers and activities of the Freedmen's Bureau, and he reversed many of the policies of the Bureau. Much of the promised land that had been leased to African American farmers was taken away and returned to Confederate loyalists. For most African Americans, the promise of forty acres and a mule was never kept. Despite the government's failure to live up to its promise, African American farmers persevered. By 1910, they had acquired approximately 16 million acres of farmland. By 1920, there were 925,000 African American farms in the United States.

Pigford v. Glickman, 185 F.R.D. 82, 85 (D.D.C. 1999)

In approving the consent decree filed by Black farmers in the largest civil rights settlement in U.S. history, Judge Friedman recounted the country's shameful past. As he noted, with perseverance and despite extraordinary barriers, Black farmers acquired a significant amount of farmland at the turn of the century. Since 1920, however, the number of farms operated by Black producers has fallen from over 900,000, nearly 15% of all farm operations in the United

States, to less than 2% of all farms today.²³ A significant factor in this decline is the long and well-documented history of discrimination by USDA against Black farmers.²⁴

The Census of Agriculture shows a steady increase in the number of farm operators owning land in the South between 1880 to 1900, but did not begin distinguishing between white and non-white owners until 1900.²⁵ Census figures show 1920 as the peak year for the number of non-white owners of farmland in the South.²⁶ A decline in non-white farm ownership began in the 1930s during the New Deal Era as many of the new policies under the Agricultural Adjustment Act of 1933 (AAA) resulted in the displacement of Black producers.²⁷ Under AAA, cotton acreage was restricted and minimum prices were instated which immediately reduced the number of both Black and white sharecroppers.²⁸ The New Deal also established numerous new government services whose distribution was controlled by politically connected groups in rural communities called "Triple A committees."²⁹ These committees were early predecessors of what would later become Farm Service Agency county committees.³⁰ These groups often used discriminatory practices, diminishing Black producers' access to necessary support.³¹ Finally, commodity price supports under AAA raised farmland prices by an estimated 15 to 20%, making land ownership infeasible for many Black farmers who were denied access to credit comparable to that of their white counterparts.³² Between 1930 and 1935, total white-operated agricultural acreage increased by more than 35 million acres, whereas farmland acreage owned by non-white farmers fell by more than 2.2 million acres.³³

By 1964, the share of Black farm operators had fallen to less than 6%.³⁴ In 1965, the U.S. Commission on Civil Rights published a lengthy report analyzing USDA programs and found that the Department had "failed to assume



responsibility for assuring equal opportunity and equal treatment to all those entitled to benefit from its programs.”³⁵ The report went on to expose numerous discriminatory practices in providing assistance and the Department’s inadequate procedures for evaluating the degree to which its programs reached non-white rural residents.³⁶ These discriminatory practices resulted in the creation of separate and unequal administrative structures providing inferior services to Black farmers and limiting their access to loan and financing options.³⁷ A 1968 report by the Commission echoed these findings, noting that the previously segregated Agriculture Extension Service offices had continued to provide unequal services to Black farmers well after the separate programs were administratively combined.³⁸

In 1970, the Commission published another report that described continued persistent discrimination within the operation of USDA programs. Many county offices were providing services to clientele predominantly of their own race, maintaining racially separate mailing lists, and passing over non-white employees with higher levels of education and tenure when giving promotions.³⁹ Further, the report described pervasive discrimination and underrepresentation within local county committees.⁴⁰ County committees are made up of locally elected farmers and serve as an informational link to farmers who participate in and receive benefits from USDA programs. Prior to 1968, no Black farmer had ever been elected to any county committee in the South, and by 1970, only two Black farmers served on committees, out of the 4,150 county committee members in the South.⁴¹

Throughout the 1980s and 1990s, numerous reports continued to find a decline in farms operated by farmers of color,⁴² rampant discrimination in USDA programs and hiring practices,⁴³ widespread underrepresentation of farmers of color on county committees,⁴⁴

perpetual failures to hold USDA accountable for civil rights violations,⁴⁵ and an overall lack of diversity.⁴⁶ These practices culminated in Black farmers filing a historic discrimination complaint against USDA in the class action lawsuit *Pigford v. Glickman*, discussed in greater detail below.⁴⁷

Native American Farmers

Native Americans, or American Indians, have cultivated the land in the region now known as the United States for centuries. Efforts to dispossess Native Americans of this land have occurred since European colonizers first made contact and continue into the present. This dispossession has transpired through individual acts of fraud and violence, as well as through government-led, backed, and sanctioned removal through use of force, genocide, and apparent legal authority.⁴⁸ Even after the U.S. Supreme Court recognized Native American rights over their already-reduced territories, President Andrew Jackson, empowered under the Indian Removal Act of 1830, charged ahead with forced removal and mass displacement.⁴⁹ These efforts were fueled by notions of manifest destiny, a desire to put fertile lands in the hands of white settlers, and myths used to disparage Native American character in order to justify the disregard for their sovereignty and the inhumane actions that transpired.

Land dispossession—which occurred multiple times over—and further encroachments devastated Native food systems and means of subsistence. Tribes were relocated to less desirable lands ill-suited to agriculture, while buffalo—which had been hunted and relied on for food—were nearly driven extinct.⁵⁰ Even where treaties established Native rights to traditional foods and foodways these agreements have been violated. For instance, treaty agreements over land in what is now called Washington protect the rights of Native people to harvest salmon in their traditional fishing areas, yet the United States has





failed to protect the salmon habitat and has instead allowed dams, intensive agriculture, development, and pollution to diminish this resource.⁵¹ Rather than recognizing the wealth of knowledge and skills Native Americans harbored from domesticating crops and sustaining their own food production systems, treaties between the United States and Tribal Nations contemplated the imposition of the colonial society's agricultural practices and coerced many into becoming the settlers' version of a "farmer."⁵² In fact, a researcher involved in the Indian Claims Commission described agriculture as "the major vehicle for Indian assimilation" in the United States.⁵³ This disavowal of Native American agricultural wisdom and foodways set the stage for the incongruous relationship between Native producers and federal agricultural policy and programs today. Land allotment policies imposed a similarly incompatible model of individual ownership over specific acreage—in place of common ownership—the lasting effects being additional land lost to white

farmers and, for that which remained under Native ownership, highly fractionated land of decreased value and utility.⁵⁴

A recent study found that over the course of 300 years, Native American peoples across the United States lost 99% of their historical lands.⁵⁵ The study authors noted that the lands to which they were forcibly relocated are, today, more at risk from climate change hazards, like drought and heat.⁵⁶ Despite these challenges, Native Americans have continued innovating and cultivating their lands, fueling belated recognition of their contributions to crop development and sustainable farming practices and further manifesting in food sovereignty movements.⁵⁷ Yet, until more recent activism and wins by Native-led coalitions, USDA did not meaningfully engage Tribal governments,⁵⁸ nor did it make its services available to Native American farmers as it did to white male farmers, culminating in the litigation and settlement described further below.



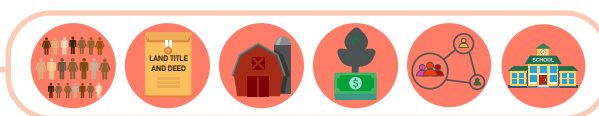
Asian American Farmers

While the history of Black farmers is tied to the South, Asian American farming roots are deepest in the western United States. An increasing number of Asian immigrants joined the agricultural sector in the late 19th century. Chinese migrant workers arrived first, assuming agricultural jobs until the 1882 Chinese Exclusion Act banned Chinese laborers from immigrating to the United States and restricted those present from naturalizing. Japanese immigration continued through this period, with many arriving to work in agriculture and eventually starting their own agricultural operations.⁵⁹ Immigration restrictions and diplomatic agreements limited all immigration from Asian countries starting in 1917, except for the Philippines due to its status as a U.S. Colony.⁶⁰ The Filipino population in the continental United States reportedly increased ninefold between 1920 and 1930, with 60% of the U.S. Filipino population working in agriculture.⁶¹ Through these shifts, thousands of immigrant workers were recruited for labor contracts on the (largely white-owned) sugar plantations that were taking over the Hawaiian islands as trade increased with the United States.⁶² Labor demands continued as the United States annexed Hawaii, where five powerful companies (three American, one British, and one German) controlled 90% of the sugar industry.⁶³

The success that Asian farmers, and particularly Japanese farmers, found in farming prompted racist responses. In the 1920s, multiple states, following California's lead, enacted laws that barred both resident and non-resident aliens ineligible to naturalization from acquiring legal interest in land for agricultural purposes.⁶⁴ Those ineligible to naturalization were deemed so based on their race, with the laws specifically designed to exclude Asian immigrants from naturalization and owning property.⁶⁵ Some states even sought to prevent Asian U.S.

citizens from owning property; in 1943, the Arkansas legislature enacted a law to prevent any Japanese person or person of Japanese descent from purchasing or holding title to any lands in the State of Arkansas.⁶⁶ Other state laws imposed restrictions not just on owning but also on leasing agricultural land. Washington's law to this effect, the Alien Land Bill of 1921, reduced the number of acres farmed by Japanese families in Washington from 25,000 acres to 13,000.⁶⁷ Such laws caused Japanese-owned farmland to drop by more than 40% in the decade from 1920 to 1930.⁶⁸ During this time, immigrants from Japan and South Asia continued to find employment as farm laborers, even as they were prevented from employing those skills to start their own farming enterprises, acquire land, and build wealth.⁶⁹ As one scholar noted at the time, "some proponents of the [California law restricting land ownership] desired Japanese farm workers and welcomed the reduction of the alien Japanese agriculturists to that status."⁷⁰ Despite these significant roadblocks, some Asian American farmers continued to find success, often due to the beneficial practices they brought from farming in their country of origin.

Executive Order 9066 marks a dark moment in this history. Signed at the height of World War II, the Order authorized the forcible removal of approximately 110,000 Japanese Americans from the west coast into centers and concentration camps operated by the War Relocation Authority.⁷¹ At the time, 45% of employed Japanese Americans on the west coast worked in growing crops, with another 18% employed in auxiliary agricultural services.⁷² These farms were incredibly productive, with Japanese-operated farms valued at seven times the average of all farms in 1940.⁷³ Japanese farmers in California had been expected to produce over 40% of the truck crops (i.e., specialty crops) USDA had targeted for production to support the



country in 1942.⁷⁴ Pressure from white-led farmer-growers associations and wealthy agribusiness corporations succeeded in swaying policymakers to remove Japanese farmers from these productive lands.⁷⁵ USDA's Farm Security Administration (a predecessor to today's Farm Service Agency) took control of the interned Japanese-Americans' agricultural land, 258,000 acres, and transferred operations to new farm operators; in the case of corporate agribusinesses, this sometimes occurred "at practically no cost."⁷⁶ Although the Farm Security Administration was meant to protect evacuee property, many "returned to find their uninsured homes and farms sold, destroyed or burned to the ground, their equipment stolen and their wells dry."⁷⁷ Post-war Japanese farm ownership sat at 30% of that preceding the war and Japanese farming operations (including leaseholds) were estimated to be less than a quarter of pre-war operations.⁷⁸

Congress later attempted to mitigate the economic harm caused by forced removal through the Japanese-American Evacuation Claims Act.⁷⁹ But like most attempts to remedy government wrongdoing, the effort was too little and too late. The types of claims capable of remuneration under the Act were limited to demonstrable economic losses, but financial records (including tax returns that the IRS had already destroyed), witnesses, and memories had been lost with time.⁸⁰ A relatively small proportion of evacuees filed claims (26,568), yet even then only \$37 million was awarded out of \$148 million claimed.⁸¹ The claims process also failed to afford claimants the "liberality" intended under the Act; in settling claims, the Justice Department focused on protecting the United States' checkbook over remedying actual harm, imposing evidentiary standards that resulted in compensation below the value of losses.⁸² It set an unfortunate trend of federally-run claims processes yielding grossly inadequate compensation to farmers of color who had been denied their land, wealth, and

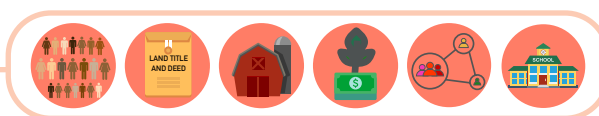
opportunity at the hands of the U.S. federal government.

Latinx Farmers

In this Report, the term Latinx refers to those who are from or descended from people from Latin America.⁸³ In many cases, USDA and other government agencies use the term Hispanic, which denotes Spanish-speaking lineage and can encompass Spanish-speaking populations who are not from Latin America. Those who are Hispanic but not Latinx do not share the same history of colonization, immigration policies, and labor policies that have contributed to the marginalization of Latinx farmers in the United States. In this Report, the term Hispanic is used only in cases where the underlying source or government program relies on the term. Latinx appears in lieu of Latino or Latina to indicate gender neutrality in reference to a group.

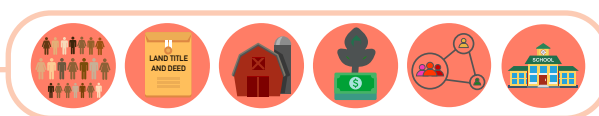
The experience of Latinx farmers and ranchers in the United States has been deeply shaped by the U.S. government's policies of westward expansion and immigration. Many Latin Americans became U.S. residents and citizens following the United States' annexation of Florida, Louisiana, and Texas, in the early 1800s, and the cessation of California, Arizona, New Mexico, Colorado, and Utah from Mexico to the United States under the Treaty of Guadalupe-Hidalgo in 1848.⁸⁴ In a familiar pattern, as white settlers moved in—often recruited by land developers—land prices and property taxes increased, forcing many to sell their land or go into debt.⁸⁵ Some were driven off their land by force, others deprived of their land through fraud, and others targeted as revolutionary suspects.⁸⁶ In Texas, lack of official title records to land granted through Spanish land grants encouraged land theft.⁸⁷ Over time, some former landowners found themselves working the land they had once owned.⁸⁸

Many more Latin Americans came to the United States seeking work, and the potential for



wealth, in mining, railroad construction, and agriculture. Demand for workers, particularly from Mexico, increased as Congress banned migrant workers from Asian countries. Fears of labor shortages increased after Congress prohibited nearly all foreign contract labor in 1917, except for temporary work.⁸⁹ During World War I, the United States used that temporary work exemption to operate what later became known as the first Bracero program to fill labor needs, primarily bringing in workers from Mexico.⁹⁰ Braceros not only faced exploitative labor conditions, but also significant racism from the communities in which they worked.⁹¹ The high demand for agricultural workers extended the program until 1921, but once the Great Depression hit the U.S. government led a “Mexican Repatriation” effort to deport Mexican workers across the border.⁹² Employer recruitment of Mexican workers outside of sanctioned channels continued throughout this time.⁹³

Agricultural labor demands during World War II ushered in the second Bracero program. First operated as a 1942 intergovernmental agreement with Mexico to provide labor to the agricultural industry, Congress formalized the Bracero Program in Public Law 78 in 1951.⁹⁴ Once formalized, the program grew to five times its size.⁹⁵ Public exposure of the horrendous working and living conditions workers experienced in the Bracero Program contributed to the Program’s termination in 1964.⁹⁶ Yet, the unceasing demand for cheap farm labor caused many workers to stay, new immigrant workers to come, and employers to continue recruiting. Some agricultural workers received amnesty under the Immigration Reform and Control Act of 1986; other aspects of that law, particularly sanctions for employers employing unauthorized workers and increased border enforcement, drove immigrant workers further into the shadows and increased employer reliance on farm labor contractors, exacerbating worker exploitation further.



Stigma concerning the immigration pathway workers have taken to come to the United States continues to plague Latinx members of the agricultural sector. Congressionally enacted exemptions of agricultural workers from wage and labor protections has driven poverty among farmworker families, intensifying these prejudices further. For more on exclusion of farmworkers from U.S. labor policy and the need for immigration reform, see FBLE's **Farmworkers** Report.

This long history of recruitment and reliance on migrant farmworkers from Latin America has set the stage for many of those workers and their descendants to become farm and ranch owners and operators. It has also bred some of the hostility that manifests in discriminatory treatment of these producers today. Latinx farmers, particularly immigrant farmers, face language and literacy barriers in accessing USDA services and programs.⁹⁷ Burdensome recordkeeping requirements and other standardized schemes also frequently conflict with farming norms and practices, exacerbating the challenge.⁹⁸ Additionally, stereotypes that associate Latinx farming with farm labor rather than business ownership have been shown to skew USDA staffs' perception of Latinx producers and of their prevalence in the farming community.⁹⁹ The prejudices and racist sentiments engendered by the past 150 years of U.S. colonial, immigration, and labor policies have led Latinx farmers and ranchers to find themselves among the many producers who have experienced discrimination by USDA.

Discrimination Suits Brought by Black, Native American, Hispanic, and Women Farmers

In the first of a series of discrimination suits against USDA, *Pigford v. Glickman*, Black

farmers lodged two key claims: first, that USDA willfully discriminated against them in denying or delaying their loan applications and, second, that USDA failed to properly investigate and resolve their complaints. In 1999, the federal judge who approved the settlement agreement reached between Black farmers and USDA found that there was a “persuasive indictment of the civil rights records of the USDA.”¹⁰⁰ Multiple reports cited in the case demonstrated the systematic denial of credit and benefits to Black farmers and acknowledged the lasting impacts of discriminatory practices.¹⁰¹ Through that settlement, over \$1 billion was paid out to African American class members.¹⁰²

However, the *Pigford* claims resolution process was plagued with shortcomings. Under the settlement's two-track dispute resolution mechanism, claimants could pursue a claim for \$50,000 and debt forgiveness via “Track A” or could pursue their actual damages via “Track B.”¹⁰³ Because Track B required more evidence to establish loss amounts and many claimants did not have access to records to support those figures—largely owing to USDA's recordkeeping—the vast majority of claimants pursued Track A.¹⁰⁴ Still, of the 22,552 eligible claimants who underwent Track A, only 15,645 received monetary relief, suggesting that the criteria were too exacting or that those administering the process misapplied the criteria, which were supposed to yield “virtually automatic” payments to claimants. Furthermore, many prevailing claimants never saw the promised debt forgiveness. For one, USDA administrative challenges delayed *Pigford* debt relief to prevailing claimants, many of which were facing pending foreclosure or acceleration of their outstanding farm debt.¹⁰⁵ Further, issues arose regarding the amount of interest accumulated by the end of the claims process, which for some claimants was substantial, although it was ultimately refunded.¹⁰⁶ The requirement that claimants continue to repay farm program



loans during the claims process also resulted in the repayment of some loans that would otherwise have qualified for *Pigford* debt relief had they remained outstanding.¹⁰⁷ Additionally, implementation issues emerged regarding how USDA determined which loans were considered “outstanding debt,” as well as the tax implications of debt relief and alleged improper tax account creation and funding for Track A claimants.¹⁰⁸ The claims filing deadline also excluded thousands of would-be claimants, leading to subsequent litigation (*Pigford II*). Through the 2008 Farm Bill, Congress reopened the opportunity to file claims and then later allocated additional funds to help settle the 34,000 additional eligible claims, of which approximately half were successful.¹⁰⁹

Shortly after the *Pigford* settlement, Native American farmers filed a class action lawsuit alleging that USDA willfully discriminated against them in processing farm loan applications and in loan servicing and failed to thoroughly investigate discrimination complaints.¹¹⁰ USDA settled this lawsuit, *Keepseagle v. Vilsack*, for \$760 million,¹¹¹ instituting a Track A (\$50,000 and potential debt relief) and Track B (up to \$250,000 with evidence of actual loss) claims process. Perhaps taking a lesson from the *Pigford* claims process, the *Keepseagle* class members filing under Track A did *not* need to identify similarly situated white farmers who received more favorable treatment in order to receive relief, which was required of *Pigford* claimants and *Keepseagle* Track B claimants. The *Keepseagle* settlement also established at USDA the Council for Native American Farming and Ranching to advise USDA on eliminating barriers and promoting access to USDA programs for Native American farmers and ranchers.¹¹²

Hispanic, or Latinx, farmers and ranchers have also faced well-documented barriers to credit access. In 2002, the General Accounting Office

(now, Government Accountability Office) found that USDA perpetuated disparities in handling loan applications from Hispanic applicants, resulting in longer loan processing times and lower loan approval rates as compared to non-Hispanic white applicants.¹¹³ Further, USDA failed to timely address complaints of discrimination against Hispanic program applicants or participants.¹¹⁴ These concerns were litigated in *Garcia v. Vilsack*, filed in 2000, in which a group of Hispanic farmers claimed that USDA willfully discriminated against them in processing applications for farm credit and disaster benefits and failed to investigate their complaints.¹¹⁵

Women farmers also filed suit in 2000, alleging gender discrimination in USDA lending and failure to investigate, in *Love v. Vilsack*. Both *Love* and *Garcia* were heard by the same district judge, and so the cases proceeded similarly and were eventually consolidated on appeal. In sum, the judge denied class certification in both suits, meaning that potential class members would have to pursue their claims individually. USDA, with the Department of Justice, established a claim settlement process, funded up to \$1.33 billion, through which qualifying farmers could have their claims resolved for awards of up to \$50,000 or \$250,000.¹¹⁶

Keepseagle, *Garcia*, *Love*, and *Pigford*—the largest civil rights class action settlement in U.S. history—marked extraordinary acknowledgments of discrimination at USDA. However, as the judge in *Pigford* made clear, “Nothing can completely undo the discrimination of the past or restore lost land or lost opportunities.”¹¹⁷ Rather, these cases “represent[] a significant first step.”¹¹⁸

USDA in the 21st Century

The discrimination suits marked an important development in recognizing systemic failures



and discrimination at USDA. However, even in the aftermath of these settlements, USDA has fallen far short of remedying the harms that led to them. In 2016, Secretary of Agriculture Tom Vilsack described his work to settle discrimination claims under *Pigford* as helping to “close a painful chapter in our collective history.”¹¹⁹ In reality, that chapter remains open. During Secretary Vilsack’s first term as Secretary of Agriculture, USDA employees continued to engage in discriminatory practices, including misrepresenting the frequency with which new complaints were made and failing to adequately compensate Black farmers through *Pigford* settlement payments, resulting in many losing their farms.¹²⁰

Alongside these lawsuits and throughout the 2000s and 2010s, Government Accountability Office (GAO) and Office of Inspector General reports repeatedly found that USDA made grossly inadequate efforts to address discrimination. For example, of the more than 14,000 civil rights complaints filed at USDA between 2001 and 2008, only one complaint of program discrimination was found to have merit.¹²¹ Poor data collection,¹²² backlogs of complaints and faulty reporting,¹²³ lengthy complaint investigations,¹²⁴ and other failures to resolve discrimination complaints were found to be rampant.¹²⁵ In one report, GAO stated that USDA’s “resistance to improv[ing] its management system calls into question [its] commitment to more efficiently and effectively address discrimination complaints both within the department and in its programs.”¹²⁶

Under both the Obama and Trump Administrations, USDA continued to fall short on enforcing civil rights protections and managing civil rights complaint processing.¹²⁷ Investigation of complaints against USDA revealed an “unusually high number of complaints filed against its own leadership” and that “almost half of these complaints were not acted upon in a timely manner.”¹²⁸ Similar issues

persisted within the program discrimination complaint process, with USDA employees providing minimal guidance to those filing complaints, attempting to close complaints wherever possible, and failing to sanction offending officials.¹²⁹

Reports also continued to document farmers of color receiving a fraction of farm subsidies compared to their white counterparts¹³⁰ and having significantly less access to credit.¹³¹ Disproportionately low government support in agriculture for systemically marginalized producers persists today, as demonstrated most recently by the fact that farmers of color received just 0.1% of the 2020 COVID-19 relief for farmers.¹³² Often when these disparities have been pointed out, officials attribute them to differences in the farm sizes, crop type, credit, and similar factors between white producers on the one hand and producers of color on the other. These types of “race neutral” justifications obfuscate the fact that the differences cited are directly attributable to government policy that enabled white farmers to amass land and wealth to the detriment of farmer of color. Furthermore, USDA programs and services have developed in response to demands and preferences of white-led industrial farming. Operations led by producers of color often employ practices or grow crops and animals that may be incompatible with the standardized models recognized by USDA.¹³³ These differences in practices are used to justify disparate outcomes despite having little connection to what constitutes good farming or positively impacts the U.S. agricultural system.

Decades of inadequate action by USDA to remedy disparate service provision and uphold civil rights have eroded the trust of systemically marginalized producers. A 1964 U.S. Commission on Civil Rights report cautioned that failure to address these inequities would “[feed] the present racial crisis and further undermine[] the faith of millions



of Americans in their Government and in the fair and proper administration of democratic institutions.”¹³⁴ That assertion remains equally true almost 60 years later. The next farm bill is an opportunity to build upon the promise of the discrimination-suit settlements and ameliorate racial and ethnic disparities in agriculture.

The Farm Bill’s Role in Promoting Equity

This Report proposes measures Congress can take in the 2023 Farm Bill to support equitable participation in agricultural production and governance, grouped into six Goals. The first two Goals directly address historic and ongoing discrimination and its effects. Goal I aims to reckon with the long legacy of structural racism within USDA and U.S. agriculture. It calls for acknowledging the varying ways that legacy has affected different marginalized groups, including recognizing the unique role of Native American producers and ensuring that farm bill programs are inclusive of producers on tribal lands. It calls for committing to structural changes at USDA to ensure that the Department integrates a focus on equity throughout its legislative mandates, including through data collection to maintain accountability for those changes.

Goal II calls for mitigating the harms associated with heirs’ property, a situation in which farmland owners lack clear title to their land after it has been passed between generations without a will. The resulting “tenancy in common” ownership structure can lead to numerous problems, including the inability to use the property as collateral for credit and impeded access to government programs that require proof of land ownership.¹³⁵

Goals III and IV outline reforms to enable broad-based and equitable participation in agricultural production. They look toward the future of agricultural production, aiming to support current and future producers in accessing land, accessing credit, and meeting the environmental and social demands of modern agriculture. These Recommendations describe reforms that target both systemically marginalized farmers and ranchers and beginning farmers and ranchers. Although many beginning farmers and ranchers identify as white, support for beginning farmers will help usher in the next generation of farmers, make farming a more accessible option, and encourage diversification of the industry through supporting new entrants.

The final two Goals aim to make agricultural governance more intentional and to spread leadership opportunities more widely among those invested in U.S. agriculture. We use the term “governance” to mean exerting control through the establishment and implementation of norms, laws, and other sources of power; agricultural governance occurs across multiple centers of authority, including Congress, USDA, Tribal governments, and elected local county committees. Goal V reimagines USDA’s county committee system of elected agricultural administration to make it more equitable, inclusive, and effective. Goal VI focuses on the role of land-grant colleges and universities as institutions of higher education and continuing agricultural education. Our goal is to elevate land-grants as special opportunities for innovation with emphasis on empowering minority-serving institutions that have been marginalized for generations. As land-grant institutions and county committees support the development and execution of agricultural leadership, this Report recommends ways to build on the best of these traditions and remedy the worst.



GOAL I



Address Discrimination and Advance Equity Across USDA

Per its own acknowledgment, USDA “[has] not done enough to provide all farmers and ranchers an equal chance of success and prosperity.”¹³⁶ This fact is uncontroverted. Despite being called out for decades, USDA’s programs and governance structures have continued to fall short on the promise of remediating discrimination and meaningfully advancing equity in agriculture. Recent commitments make the next farm bill a promising opportunity to catalyze lasting change.

The goal of achieving “equity” has risen to prominence across the federal government, as well as throughout the public and private service sectors. But this nebulous term can encompass a range of distinct perspectives on the actual outcomes sought to be achieved and the most appropriate pathways to getting there. In President Biden’s Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (discussed further below), equity is defined as “the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment[.]”¹³⁷ A limited reading of that definition could reduce it to requiring merely the absence of discrimination in federal programs. Nondiscrimination is required of governments at baseline, however; equity must

require more. Distinct from the related concepts of “equality,” “diversity,” and “inclusion,” advancing equity is commonly understood to mean providing individuals and groups with support that mitigates the social and economic disadvantages that lead to disparate outcomes such that, when equity is achieved, outcomes no longer vary by race, ethnicity, income level, or other demographic marker.¹³⁸ Particularly in the case of government, equity is closely linked to concepts of justice—where the government has played a role in causing or exacerbating social and economic disadvantages (as in the case of USDA), it is imperative that it design its programs and policies to remedy the resulting disparities in access, wealth, and power, and ensure such programs and policies no longer contribute to such disparities. Fair and just treatment of USDA’s constituents, as required under the Executive Order, thus demands intentional, comprehensive, and well-resourced actions across USDA’s programs and governance structures to make equity a realizable goal of the Department.

While each Goal of this Report seeks to advance equity in some respect, this first Goal recommends actions to advance equity across Departmental programs as whole. It emphasizes opportunities for meaningful stakeholder engagement, extending and amplifying the work of the Equity Commission, codifying aspects of USDA’s Equity Action



Plan, leveraging data to keep the Department accountable, and creating new mechanisms for stakeholders to hold USDA to its mandates.

Strengthen USDA's Programmatic Offerings for Systemically Marginalized Producers

As described in detail in the Introduction, USDA has failed to serve producers and constituents of color to such a degree that those individuals have been systemically marginalized. Stakeholder advocacy has achieved meaningful programmatic changes to USDA's offerings that have helped address this gap. One major achievement was the addition of grant programs to support outreach and technical assistance to socially disadvantaged farmers and ranchers (the 2501 Program, discussed below), through which trusted organizations—i.e., not USDA agents—can offer support to producers in accessing USDA programs and in managing their agricultural operations. Other programmatic changes have been achieved over successive farm bills, often due to the leadership and advocacy of producers of color and the advocacy organizations that represent or collaborate with them on policy reform. The Opportunities that follow seek to strengthen these offerings further by requiring stakeholder engagement, reinforcing the need for targeted outreach and assistance, and improving access to program funding.

LEGISLATIVE OPPORTUNITY

Codify mandate for meaningful stakeholder engagement with a diverse group of farmers, ranchers, and food system workers

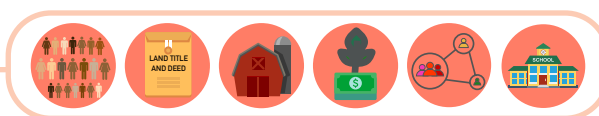
Persistent discrimination has resulted in producers of color being disproportionately underrepresented in U.S. agricultural policy. Moreover, discrimination and other barriers to USDA benefits and programs undermine

their ability to achieve sustainable, profitable agricultural operations. Without sufficient representation, the valuable perspectives of producers and constituents of color cannot be used to shape and influence USDA programs and practices. Nor can their input be utilized to address long-standing inequities and influence U.S. agricultural policy.

USDA has recognized that there are not consistent ways for stakeholders to provide recommendations, nor are there systems in place to collect customer input on USDA program delivery and customer interactions with USDA.¹³⁹ The Department has thus proposed creating opportunities to gather input and provide it to policy and program staff capable of acting on the information received.¹⁴⁰

To institutionalize this important step, Congress should require that USDA promulgate a regulation that sets out the Department's processes for guaranteeing meaningful stakeholder engagement with a diverse constituency of stakeholders to promote inclusion across different races, ethnicities, genders, farm sizes, and types of crops or animals produced. Congress should require USDA and its agencies to actively solicit input from diverse stakeholders in all aspects of USDA's program design, outreach, and implementation.¹⁴¹ Congress should direct USDA to consider the disparate histories of discrimination experienced by different racial and ethnic groups as it develops strategies to increase participation from diverse participants to assist in the design, implementation, and evaluation of programs. Redressing harms may require different approaches, with different mechanisms needed to eliminate discrimination against and achieve equity with respect to a particular group.

As an example, all agencies of the USDA are already directed to engage in meaningful consultation with tribes in a timely manner on



policies that have substantial direct effects on one or more tribes.¹⁴² This directive describes consultation as encompassing three essential elements: (1) who can consult (those with delegated authority), (2) the qualities of process (timely, meaningful, substantive), and (3) the inclusiveness of communication (two-way dialogue between parties).¹⁴³ Consultation is also distinguished from mere notification, technical communications, or outreach activities.¹⁴⁴ In taking up this Legislative Opportunity, this distinct process for consulting with tribes must be preserved, given their unique history of discrimination and political position as sovereign nations.

USDA should develop alternative procedures to guarantee engagement from systemically marginalized non-tribal groups. For example, USDA could be required to solicit input from marginalized stakeholders on proposed program priorities, evaluation criteria for competitive grant programs, effective outreach, and service delivery models. This may include listening sessions with specific participation requirements to ensure all stakeholders are represented and views separately accounted for (i.e., not all grouped together as one socially disadvantaged cohort), with a response by USDA to recommendations suggested at the listening session. USDA should consider modeling these efforts after California's Farmer Equity Act that directs the California Department of Food and Agriculture to ensure that socially disadvantaged farmers and ranchers are included in the development, adoption, implementation, and enforcement of food and agriculture laws, regulations, and policies and programs.¹⁴⁵

Importantly, Congress should also appropriate the funding necessary for USDA to fully implement this recommendation and adopt processes and newly developed opportunities for USDA to incorporate diverse perspectives into all aspects of the Department's work. By

prioritizing this coordination, the interests of historically underrepresented stakeholders will be reflected and help shape USDA programs to be accessible and equitable. Creating mechanisms of increased participation from all producers and constituents will allow USDA to harness this untapped experience and expertise and build an environment at USDA that values diversity and stakeholder engagement.

LEGISLATIVE OPPORTUNITY

Insert a finding of fact and statement of purpose for the 2501 Program

The 2501 Program refers to the Outreach and Assistance for Socially Disadvantaged and Veteran Farmers and Ranchers program, first established through Section 2501 of the 1990 Farm Bill.¹⁴⁶ This program provides funding—through grants and partnership contracts—to non-governmental organizations and educational institutions that support socially disadvantaged farmers and ranchers' agricultural endeavors through outreach and technical assistance and is one of the centerpieces of Congress's and USDA's efforts to address the history of white supremacy in agriculture. Originally designed to serve just socially disadvantaged farmers and ranchers, Congress expanded the program to also serve military veterans in the 2014 Farm Bill.¹⁴⁷ The 2501 Program was an important first step in addressing the service gap for socially disadvantaged farmers and ranchers, but it is not sufficient on its own. Congress must also articulate the role the U.S. government has played in oppressing producers of color. By doing so, Congress can create a stronger foundation for both improving government practices and repairing harms.

Beyond the moral obligation of addressing racial and ethnic inequities, the inclusion of an explicit finding of facts and statement of purpose would strengthen the program's mandate and secure against any future



objection to its continuing importance. Congress should amend the statute to provide a finding of fact and purpose that circumvents such objections, demonstrates the compelling basis for the program, and clearly articulates and admits the role the government has played in oppressing farmers of color. The findings and statement of purpose may look something like the following:

FINDINGS – Congress makes the following findings:

1. The disproportionate representation of white individuals among farmer and rancher populations in the United States as compared to farmers and ranchers of color, and especially the decline in the number of Black farmers, is a result of decades of racial and ethnic discriminatory practices within the United States government, Department of Agriculture, and other government agencies;
2. The discriminatory practices created disparities which disadvantaged farmers and ranchers from certain racial and ethnic groups, including Black, Native American, Latino/a, and Asian and Pacific Islander producers;
3. That the United States government and its agencies are aware of the effects of discriminatory practices and promoted the disparate treatment of farmers and ranchers based on race and ethnicity without regard to their individual qualities;
4. That the discriminatory practices have been implemented for such a long period of time that United States government action is required to rectify the inequities;
5. That the discriminatory practices have become systemic and impact on current activities of the United States government; and
6. That the United States has a compelling interest in addressing decades of historic

discrimination and current discrimination promoted by its policies and agencies.

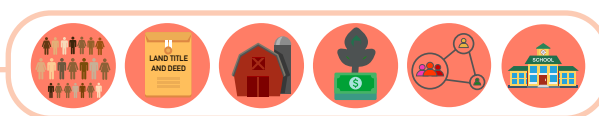
PURPOSE – The purpose of this title is to address racial and ethnic discrimination against farmers and ranchers by:

1. Requiring programs and policies to address the history of discrimination and the inequities the United States government created,
2. Requiring reforms within the Department of Agriculture to end current and prevent future discrimination,
3. And for other purposes.

LEGISLATIVE OPPORTUNITY

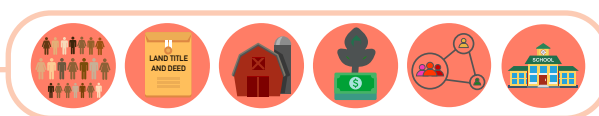
Streamline grant and program applications to promote accessibility

Applications for USDA grants, programs, cooperative agreements, and other forms of support are time and resource intensive. Many community-based organizations operate as non-profit entities whose primary objective is providing direct services and support to their communities. These organizations often have a small set of paid staff who fill multiple roles and have limited additional bandwidth. Completing substantial and complex funding applications thus exceeds the organization's capacity. The subsequent grant reporting process is also resource intensive, further discouraging applicants. Individuals applying for USDA programs face similar barriers in program applications. For those from or working directly with systemically marginalized groups, these resource challenges can be even more pronounced and layer on top of long histories of discriminatory application processes and inequitable distribution of USDA resources. USDA should work to streamline and simplify its grant application and reporting processes, establishing reasonable requirements that minimize the burden on these organizations.¹⁴⁸ Stakeholders have identified the need for



grant streamlining for community-based organizations and underserved communities across federal programs; the challenge is a key concern in the Biden Administration’s Justice40 initiative, which aims to deliver “at least 40% of the overall benefits from Federal investments in climate and clean energy to disadvantaged communities.”¹⁴⁹ USDA should leverage lessons from these federal initiatives and further tailor them to the agricultural context, as appropriate, to make its grant programs more accessible to community-based organizations working with marginalized producers. For individuals, USDA should continue working to reduce the overly burdensome application processes and documentation requirements that can deter systemically marginalized and beginning farmers from pursuing USDA programs and funding opportunities.

USDA has recognized these existing barriers in its Equity Action Plan.¹⁵⁰ USDA could mitigate these concerns by implementing universal applications to reduce requirements to submit duplicative information.¹⁵¹ USDA should also engage technical assistance providers that can support organizations in seeking USDA grants, such as those offered through the 2501 Program as well as USDA’s organization-eligible grants administered by Rural Development, the Agricultural Marketing Service, and the National Institute of Food and Agriculture. Permanent, increased funding for the technical assistance partnerships designed to support systemically marginalized producers in applying for USDA programs—discussed again below—will also improve access.



Terminology and Accounting for Varied Experiences of Historical and Persistent Discrimination

For over a century, reports have documented systemic racial and ethnic discrimination against farmers of color by USDA. Following farmer-led advocacy, Congress first established target participation rates and reserved funds for socially disadvantaged groups in USDA's agricultural lending under the Agricultural Credit Act of 1987.¹⁵² This Act reflects the first instance of "socially disadvantaged" appearing in agricultural governance, though it had been used in Small Business Administration programs previously.¹⁵³ Building on this achievement, advocacy organizations including the Federation of Southern Cooperatives, Land Loss Prevention Project, Rural Coalition, and the National Family Farm Coalition worked with members of Congress to introduce the Minority Farmers Rights Act of 1990.¹⁵⁴ Enacted in Section 2501 of the Food, Agriculture, Conservation, and Trade Act of 1990 (the 1990 Farm Bill), the "Outreach and Assistance for Socially Disadvantaged Farmers and Ranchers" provisions established the 2501 Program described in the preceding section.¹⁵⁵ Section 2501 also defined, for the first time, "socially disadvantaged group" to mean "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."¹⁵⁶ A "socially disadvantaged farmer or rancher," then, means a farmer or rancher who is a member of a socially disadvantaged group.¹⁵⁷ Today, these definitions are found in 7 U.S.C. § 2279. The 1990 Farm Bill also inserted the socially disadvantaged definition into 7 U.S.C. § 2003, the "Target Participation Rates" of the Agricultural Credit, Administrative Provisions. Congress amended this latter definition two years later to include gender prejudice.¹⁵⁸ Legislation and regulations enacted since have often referenced one of these two definitions (that in 7 U.S.C. § 2279 or 7 U.S.C. § 2003) in designing programs to reach these producers.

While the 2501 Program, targeted participation rates, and other provisions designed to support socially disadvantaged farmers and ranchers in USDA programs have filled critical gaps and led to necessary progress, many producers who fall within this broad category do not identify with the descriptor of "socially disadvantaged."¹⁵⁹ Others have pointed out that the term fails to reflect the diverse and discrete experiences of the concerned groups.¹⁶⁰ The Black farmers' experience of land dispossession and disenfranchisement following generations of enslavement is distinct from the history of Native American land robbery and forced relocation, which is distinct from Latinx farmers' history, particularly of those who came to farming as immigrant farmworkers from Mexico and Central America.

Despite the importance of these unique histories, however, programs targeted to specific racial or ethnic groups can run into equal protection challenges if not "narrowly tailored," and even well-conceived programs—ones that cite to compelling justifications and are designed to remedy the specific harms experienced by the racial or ethnic group in question—may be hamstrung by litigation challenges if structured in this manner (see Debt Cancellation Litigation, next page). Distinctly, the "socially disadvantaged" definition primarily contemplates groups having experienced discrimination. Other terms, such as "underserved," can capture a broader cross-section of producers without necessarily raising the specter of litigation. Nonetheless, because USDA has historically predominantly served the largest, wealthiest producers, the breadth of producers encompassed by an "underserved" category could undermine the purpose of remediating harms and reestablishing relationships with racially and ethnically diverse producers.

The policy considerations around terminology and program design are challenging. As communities of color and their advocates consider the most appropriate path forward, we encourage Congress and USDA to acknowledge and respect the differences in the histories of oppression that Black, Native American, Latinx, and Asian American farmers have faced in the United States, especially as solutions are identified and discussed.



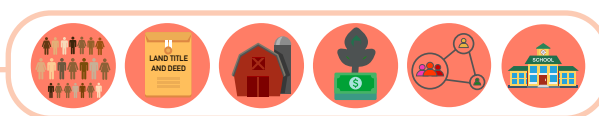
Debt Cancellation Litigation

Recent efforts to remedy historic and on-going discrimination against producers of color, particularly their exclusion from recent farm relief programs that provided direct payments to certain producers, have been stalled by litigation. Recognizing the dire circumstances facing producers of color after nearly a year of the COVID-19 pandemic, Senator Warnock introduced the Emergency Relief for Farmers of Color Act of 2021.¹⁶¹ Several provisions of the Act made it into the American Rescue Plan Act (ARPA), which President Biden signed into law on March 11, 2021.¹⁶² ARPA's Section 1005 appropriated funds for USDA to provide payments of up to 120% "of the outstanding indebtedness of each socially disadvantaged farmer or rancher as of January 1, 2021, to pay off the loan[.]" for direct and guaranteed farm loans (the amount to pay off the loan plus an amount to offset the tax burden).¹⁶³ The legislation referred to the term "socially disadvantaged farmer or rancher" as defined in 7 U.S.C. § 2279. That section defines socially disadvantaged farmer or rancher as one who is a member a "group whose members have been subjected to racial or ethnic prejudice because of their identity as members of the group without regard to their individual qualities." In carrying out the program, USDA relied on its typical enumeration of this designation, providing a non-exhaustive list that included American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos.¹⁶⁴ It also provided that the Secretary would determine on a case-by-case basis whether additional groups qualify under this definition.

Certain white farmers in jurisdictions across the United States sued USDA shortly after the Department took steps to administer the program. Twelve cases were filed over the summer of 2021, with three federal courts entering orders (preliminary injunctions) to halt the program until the case could be decided on the merits.¹⁶⁵ As part of the preliminary injunction analysis, each court determined that the plaintiff farmers had a likely chance of succeeding on their claim. While the claims differed somewhat between cases, the core claim in each case was that Section 1005 violated the plaintiffs' right to equal protection of the law by excluding the plaintiffs from receiving the benefit of debt relief due to their race.

The merits of this claim may never be determined in court. The Inflation Reduction Act, passed in August 2022, repealed Section 1005 and replaced the program with funds for USDA to provide loan modifications or relief to distressed borrowers, without reference to their status as socially disadvantaged. Yet, advocates for producers of color and the ARPA debt cancellation program have made compelling arguments that Section 1005 could have survived the court challenge. First—though not a central issue in the preliminary injunction decision—the statutory definition of socially disadvantaged farmer or rancher does not reference race, but instead references belonging to a group that has experienced unlawful discrimination.¹⁶⁶ Thus, it is not clear that the statute itself raises equal protection concerns. Assuming, as the parties in the case did, that the program does concern equal protection, the standard the court would apply to evaluate the program is a stringent one. Those defending the program—in this case, USDA and the Federation of Southern Cooperatives, National Black Farmers Association, and the Association of America Indian Farmers (the latter three having intervened in the case to defend the program)—would need to show that the program furthers a compelling government interest and that the program is narrowly tailored to serve that interest. In deciding the preliminary injunctions, the courts generally seemed to acknowledge the past harms committed but questioned whether the program was tailored closely enough to the harm to survive the exacting standard. The courts also wanted to see more evidence of recent discrimination to demonstrate the compelling interest to justify the program. In the months that followed, advocates collected testimony from farmers to show the extent of the problem, but due to the repeal of the program, this evidence is unlikely to be heard in court.

The litigation has left producers, advocates, and policy makers with unanswered questions about how to best support producers of color who have experienced discrimination at the systemic level (past and present) and thus face unique barriers to accessing USDA programs. Targeted programs are often the most effective and efficient tool for mitigating such barriers and promoting access to critical resources, and they should continue. Going forward, attention should be paid to how such programs are designed, not because tailored programs are inherently flawed, but because they may raise the specter of litigation and their benefits may thereby be delayed.



Enact Changes to Better Support Native American Farmers and Ranchers

Equity reforms within the farm bill must also grapple with the distinct history of genocide, land robbery, and discrimination against Native Americans by the federal government and within USDA. The needed changes should be part of broad legal reforms to acknowledge tribal sovereignty, including in areas beyond the purview of USDA. Nevertheless, there are some steps Congress can take in the farm bill to reform how USDA programs operate on tribal lands. These steps were comprehensively laid out in the Indigenous Food and Agriculture Initiative (IFAI) report *Regaining Our Future: An Assessment of Risks and Opportunities for Native Communities in the 2018 Farm Bill* in the last farm bill cycle.¹⁶⁷ The Native Farm Bill Coalition (of which IFAI is a member) published and advocated for *Indian Country Priorities and Opportunities for the 2018 Farm Bill*, which helped spur Congress to enact 63 separate tribal-related provisions in the 2018 legislation.¹⁶⁸ The Native Farm Bill Coalition published its new report, *Gaining Ground: A Report on the 2018 Farm Bill Successes for Indian Country and Opportunities for 2023*, in September 2022 in anticipation of the 2023 legislation. FBLE encourages Congress

to continue collaborating with tribal leaders and advocates to make the farm bill a channel for enacting policy change to support Native American communities, agriculture, and food systems on tribal lands.

Build Upon, Extend, and Codify the Reforms Begun Through the Equity Commission and the Equity Action Plan

Following a specific appropriation of funds in the American Rescue Plan Act (ARPA), Section 1006, USDA announced, in September 2021, its intent to establish an Equity Commission (EC) and Subcommittee on Agriculture (Subcommittee).¹⁶⁹ The 15-member EC is tasked with advising the Secretary of Agriculture regarding USDA programs, policies, and other systemic structures contributing to barriers to inclusion, perpetuating systemic discrimination, and exacerbating racial, economic, health, and social disparities.¹⁷⁰ The EC is also expected to deliver a report on barriers to USDA program accessibility and actionable recommendations to reduce barriers for underserved populations within 12 months after it has convened.¹⁷¹ Similarly, the 15-member Subcommittee is charged with developing recommendations to optimize USDA programs, dismantle structural inequities and systemic discrimination, and promote social justice, particularly for historically underserved and diverse communities served by USDA.¹⁷²

Members of these committees were appointed in February 2022, and according to USDA, include individuals who “serve or advocate for underserved communities, minorities, women, individuals with disabilities, individuals with limited English proficiency, rural communities and LGBTQI+ communities.”¹⁷³ Representatives from small business, higher education and farmworkers also sit on the committees. The



EC is charged with meeting up to four times per year; as of this writing, two public meetings have occurred, at which the EC heard from USDA regarding its efforts at addressing equity, listened to public oral comment, and discussed next steps.¹⁷⁴

While it is a positive development that USDA created the EC, it is crucial that the Commission not simply reiterate past findings regarding USDA's systemic discriminatory practices. The EC needs to make actionable proposals for systemic change at both the administrative and legislative levels.

In February 2022, USDA published its Equity Action Plan in furtherance of the Biden Administration's Executive Order 13985.¹⁷⁵ The Plan includes a series of initiatives and objectives that USDA plans to take to promote equity within the agency and better support underserved farmers and ranchers.¹⁷⁶ Although many of the initiatives are laudable, the Equity Action Plan relies heavily on administrative changes. More action, especially legislative, is required to root out decades of racial discrimination in the agency itself and in the administration of its programming and to achieve equity in USDA programs.

LEGISLATIVE OPPORTUNITY

Renew the Equity Commission charter

The Equity Commission was established in accordance with the Federal Advisory Committee Act (FACA).¹⁷⁷ Under FACA, an advisory committee shall terminate within two years of its establishment unless the charter is renewed before the termination date.¹⁷⁸ Congress should ensure that the EC has sufficient time to fully realize its directive to "address racial equity issues within the Department of Agriculture and its programs."¹⁷⁹ This process will likely require that the EC charter be extended beyond the default two-

year mark. Congress should also consider creating a permanent body modeled after the EC for ongoing promotion of racial equity at USDA.

LEGISLATIVE OPPORTUNITY

Dedicate mandatory funding to make permanent the recently authorized additional assistance and support for systemically marginalized producers

ARPA Section 1006 provides over \$1 billion in funding to support socially disadvantaged farmers and ranchers and advance equity in USDA programs. The funds were allocated to various programming efforts including expanding outreach efforts, training, and technical assistance, improving land and credit access, and added funding support for agriculture research, extension programming, and minority-serving institutions.¹⁸⁰ In August 2022, Congress amended these authorizations to support a broader range of underserved producers, and changed the sums allocated for each programming effort.¹⁸¹ Section 1006 now provides \$2.835 billion to support underserved producers, with the majority (\$2.2 billion) allocated for a program to provide financial assistance to producers that experienced discrimination prior to January 1, 2021.¹⁸²

USDA's Equity Action Plan indicates that it intends to work with Congress to make Section 1006 programming and technical assistance partnerships permanent. Congress should provide mandatory funding in the 2023 Farm Bill for the programming established by Section 1006.¹⁸³ Although the Equity Action Plan outlines plans to address a multitude of issues perpetuating and exacerbating inequities at USDA, many of the proposed remedies are purely administrative and vulnerable to being undermined or eliminated as a result of changing administrations. A true commitment to advancing equity across the Department requires stronger assurances that the resources



necessary to remove systemic barriers and improve diversity in the agricultural sector will be available. Currently, the 2501 Program is due to receive just \$20 million annually beginning in FY2023;¹⁸⁴ the demand for Section 1006 and USDA's Equity Action Plan show that much more investment is needed to support the types of partnerships USDA hopes to implement with the new line of funding. By providing mandatory, annual funding for Section 1006 programs in the farm bill, Congress can create stable and continued support that ensures underserved farmers and ranchers have the support they need and foster equity at USDA.

Incorporate a Commitment to Equity Throughout USDA Entities and Policies

USDA has a number of staff offices that support the Department's agencies and programs in carrying out their missions and the administration of the Department as whole.¹⁸⁵ These offices often work with the Secretary of Agriculture directly to support leadership, oversight, and coordination. All of these offices have a role to play in advancing USDA's equity goals, but two in particular stand out for their potential influence: the Office of the Assistant Secretary for Civil Rights (OASCR) and the Office of Budget and Program Analysis (OBPA).

Congress created the position of USDA's Assistant Secretary for Civil Rights and OASCR in the 2002 Farm Bill. OASCR is tasked with providing leadership for resolving long-standing issues of discrimination, reporting on participation rates in USDA programs by producers and constituents of color, and developing strategies to improve handling of discrimination complaints and preventing backlogs.¹⁸⁶

Unfortunately, OASCR and the civil rights offices

that preceded it have been long plagued by substantial deficiencies in their civil rights management.¹⁸⁷ GAO has cited OASCR for failures to prevent backlogs of discrimination complaints, as well as faulty reporting and unreliable data that have undermined complaint resolutions and tracking of minority participation in USDA programs.¹⁸⁸ Further, it has chided OASCR for sacrificing quality for efficiency, neglecting to incorporate fairness and equity into its strategic planning, and failing to engage with diverse stakeholders in developing its strategic plan.¹⁸⁹ While previous Administrations have failed to address these and other concerns, the current leadership has indicated stronger commitments to reform. As discussed in the Opportunities below, new governance structures and internal reforms are needed to garner faith in USDA's ability to manage its civil rights obligations.

In addition to OASCR, OBPA's functions may be leveraged to promote equity at USDA. OBPA is responsible for coordinating the preparation of USDA budgets, legislative reports, and regulations.¹⁹⁰ OBPA also directs and administers USDA's budgetary functions, reviews program and legislative proposals for program and budget-related impacts, and analyzes programs, resources, and alternatives.¹⁹¹ OBPA plays an important role in ensuring efficient and effective delivery of USDA programs by incorporating performance, evidence, and risk into decision making and seeking the resources needed to carry out USDA programs.¹⁹² Additionally, OBPA develops USDA's Budget Summary, Strategic Plan, and Annual Performance Plan and Report.¹⁹³ Finally, OBPA serves as an advisor for the Office of the Secretary on matters related to implementation of Secretarial priorities and advocating for USDA's program plans and budget to Congress.¹⁹⁴ Incorporating equity into OBPA's charge can ensure that the strategies, budgets, and activities of each USDA agency align with the Department's equity goals.





LEGISLATIVE OPPORTUNITY

Implement the remaining components of the institutional governance structure proposed in the Justice for Black Farmers Act

The Justice for Black Farmers Act proposed three new entities within USDA: (1) an independent Civil Rights Oversight Board; (2) an Equity Commission; and (3) an ombudsman within OASCR.¹⁹⁵ The independent Civil Rights Oversight Board would oversee FSA county committees; review appeals of decisions on civil rights complaints; investigate reports of discrimination within USDA; recommend improvements to USDA policies and procedures intended to address and prevent discrimination; review OASCR for compliance with civil rights, fair employment, and pay equity policies; and produce an annual public report on the status of socially disadvantaged farmers and ranchers. The contemplated Equity Commission would study the legacy of discrimination and recommend solutions to improve the status of Black agricultural producers; as discussed above, USDA administratively established its EC in 2021. Finally, the ombudsman would assist individuals in navigating OASCR (including the complaint process) and recommend grants to community-based organizations that provide technical assistance to farmers and ranchers seeking to file civil rights complaints with OASCR.

Congress should establish these novel entities in the next farm bill. USDA's history of mishandling civil rights complaints from USDA customers and its own employees means that efforts to merely reform OASCR will be met with skepticism and even obstinance from the inside. Establishing new positions to carry forth equity reforms at USDA will be a major step in restoring favorable public perception of the government and signal to all program administrators that Congress has prioritized ensuring that programs are being equitably dispersed.

LEGISLATIVE OPPORTUNITY

Appropriate specific funding to reform civil rights enforcement

USDA's history of discrimination has been accompanied by an ineffective civil rights complaint process that has all but guaranteed that meritorious employee and program complaints go unaddressed. While some of this history can be attributed to poor leadership, structural issues abound that may be mitigated through changes in policy or the establishment of independent review mechanisms. As the office responsible for leading and overseeing the agency's civil rights programs, OASCR should be a focal point for reform.

USDA's Equity Action Plan recognizes the gaps in OASCR's work. The Plan notes, among other



factors, deficiencies in effective complaint resolution, the skills and capacity of its staff, coordination between OASCR and Mission Area civil rights offices, coordination between program performance metrics and civil rights impacts, coordination between civil rights complaints and program design, and tools that encourage proactive accountability for civil rights.¹⁹⁶ To rectify these gaps, the Plan proposes: addressing OASCR's staffing and capacity needs; improving accountability for civil rights violations; providing staff training on civil rights, equity, and other critical competencies to reduce barriers to access and improve equity at USDA;¹⁹⁷ and improving timely processing of complaints.¹⁹⁸ Additional recommendations for improving OASCR's civil rights enforcement activities were published following the 2021 Administration change in *Supporting Civil Rights at USDA: Opportunities to Reform the USDA Office of the Assistant Secretary for Civil Rights*.¹⁹⁹ Key reforms include establishing and maintaining clear division between USDA's Office of General Counsel and OASCR for all civil rights complaints, expanding USDA's application of the foreclosure moratorium for producers with outstanding civil rights complaints, establishing fast track procedures, and documenting instances of discrimination arising in cases brought to the National Appeals Division (which reviews appeals of adverse decisions made by FSA). Additional recommendations will likely emerge from close examination of OASCR's processes. The EC is well positioned to review the Equity Action Plan and other proposed administrative reforms and conduct further evaluation of the complaint process to recommend a path for reform. If established, the Civil Rights Oversight Board and civil rights ombudsman will also be key voices in this review.

The reforms needed to make OASCR an effective office will necessarily demand increased funding to carry out, particularly the need to increase staffing and capacity. Congress

should thus appropriate a pool of funds dedicated to carrying out reforms to civil rights enforcement, to be allocated based on the EC's recommendations.

ADMINISTRATIVE OPPORTUNITY

Revise the charge of OBPA to promote equity

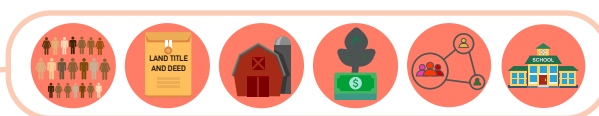
The mission of OBPA is “to ensure that USDA programs are delivered efficiently, effectively, and with integrity by incorporating performance, evidence, and risk into decision making. OBPA advocates for the necessary resources required and executes the budget to ensure the USDA can effectively and efficiently accomplish its mission for the benefit of the American people.”²⁰⁰ This charge presents an additional opportunity to integrate emphasis on equity throughout USDA operations and programs in the next farm bill.

USDA should revise OBPA's mission to incorporate specific considerations of racial equity into its decision making and ensure that programs and policies proposed by USDA are not only economically sound but are also designed to be accessible and equitable for marginalized producers and constituents. OBPA should develop specific criteria in its budget creation, evaluation, and strategic planning analysis procedures and internal operations to ensure that going forward, all programs and policies are evaluated to determine (1) whether they perpetuate racial discrimination, and (2) whether they actively dismantle systemic barriers to participation in USDA programs by producers and constituents of color.



Collect Demographic Data to Ensure Accountability for Equity Reforms

Data collection is crucial to ensuring transparency, understanding issues of



discrimination, and developing solutions to make USDA programs equitable and accessible to producers and constituents of color. USDA's Equity Action Plan notes that current deficiencies in data collection and evaluation are a barrier to equitable outcomes in USDA programs.²⁰¹ It sets a goal of collecting better data, expanding collection and analysis, and creating systems for external evaluation to help address this barrier, enable program evaluation, and help USDA understand the implications of its programs and policies at a macro level.²⁰² USDA has several opportunities to act administratively to further this goal; Congress could also direct or require implementation of these opportunities in the next farm bill. In addition to the Administrative Opportunities described below, a Legislative Opportunity to improve FSA data collection and reporting may be found on page 54.

ADMINISTRATIVE OPPORTUNITY

Leverage the Equity Commission to study and evaluate USDA's data collection efforts

The Equity Commission's broad mandate and access to stakeholders and external expertise offers an opportunity to use its influence to reform data collection and accessibility at USDA. The EC should study data collection efforts by USDA in order to determine additional data that should be gathered and evaluated, particularly to assist in making recommendations to repair the legacy and ongoing harm resulting from discrimination within USDA programs. The EC can also seek to obtain data that may be in USDA's possession but not current subject to reporting requirements for purposes of reviewing programs as well.

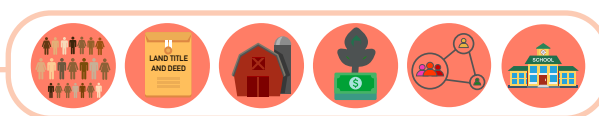
Of particular concern, the EC should review FSA data on loan processing dates (starting from loan origination to the date the farmer actually received the loan); attention should be given to geographic patterns of late lending and delayed

loan approval, which may increase loan risk and has historically negatively impacted producers of color compared to white farmers.²⁰³ It should take up several of the recommendations the Rural Coalition—an advocacy organization representing diverse producers, farmworkers, and rural communities—advised GAO to adopt in its own examination of agricultural lending, such as reviewing demographic trends among producers receiving loan funds after April of any given crop year and demographic trends in collateral required in order to receive an FSA loan or obtain meaningful loan servicing through workout and loan modifications.²⁰⁴ It may also be appropriate to broaden the review to include USDA's employment data, such as race, ethnicity, and compensation data for USDA employees.

The EC should also review USDA's practices concerning:

- Responsiveness to public records requests concerning demographic data, including the adequacy of FSA's data management software in producing responses to such requests.
- Maintenance and public release of important demographic data, even as internal policies around data collection shift.
- Availability and ease of access of data subject to public disclosure, including the navigability of USDA's website.
- Partnerships with private lending institutions and adequacy of data collection (and communication of that information to USDA) by these private entities concerning demographic data on foreclosures and debt collection activities.

The EC should identify where the gaps are in data collection and provide actionable recommendations for change. This will aid



in the endeavor to develop strategies to improve accessibility and address systemic impediments to equity in USDA programs and the cumulative effect of USDA's historic discriminatory practices. Any data collected by and for the EC should be used to identify and recommend specific reforms to prevent further discrimination, including mechanisms to ensure transparency and accountability and measures that USDA can take immediately to begin restoring trust and helping producers of color regain access to farmland and USDA programs. Recommended actions could include:

- Revising the terms of the USDA-private entity partnerships that address gaps in data collection and existing barriers to accessing credit and loan services; proposing strategies to eliminate inequities in lending within those private entities.
- Producing an annual report on recipients of USDA assistance broken down by race, ethnicity, and gender that is consolidated and publicly accessible.
- Establishing mechanisms to improve support for systemically marginalized and beginning producers beyond providing financing directly to farmers that covers annual operating expenses and farmland investments. For example, investments to support processing and aggregation infrastructure could address the needs of limited-resource farmers engaged in value-added agriculture, increase their ability to sell in local and regional markets,²⁰⁵ and make government or institutional procurement contracts more accessible.

ADMINISTRATIVE OPPORTUNITY

Establish coordination between the Equity Commission and the Advisory Committee on Agriculture Statistics on the design and execution of the Census of Agriculture

The Census of Agriculture is a vital source of information regarding the agricultural sector and its demographic makeup. It takes place every five years and aims to obtain a complete count of U.S. farms, ranches, and operators and certain characteristics.²⁰⁶ The Advisory Committee on Agriculture Statistics advises the Secretary of Agriculture on the Census of Agriculture and its scope, timing, and content and prepares recommendations to ensure that the Census provides robust and relevant data.²⁰⁷

The Secretary of Agriculture should form a joint working group with representation from the EC and the Advisory Committee to collaborate on the design and implementation of the Census to better capture equity concerns. The group should work to design the Census to collect diverse agricultural characteristics (geography, size, scale, and type of production) and demographics, with special emphasis on the representation of producers of color.²⁰⁸ The group should ensure that data collection and analysis is transparent, and that the demographic data aggregated at the census tract level as well as the data collection methods used are made publicly available.²⁰⁹ The working group should consider whether the current racial and ethnic categories on the Census sufficiently capture the data needed to effectively conduct outreach, tailor technical assistance to the community, and inform policy. The working group should ensure the Census survey is culturally appropriate and that it is provided in relevant languages.²¹⁰ The working group should also explore and recommend other ways to increase participation and strategize methods for addressing non-response in the Census from underrepresented groups. This may include additional support for outreach and education, especially among producers who may face language, technical, or other barriers, as well as establishing partnerships with organizations such as cooperative extensions²¹¹ and trusted community-based organizations serving



farmers of color to increase awareness of, and trust in, USDA surveys.

Further, the working group should evaluate strategies to make the Census more accessible. The Census can be a time-consuming, complicated process that may be especially burdensome on producers of color who may not see a direct benefit from participating in the survey. This may be especially true among Black farmers who have been historically undercounted by the Census.²¹²

Finally, the group should consider whether Census data should be disaggregated in order to obtain a better understanding of the barriers that particular groups face (e.g., how many Black women rely on rented land).²¹³ Additional opportunities for analysis through data disaggregation would help USDA identify and more effectively target its efforts to dismantle systemic discrimination in its programs.

ADMINISTRATIVE OPPORTUNITY

Complete farmland ownership data collection and reporting as required by the 2018 Farm Bill

The 2018 Farm Bill required USDA to collect and report data on farmland ownership.²¹⁴ The statute requires the Secretary of Agriculture to submit to Congress and make publicly available a report identifying (1) the barriers that prevent or hinder the ability of beginning and socially disadvantaged farmers and ranchers to acquire or access farmland; (2) the extent to which federal programs are improving farmland access and tenure for beginning and socially disadvantaged farmers and ranchers, farmland transition and succession; and (3) the regulatory, operational, or statutory changes that are necessary to improve the ability of beginning and socially disadvantaged farmers and ranchers to acquire or access farmland, improve their tenure, and support farmland transition

and succession.²¹⁵ Additionally, data analysis on beginning and socially disadvantaged farmers and ranchers' land ownership, tenure, transition, entry and barriers to entry, among other trends, should be conducted once every 3 years.²¹⁶ This information is critical to effectively develop policy on agricultural land ownership. USDA was expected to complete this report by December 2019 and should commit to producing the report by 2024. USDA should also provide a progress report and preliminary findings on ownership, tenure, transition, and entry of beginning and socially disadvantaged farmers and ranchers, as well as an overview of the surveys and survey questions developed in accordance with the 2018 Farm Bill directive, by the end of 2023.

Cross-Cutting Recommendation

Establish Citizen Suit Provisions to Hold USDA Accountable for Implementing Mandatory Programs

Each farm bill establishes new programs, including new mandates for USDA. For instance, in 2002 Congress directed USDA to develop rules for appointing socially disadvantaged farmers and ranchers to county committees.²¹⁷ It was another decade before USDA issued a rule to implement that congressional mandate.²¹⁸ Similarly, in the 2018 Farm Bill Congress authorized USDA to establish a relending program to help farmers who own heirs' property.²¹⁹ Although President Trump signed the bill, his Administration did nothing to implement the relending program, and USDA did not finalize an heirs' property relending rule until late summer 2021, after the new



Administration took the helm at USDA, three years after the authorization.²²⁰ The 2018 Farm Bill also created a commission to study farm transitions and mandated appointments of commission members within 60 days of farm bill enactment.²²¹ As of this writing, four years later, those appointments have not been made. These are just a few examples of USDA inaction on new programming required by Congress. Farmers and other stakeholders should have an opportunity to confront these sorts of delays and inaction, as well as other public interests that emerge from agriculture.

Concerns about unwillingness to carry out discretionary *and* mandatory policy have animated other important and successful policy changes. With the Civil Rights Act and particularly with foundational environmental laws such as the Clean Air Act and the Clean Water Act, Congress demonstrated a willingness to act assertively, including by adopting a series of innovations such as strict timelines, science-based standards to guide agency policymaking, and the opportunity for members of the public to sue to force non-discretionary action or challenge actions that violate the terms of statutes or regulations.²²² Establishing a cause of action for members of the public is now known as a “citizen suit” provision. Such provisions have proven uniquely effective at empowering new voices to have a role in governance.²²³ As such, we recommend the Congress create citizen suit opportunities in the farm bill.

LEGISLATIVE OPPORTUNITY

Add citizen suit provisions to farm programs

Congress should design one or more citizen

suit provisions in the next farm bill. Unlike, for example, the Clean Air Act, the farm bill is an omnibus bill that amends a variety of specific programs inside and outside of USDA, so a provision covering the entire farm bill may be overbroad. Congress must therefore consider the areas of highest priority for injecting more public participation. There are a variety of programs that stand out as high priority. The conservation compliance program may be an important place for citizen suit provisions, allowing those with standing (i.e., an interest in the provision’s enforcement) to challenge conservation violations or USDA’s unwillingness to enforce against violators. As discussed below, the 2018 Farm Bill established a commission to study farm transitions,²²⁴ but the USDA has yet to constitute the committee.²²⁵ Congress could address inaction of this nature by empowering stakeholders to bring suits to compel progress.

Regardless of the specific programs, citizen suit provisions should include several considerations. Prior to filing a lawsuit, Congress should require public interest plaintiffs to provide notice to USDA, giving USDA the opportunity to resolve the complaint without litigation. Suits should, at a minimum, be available where USDA has failed to carry out a non-discretionary duty, such as when Congress imposes a deadline that USDA fails to meet. As with, for example, the Clean Air Act, Congress should permit courts to award attorney’s fees to prevailing parties in order to incentivize and facilitate public engagement. Finally, Congress should expressly authorize federal subject-matter jurisdiction regardless of the amount in controversy or the location of the parties in order to create consistent federal law emerging from the suits that may arise.



GOAL II



Mitigate Loss of Heirs' Property

Heirs' property results when land is passed between generations without clear title, often where no formal will has been established.²²⁶ When someone dies without a will, state intestacy laws govern distribution of property including land. In all states, land left to multiple heirs without specific designation results in land owned by all heirs as "tenants in common." Tenants in common each own an undivided interest in the land, meaning that rather than owning their own individual lot, they each have an ownership stake in the whole property. Common ownership of some tracts is known to reach hundreds of tenants, many of whom do not know one another.²²⁷ Land management is complicated because agreement by *all* of the tenants in common is necessary to make major decisions, including selling or leasing the land. In addition, the title often remains in the name of the ancestor who died, leaving current heirs without clear title to the land.

The lack of clear title (sometimes called "cloudy title") can cause numerous problems for heirs, including risk of land loss. A single tenant in common can bring an action to partition the property, resulting in a forced sale for much less than the actual value of the land. Predatory real estate speculators have taken advantage of this vulnerable form of ownership by purchasing a share from an heir and filing a partition action, asking the court to sell the property.

Even where partition sales have not caused land loss, cloudy title restrains economic development.²²⁸ Cloudy title diminishes the value of heirs' property because, generally, without clear title, land cannot be used as collateral for a loan or used as a share against an investment.²²⁹ The ability to collateralize real estate is a primary method of wealth accumulation in the United States, and families with heirs' property face significant barriers to using their land to generate wealth.²³⁰

Some have estimated that 40 to 60% of Black-owned land is owned as heirs' property.²³¹ However, the extent to which heirs' property has and continues to contribute to Black land loss is context-specific, particularly affecting families in the rural southeast.²³² Until there is robust data collection nation-wide, it is difficult to accurately estimate the impact that heirs' property has had in any given locale.²³³ Heirs' property also affects rural Appalachian and Latinx communities, among others.²³⁴ Historically these populations have lacked access to legal services, including for estate planning, which has contributed to this disparate impact. Importantly, alongside developers and real estate speculators, legal professionals have participated in the exploitation of heirs' property owners, resulting in low confidence in and mistrust of legal professionals, especially in Black communities.²³⁵





The 2018 Farm Bill authorized a new Heirs' Property Relending Program (HPRP) which will provide loans to eligible entities to relend to heirs that have inherited land without clear title so that they can pay for assistance to resolve ownership and succession issues, including by developing a succession plan.²³⁶ A second reform passed in the 2018 Farm Bill changes the types of documentation required to access certain USDA programs. Prior to 2018, cloudy title meant owners of heirs' property had significant difficulties obtaining a farm number from USDA. Assignment of a farm number is a prerequisite for eligibility to participate in many USDA programs including loans and grants, disaster relief programs, and county committees.²³⁷ The 2018 Farm Bill authorized the use of alternative documentation for heirs' property owners and those operating on heirs' property so that they could obtain a farm number.²³⁸

Additionally, as of this writing, 21 jurisdictions have enacted the Uniform Partition of Heirs

Property Act (UPHPA), model legislation proposed and supported by a diverse coalition of organizations across the country.²³⁹ The UPHPA provides a variety of basic due process protections for heirs' property owners, including requiring adequate notice of any pending forced partition of the land, first right of refusal to existing heirs to purchase the land, a stronger preference for partition in kind rather than forced sale, and court-mandated fair-market value sale of the property when a sale does occur.²⁴⁰ If a sale is ordered, the law requires that the property be assessed by a neutral third party and publicly listed for sale. These provisions are designed to help preserve the land and wealth of heirs' property owners, providing an opportunity to consolidate ownership or sell the land at a fair price.²⁴¹

Although the UPHPA is state law, the 2018 Farm Bill leveraged the legislation in an important way. Farmers in states that have passed the UPHPA can, in addition to all of the documentation options regularly available,

secure a farm number as a farm operator with a court order that verifies the land meets the UHPHA definition of heirs' property or with certification from the local recorder of deeds that the recorded owner of the land is deceased and at least one heir has initiated a procedure to retitle the land.²⁴² In states that have not adopted the UHPHA, the documentation requirements can be far more cumbersome.²⁴³ These changes were not implemented until July 2020, so limited information on the impact of these revisions is currently available.

Heirs' property continues to be a formidable challenge that threatens further loss of Black-owned farmland and hinders economic development. Although the 2018 Farm Bill made some strides in addressing the issue, the next farm bill provides opportunities to build on that momentum and resolve remaining gaps. In addition to HPRP, which announced its first three intermediary lenders in August 2022,²⁴⁴ Congress should create a more accessible grant program; establish a new office to oversee nationwide efforts to resolve heirs' property issues; make conservation programs accessible to heirs' property owners; and make funding available for grant programs, legal services, and Heirs' Property Centers.

Create a New Program to Complement the Heirs' Property Relending Program

The newly funded Heirs' Property Relending Program (HPRP) will allow owners of heirs' property to use HPRP loans to clear title by buying out other heirs' shares of the land, or for legal, appraisal, and other fees associated with developing family agreements, succession planning, and title clearing.²⁴⁵ FSA will select community development financial institutions (CDFIs) to distribute the loans to heirs' property owners to resolve ownership, title, and succession issues.²⁴⁶ HPRP requires the

lending entity to have experience assisting socially disadvantaged farmers and ranchers, with preference given to eligible entities that have at least 10 years of experience serving such individuals.²⁴⁷

USDA announced the first three lenders to be intermediaries for the Heirs Property Relending Program in August 2022.²⁴⁸ Akiptan, Inc., the Cherokee National Economic Development Trust Authority, and the Shared Capital Cooperative, which has partnered with the Federation of Southern Cooperatives, will each receive a loan from USDA to establish a revolving loan fund for heirs' property owners to access. The funds can be used for costs and fees associated with buying out heirs, closing costs, appraisals, title searches, mediation, and legal services, to clear title. The intermediary lenders can make loans to heirs who: (1) have authority to incur the debt and resolve ownership and succession issues on a farm with multiple owners; (2) are a family member or are related by blood or marriage to the previous owner of the property; and (3) agree to complete a succession plan. More rules will be forthcoming, and the lenders are still developing criteria for heirs and determining what the collateral will be for the loan.

HPRP's reliance on loans presents practical challenges. Given historic and current discrimination, systemically marginalized producers face financial barriers to obtaining credit as they are more likely to have limited credit histories and face difficulty meeting credit score standards.²⁴⁹ Additionally, loans typically require collateral and accrue interest, which creates further financial obstacles and hardship for historically underserved heirs' property owners.²⁵⁰

LEGISLATIVE OPPORTUNITY

Create a Program for Income-Eligible Heirs' Property Owners for whom the Heirs' Property Relending Program is Inaccessible



While some heirs' property owners with a certain level of wealth, ability to generate income, and ability to resolve their title issues may be able to secure loans through HPRP, many will not qualify. In order to support heirs' property owners, prevent unwanted partition sales of their land, and protect this critical source of generational wealth, Congress should establish a complementary program that offers grants of financial and technical assistance to those for whom HPRP is inaccessible. Heirs' property exists in large part due to historic racial discrimination, including directly by USDA, and USDA can help remedy its discriminatory practices (past and present) by setting up a grant program to supplement the loan program. Elements of a new grant program could include: (a) income eligibility requirements for participation; (b) a simple reporting requirement that could require the grantee(s) to provide periodic updates regarding their attempts at resolution; (c) provision of free technical assistance, including but not limited to referral to Heirs' Property Centers or other relevant organizations with demonstrated expertise in assisting heirs' property owners with legal issues (such as title clearing), resolving family conflict, and developing strategies for wealth building; (d) provision of free estate planning services; and (e) provision of financial assistance for the wide variety of financial needs that arise when resolving heirs' property issues.

LEGISLATIVE OPPORTUNITY

Revise the Heirs' Property Relending Program to ensure heirs' rights in the event of default

The HPRP's purpose is to assist heirs' property owners by helping them clear title to their land and generate wealth from their land. It should not contribute to loss of family land. However, the HPRP has the potential to generate further economic burden on participating owners of heirs' property if the loans enter into default as

loans may continue to accrue interest while in default.²⁵¹ Further, the land is vulnerable to loss (i.e., foreclosure) where the property is used as collateral and the borrower defaults on a loan.²⁵²

Congress should create a remedy to prevent loss of the property in the event of default on a HPRP loan. To protect heirs' rights in the event of default, Congress should amend the statute to require that all heirs are notified and given an opportunity to assume the terms before loans on the property are accelerated, transferred to, or assumed by non-heirs. A perpetual right of first refusal should be granted to the remaining heirs (i.e., those who did not sign the original loan documents) before title can be transferred to a non-heir.



Build Programmatic Infrastructure to Support Heirs' Property Owners

Historically, heirs' property owners have been unable to benefit from USDA programs. Government agencies, including USDA, engaged in discriminatory practices that dramatically exacerbated heirs' property issues by denying and delaying loans, providing insufficient credit, and failing to provide technical assistance.²⁵³ This resulted in tremendous loss of agricultural operations, including land, owned by Black farmers and ranchers.²⁵⁴ Alongside discriminatory practices, until very recently, having clear title, proof of ownership, and control of the land generally was required to obtain a farm number necessary to participate in USDA programs. Therefore, most heirs' property owners were unable to access USDA's vital support programs, nor were they able to leverage land as collateral for private financing and federal loans.

Although owners and operators of heirs' property are now eligible for FSA loans and commodity subsidies if they can produce



certain documentation, having a farm number does not thwart every challenge. Additional barriers may remain in accessing other USDA benefits and programs. Furthermore, heirs' property remains susceptible to loss due to disputes between tenants in common, failure to pay taxes, or outside investors pushing partition sales. Family agreements, estate planning, and obtaining clear title are key to preserving land ownership, an important source of generational wealth for many farmers.

For these reasons, additional institutional support is needed to ensure that heirs' property owners and operators are able to unlock the full potential of their land. Some of these services should be funded and coordinated by USDA. Beyond accessing programs, a significant issue for heirs' property owners is the lack of legal support to resolve the variety of legal issues that need to be dealt with when they attempt to find all the heirs, bring them together and resolve title issues. Lawyers must have experience and knowledge in trusts and estate planning, entity formation, real estate, property, and probate law. And they must be trustworthy. Congress and USDA can promote the expansion of such support mechanisms by fostering new and existing partnerships with trusted entities and institutions.

LEGISLATIVE OPPORTUNITY

Create a new USDA office of National Heirs' Property Coordinator

Congress should create a new National Heirs' Property Coordinator office at USDA to oversee USDA's efforts to assist heirs' property owners and prevent land loss. The National Coordinator would be responsible for coordinating services for heirs' property owners within USDA, conducting research on the efficacy of such services (in collaboration with educational institutions and nonprofits), and promoting awareness of these services among both USDA personnel and heirs' property owners

themselves. The National Coordinator would also determine the most effective method of delivery and implement strategies to improve accessibility. This could be accomplished through training for extension agents and creating state-level heirs' property coordinators in states with significant levels of heirs' property ownership. The National Coordinator would engage with community-based organizations and other stakeholders to determine barriers to participation in USDA programs, especially concerning documentation requirements for establishing ownership or control of heirs' property. This new office could be modeled after the National Beginning Farmer and Rancher Coordinator,²⁵⁵ who works closely with state coordinators to develop goals and create plans to increase beginning farmer participation and access to programs while also coordinating nationwide efforts.²⁵⁶

LEGISLATIVE OPPORTUNITY

Create a grant program for HBCUs and minority-serving institutions to develop CLEs for attorneys to better serve clients with heirs' property

Continuing legal education (CLE) is professional education for attorneys after their initial admission to the bar. In the United States, each jurisdiction has discretion to regulate CLE requirements and accreditation.²⁵⁷ Generally, this authority is held by each jurisdiction's supreme court and delegated to specific CLE commissions or boards.²⁵⁸ Thus, CLE accreditation is awarded on a state-by-state basis.²⁵⁹

Currently, six HBCUs have affiliated law schools.²⁶⁰ USDA should create a grant program for HBCUs and other minority-serving institutions (a designation that refers to "colleges and universities that provide educational opportunities to those who have historically faced inequality in their access to higher education"²⁶¹) to develop CLE programs



for attorneys to be better able to serve clients with heirs' property. This funding could be used to develop trainings on estate planning, tools for clearing title, entity formation for land-holding, and other legal issues relevant to heirs' property. Grant funding should also support institutions in their efforts to obtain CLE accreditation for the program from their jurisdiction's accrediting commission or board.

LEGISLATIVE OPPORTUNITY

Support existing and new Heirs' Property Centers

In order to prevent continued loss of vulnerable heirs' property, heirs' property owners need access to culturally competent, qualified professionals with experience handling issues related to estate planning, family mediation, and real property law. This assistance can be difficult to procure, especially in rural areas.²⁶² Congress should fund USDA partnerships with Heirs' Property Centers, with such partnerships overseen by the newly established National Heirs' Property Coordinator. Heirs' Property Centers assist property owners, nonprofits,

and municipalities to protect heirs' property and address issues related to title clearing, wills, estates, and succession planning through education, outreach, and pro bono legal services. Examples of entities that could qualify as such Centers include the Center for Heirs Property Preservation (SC), Georgia Heirs Property Law Center (GA), Land Loss Prevention Project (NC), Louisiana Appleseed (LA), the Federation of Southern Cooperatives (multi-state), and the Black Family Land Trust (NC/VA). The newly established funding would support the work of these Centers, expanding their capacity and fostering the development of holistic approaches to addressing heirs' property. This interdisciplinary approach would utilize the expertise of lawyers, surveyors, engineers, zoning advocates, and other professionals to support clearing title and succession planning. Funding could also be used to create training programs and public workshops about estate planning and consolidation of title in areas significantly affected by heirs' property.

In areas with a dearth of services for heirs' property owners, Congress should provide resources to open new Heirs' Property Centers.²⁶³ New Centers should be established within qualified nonprofit entities with experience providing meaningful technical and legal assistance to heirs' property owners,²⁶⁴ or within 1890 Institutions. These Centers would provide vital services to enable historically underserved heirs' property owners to keep their land and derive the economic, environmental, and social benefits of clearing title.²⁶⁵

Further, heirs' property cases can be time-intensive and take months or years to resolve. To support the Centers' work, Congress should also establish an Heirs' Property Law Fellowship Program which would support two-year appointments for lawyers to serve in Heirs' Property Centers. These fellowship positions



could be used as training for newer attorneys, or support experienced practitioners moving into a new field.

Protect Heirs' Property Through Conservation Programs

As noted above, a primary reason to focus legislative attention on heirs' property is that cloudy title has contributed to precipitous land loss among Black landowners and attracted predatory investors and land developers seeking to prosper from the circumstances. To ward off speculators and better secure the agricultural future of the land, conservation programs that already aim to protect farmland and promote sustainable resource management could expressly target heirs' property for protection. Congress should modify the Agricultural Conservation Easement Program and Regional Conservation Partnership Program to do just that.

LEGISLATIVE OPPORTUNITY

Create a specialized program within ACEP-ALE to protect heirs' property

The Agricultural Conservation Easement Program - Agricultural Land Easements (ACEP-ALE) is a voluntary federal conservation program that seeks to keep agricultural land under cultivation and protect it from encroaching development as well as restore the environmental quality of the land.²⁶⁶ ACEP-ALE accomplishes this by providing funding for up to 50% of the fair market value of the easement to eligible entities such as land trusts, NGOs, or state and local governments to purchase an agricultural easement.²⁶⁷ Landowners benefit from the protection of the land as well as the additional funding to put towards their agricultural operation or other economic interests.²⁶⁸

Congress should create a specialized program within ACEP-ALE to prioritize the purchase of easements to maintain agricultural production on heirs' property. The National Heirs' Property Coordinator would be responsible for determining legally feasible criteria such as requiring that applicants take certain steps towards clearing title as a condition of enrollment.²⁶⁹ This new program would support heirs' property owners by enabling them to benefit from ACEP-ALE and reinvest the proceeds of the easement sale into their operations, transition land to the next generation, or offset the costs of improved conservation practices.

LEGISLATIVE OPPORTUNITY

Leverage the Regional Conservation Partnership Program to resolve heirs' property ownership challenges

The Regional Conservation Partnership Program (RCPP) is another innovative conservation program overseen by USDA's Natural Resources Conservation Service (NRCS). RCPP funds projects that coordinate between NRCS, state and local agencies, and other nonprofit organizations to provide financial and technical assistance to farmers to address resource concerns.²⁷⁰ The two main funding pools are for Critical Conservation Areas and State/Multistate projects. RCPP offers partners a fair amount of flexibility in designing their projects, with potential activities including land management and land improvement practices, land rentals, and easements.²⁷¹ These types of coordinated activities could be used to protect heirs' property for future agricultural use.

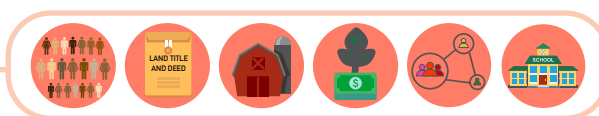
The Sustainable Forestry and African American Land Retention Program (SFLR), established in 2013, has been successful in supporting heirs' property owners in their efforts to clear title and generate wealth from their land.²⁷² SFLR was originally an RCPP project in a public-private partnership between NRCS, the U.S. Forest



Service, and the U.S. Endowment for Forestry and Communities.²⁷³ The program is now housed at the American Forest Foundation.²⁷⁴ Evaluations of the program have demonstrated that it provided substantial benefits to landowners and communities, improving the value of land by \$2,000–3,000 per acre, of which \$1,190 per acre was the direct result of cleared title.²⁷⁵

The 2018 Farm Bill directed USDA to use \$300 million annually from the Commodity Credit Corporation to carry out RCPP.²⁷⁶ It also required USDA and eligible partners,

“to the maximum extent practicable,” to conduct outreach to historically underserved producers.²⁷⁷ This mandate could be revised to include sustainable agriculture and forestry specifically involving heirs’ property. This could be accomplished by requiring that a certain portion of funding be set aside for projects targeting operators on heirs’ property, including the resolution of heirs’ property issues as a priority objective, or requiring partners to include in their application a plan for making their program accessible to heirs’ property operators, to the extent practicable.



GOAL III



Facilitate Farmland and Ranchland Transitions to Systemically Marginalized and Beginning Producers

Producers of color hold a disproportionately small share of agricultural land and have historically faced direct discriminatory practices and systemic barriers to entering or remaining in agriculture.²⁷⁸ While U.S. agricultural land has always been held mostly by white males, it has become significantly more concentrated over the past century.²⁷⁹ The number of Black farmers has fallen from nearly 1 million in 1920 to fewer than 50,000 in 2020 and Black-owned farms are typically less than one-third the size and produce one-twelfth the income as compared to the average U.S. farm.²⁸⁰ Native Americans comprise just 1.7% of farmers; while the proportion of farmers identifying as Native American (or American Indian) has increased slightly, from 1% in 1900 to 2.3% in 2017, the real number of Native American farmers fell by nearly 50% over the twentieth century.²⁸¹ Asian and Native Hawaiian/Pacific Islander farmers constitute 0.6% and 0.1% of farmers, respectively.²⁸² While 3% of farmers identify as Hispanic, this includes Spanish, Hispanic, and Latinx ethnicities (i.e., individuals who may or may not identify as white); of this group, immigrant Latinx farmers have been shown to experience racialized exclusion from USDA programs, hindering land access.²⁸³

Rising agricultural land values, policies that structure farm profitability (such as by determining access to credit and crop

insurance), and policies that incentivize land retention across multiple generations have anchored agricultural land in the hands of white owners.²⁸⁴ Further, trends in farmland consolidation towards larger and more concentrated business entities makes it more difficult for smaller, less profitable farmers to find and retain land.²⁸⁵ These inflated costs of acquiring agricultural land result in that land, if ever sold, being most accessible to wealthy buyers and investors, effectively locking undercapitalized systemically marginalized and beginning farmers seeking land out of the market.

As the current generation of farmers retire, over 370 million acres of farmland are expected to undergo ownership transition over the next 15 years.²⁸⁶ Most will be bequeathed or sold to relatives but some of that land will be available on the open market.²⁸⁷ This anticipated transition presents an opportunity for more farmland to be held by systemically marginalized producers. The forthcoming farm bill will be a critical tool in promoting equity in farmland transition and diversity among agricultural producers. Supporting the next generation of farmers and increasing the numbers of producers from systemically marginalized groups is crucial to the sustainability and equity of our food system.²⁸⁸



Young and beginning farmers also face numerous barriers to establishing agricultural operations, the most impactful issues being access to high-quality land and secure tenure. The current trend towards larger and fewer farms, also known as farmland consolidation, can be attributed to significant changes in agriculture that emphasize productivity and maximizing yields of commodity crops.²⁸⁹ This consolidation has resulted in fewer farmers and farm jobs, depleting rural economies and depopulating rural communities.²⁹⁰ As developers, investors, and non-farmers seeking rural residence all compete with farmers to purchase acreage, the price of farmland is rising, often beyond its agricultural production value.²⁹¹ Agricultural land is also at risk of being developed for non-agricultural purposes near urban areas.

Non-operating landowners and owner-operators have a much more secure form of land tenure than tenants who must regularly negotiate a lease, comply with the landowner's conditions of tenancy, have limited, if any, control over the future of the land, and do not have any opportunity to leverage the land to build long-term wealth.²⁹² According to the most recent Tenure, Ownership, and Transition of Agricultural Land (TOTAL) survey, 97% of principal non-operating landowners who rent out land for agricultural purposes are white and receive the vast majority of rental payments.²⁹³ Almost all cropland and two-thirds of pasture and rangeland in the United States is privately owned, and roughly 1.4 million non-operating landowners own one-third of this privately owned land, the other two-thirds being owned by about 2.1 million owner-operators.²⁹⁴

Roughly 10% of new and beginning farmers rent farmland for their operations,²⁹⁵ but among all young farmers this portion is much greater as nearly one third rely on renting farmland.²⁹⁶ The general trend in farmland tenure is an inverse relationship, with the percentage of land

operated through renting declining as the age of the operator increases.²⁹⁷

These leasing arrangements do not provide the equivalent secure tenure and lasting investment that farmers who own their land enjoy. Further, short-term leases can limit farmers' access to federal programs and disaster aid.²⁹⁸ They also fail to incentivize good farming practices that could help combat climate change, such as building soil health to sequester carbon. Young and beginning farmers of color experience the challenges of securing farmland against a background and long history of structural racism and discrimination.²⁹⁹ In the next farm bill, Congress can support land access by directing resources and attention to study the current challenges and by bolstering incentives and tools to support land transfer to farmers. Additional opportunities to support burgeoning agricultural operations in urban areas can be found in FBLE's **Farm Viability** Report.

Establish the Commission on Farm Transitions – Needs for 2050

Significant changes in farmland ownership are shaping agriculture and will impact the coming generations of farmers and ranchers for decades to come. Seniors aged 65 and older own more than 40% of the agricultural land in the United States, and outnumber those under age 35 by a four to one ratio.³⁰⁰ Over 370 million acres of farmland are expected to be transferred in the next two decades, although a 2020 survey showed that most farmland is not sold on the open market and only a fraction is expected to be sold to non-relatives.³⁰¹

Farmland converted to non-agricultural uses and lost to development also contributes to the scarcity of available land. Between 2001 and 2016, 11 million acres of land were converted to non-agricultural uses.³⁰² Additionally, corporate and foreign interest in farmland



holdings have continued to grow over the past decades. An estimated one quarter of farmland buyers in parts of the United States are now institutional investors seeking to hedge against inflation.³⁰³ Further, foreign farmland holdings have doubled over the past two decades, with foreign investors now holding an interest in over 35 million acres of U.S. farmland, the largest share being held by Canadian investors.³⁰⁴ Finding affordable agricultural land continues to be the most significant barrier for young and beginning farmers and ranchers.³⁰⁵

Agricultural land that is unaffordable to farmers and ranchers or lost to development and speculators threatens the security of our food system and the stability of rural economies. In order to better understand how and to whom land will be transferred, and to identify policies that ensure viable agricultural land is accessible to a new generation of producers, Congress authorized a *Commission on Farm Transitions—Needs for 2050* in the 2018 Farm Bill.³⁰⁶ The ten-member Commission consists of the USDA Chief Economist along with three appointments each by the Secretary of Agriculture and the House and Senate Agriculture Committees.³⁰⁷ The Commission is tasked with studying several issues, including the availability of quality land and necessary infrastructure, affordable credit, adequate risk management tools, apprenticeship and mentorship programs, the state of current agricultural asset transfers, incentives to facilitate agricultural asset transfers to the next generation of farmers and ranchers, the efficacy of transition assistance programs and incentives, and other issues impacting the transition of farm operations.³⁰⁸

Although the Commission was meant to be established within 60 days of the bill's passage in 2018, it has not yet been constituted. However, the Commission is authorized through September 30, 2023.³⁰⁹ Thus, there is still an opportunity to implement this important

method of identifying barriers and developing strategies to support successful agricultural operations for the next generation of producers. The authorization date should be extended to September 30, 2028 to ensure the Commission is able to carry out its charge, modified by the following Recommendations.

ADMINISTRATIVE OPPORTUNITY

Establish the Commission on Farm Transitions

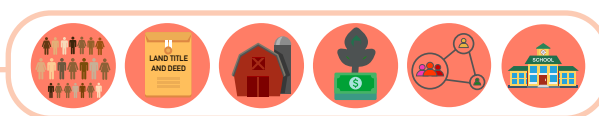
Congress recognized the need for concerted study, planning, and action by authorizing the Commission in the 2018 Farm Bill. The need for the Commission is just as strong, if not stronger, today. USDA should move swiftly to establish the Commission and begin executing its mandate so that its initial findings may inform the next farm bill discussion.³¹⁰

LEGISLATIVE OPPORTUNITY:

Require the Commission on Farm Transitions to place special emphasis on systemically marginalized producers

Producers of color, especially those just beginning their agricultural operations, face considerable barriers to obtaining appropriate and affordable land. On top of the barriers that beginning farmers face, such as a competitive real estate market, insufficient access to credit, and land lost to development, beginning farmers of color have also faced discriminatory practices by USDA, and particularly FSA, creating additional barriers to purchasing land.³¹¹

The Commission on Farm Transitions could help increase opportunities for systemically marginalized producers and improve their ability to procure transitioning land.³¹² To ensure this role, the composition of the Commission should include robust representation of diverse producers of color of varying backgrounds.³¹³





The Commission's membership should be required to include (1) racial, ethnic, and gender diversity; (2) diversity in production type; and (3) geographic diversity. Additionally, the Secretary should have the authority, upon consultation with the Equity Commission, to appoint up to five additional members to the Commission on Farm Transitions in order to achieve these representation objectives. Finally, the Commission's charge should be expanded to identify and develop solutions to address the unique challenges faced by systemically marginalized producers in light of historic and systemic racial discrimination.³¹⁴

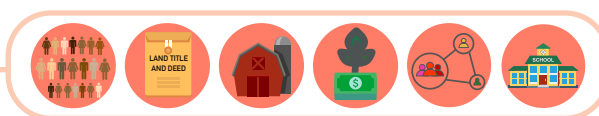
LEGISLATIVE OPPORTUNITY

Revise the Commission on Farm Transitions' charge to include specific study objectives regarding beginning and systemically marginalized producers

The Commission is tasked with a broad-ranging study of challenges impacting the transition of agricultural operations to the next generation of farmers and ranchers. This includes a review of

(1) the availability of quality land and necessary infrastructure, affordable credit, adequate risk management tools, and apprenticeship and mentorship programs; (2) the state of current agricultural asset transfer strategies and potential improvements; (3) incentives to facilitate agricultural asset transfers to the next generation of farmers and ranchers, including an assessment of how current federal tax policy impacts lifetime and estate asset transfers, and impacts individuals seeking to farm who do not have a farm family lineage, as well as recommendations for new or modified incentives; and (4) the effectiveness, and potential improvements, of transition assistance programs and incentives.³¹⁵

To ensure that the Commission adequately understands and addresses the challenges faced by beginning producers and producers of color and what the transfers of millions of acres and billions of dollars in agricultural assets will mean for their operations, several study objectives need to be made explicit.



First, the Commission's charge should be expanded to include studying farmland trust models to facilitate land transfers to beginning and systemically marginalized producers. Farmland trusts protect agricultural land by purchasing property outright or by holding a conservation easement on the land.³¹⁶ Farmers benefit from land trusts that hold conservation easements by receiving capital for transferring certain property rights, which helps the farmer to invest in improvements, lowers the purchase price of the land, and/or reduces the property owner's tax burden.³¹⁷ The Commission should explore the potential structure, benefits, drawbacks, feasibility, and possible alternatives for establishing a land trust that would buy land from farmers looking to retire and either (a) set it aside for beginning and systemically marginalized farmers to purchase at a subsidized rate,³¹⁸ or (b) transfer it to a community-based land trust that could hold the land in perpetuity and issue long term leases to beginning and systemically marginalized farmers and ranchers. There might also be potential to suggest changes to state law intestacy rules where farmland is left without a designated heir. For marginalized producers, the Commission should study how optimal models may vary with the context and history of different demographic groups.

Second, the Commission should also review land grant options for beginning and systemically marginalized producers. For example, the Commission should consider establishing an Equitable Land Access Service that would purchase agricultural land and convey grants of that land to eligible beginning and systemically marginalized farmers and ranchers.³¹⁹ The Equitable Land Access Service could also convey financial grants to qualified entities to support beginning and socially disadvantaged producers in identifying, acquiring, and starting farm operations on land;³²⁰ farmer training; legal services; and succession planning.³²¹

Third, the Commission should evaluate the impact of dramatically rising corporate and institutional investor interests in agricultural land on the ability of beginning and systemically marginalized farmers to purchase and hold on to farmland. The Commission should also develop proposals of strategies to limit corporations—apart from those formed by family farmers as a mechanism for managing their farming business—and institutional investors from acquiring additional farmland and skewing the market as they have in recent years.

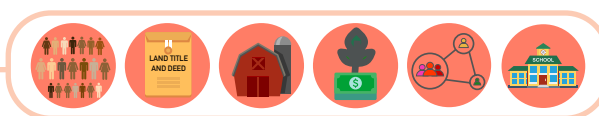
Fourth, the Commission should evaluate strategies to develop new models of agricultural land tenure, that allows for multiple agricultural enterprises on a single parcel of land, owned by a local community. As advocates have stated, “our current agricultural land tenure system is built on a history of racial exclusion and continues to reinforce structural exclusion of people of color from farming, food systems and land ownership.”³²² New models should be incentivized. The Commission could develop incentives for states to support pilot programs to develop new models of agricultural land ownership.

Adding these areas of study will help the Commission craft recommendations specifically designed to support beginning and systemically marginalized farmers and diversify the next generation of producers in the agricultural sector.³²³

LEGISLATIVE OPPORTUNITY

Require the Commission on Farm Transitions to receive input from diverse perspectives

Public policy will play a pivotal role in determining how and to whom a significant amount of land and agricultural assets are transferred over the next few decades.³²⁴ The Commission is responsible for studying and



reporting on how different policies will shape the availability of this vital national resource for the next generation of farmers.³²⁵ Currently, the Commission's mandate does not contemplate a meaningful role for stakeholder engagement, but merely authorizes the Commission to hold hearings as it considers them to be advisable.

For the Commission to be effective and fully understand the opportunity that the pending transfer of millions of acres of land offers to diversify agricultural operations, the Commission should be required to ensure that its work is informed by diverse voices in U.S. agriculture. This could be accomplished through listening sessions, outreach, and other opportunities for input from marginalized producers on the unique challenges they face. Congress should add such a requirement to the Commission's charge to ensure its final products reflect the needs, concerns, experiences, and ideas of a diverse range of agricultural stakeholders.

LEGISLATIVE OPPORTUNITY

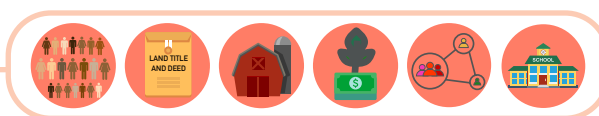
Extend the Commission on Farm Transitions' report submission deadline

The Commission's original deadline for submitting a report with the results of its study and its recommendations to the President, the Committee on Agriculture of the House of Representatives, and the Committee on Agriculture, Nutrition, and Forestry of the Senate was one year from the enactment of the 2018 Farm Bill.³²⁶ This deadline has passed, and the Commission has yet to be convened. The Commission's report deadline should be extended from one year to two years after it is convened to allow for additional subject matter coverage and to provide time for listening sessions and outreach.

Use Tax Exclusions to Promote Land Transfers to Systemically Marginalized and Beginning Producers

Over 40% of farmland and ranchland in the United States is owned by farmers and non-operator landowners aged 65 and older.³²⁷ Over 370 million acres of farmland are expected to undergo ownership transition over the next 15 years.³²⁸ Federal tax policy can help facilitate affordable transfer of this land to beginning and systemically marginalized farmers, those most likely to rank farmland access as their greatest barrier to starting or continuing their agricultural operation.³²⁹

Current tax policy penalizes landowners for selling land during their lifetimes, thereby incentivizing transfer of land through estates, resulting in land not going on the open market and thus not becoming available to lesser-resourced farmers and ranchers. This contributes to the highly competitive agricultural real estate market.³³⁰ Both lack of supply and high prices increase the barriers for beginning and systemically marginalized farmers and ranchers in accessing land. Of the hundreds of millions of acres expected to transfer ownership in the next decade, just a fraction is likely to be sold, and even less is expected to be sold to non-relatives on the open market. Another significant factor contributing to farmland scarcity is land transferred to non-farming heirs which is then sold and converted to development. Sales of farmland converted to non-agricultural uses typically occur near metropolitan areas that would otherwise offer some of the most profitable market opportunities for young, beginning, and systemically marginalized farmers.³³¹ The Internal Revenue Code should be revised to support the next generation of producers, revitalize rural economies, and incentivize equitable land transitions.



LEGISLATIVE OPPORTUNITY

Create federal capital gains tax exclusions for sale of land to qualified systemically marginalized and beginning farmers

Farmland is subject to capital gains taxation upon sale. Given the long periods that farmers often hold their land and the overall trend in increasing land prices, many farmers may have seen a significant increase between the purchase (or “basis”) price and present value of their farmland. The federal tax rates for long-term capital gains range from 0-20% based on the farmer’s ordinary tax bracket, with most landowning farming households subject to a 15% capital gains rate.³³² This tax burden discourages many farmers and ranchers from selling off their land assets when they retire.³³³

In addition, most land transfers at death are exempt from the federal estate tax, effectively penalizing those who sell their land to finance retirement or support the next generation of farmers.³³⁴ Thus, some farmers opt to hold on to their land and transfer it at death, which allows them to avoid the capital gains tax and allows beneficiaries to take possession of the property on a stepped-up basis.³³⁵ Stepped-up basis means that the tax value of the land when the inheritor acquires it will not be based on what the original purchaser paid for it, but rather the land’s value when it is inherited. Potential capital gains taxes paid by the inheritor are then much lower, because the base value above which gains are measured is much higher than when the purchaser bought the property (assuming that the property value has appreciated). The capital gains tax structure leads to land being kept off the market, reducing available land for beginning farmers looking to build equity, and driving up the price of farmland generally because available land is scarcer. At higher prices, beginning farmers are less likely to be able to compete with established farmers, who can leverage their existing assets to finance new purchases, or investors.

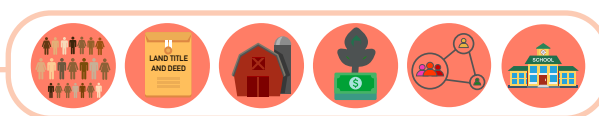
Rather than incentivizing landowners to hold assets until death, creating a federal capital gains tax exclusion for the sale of land to systemically marginalized and beginning farmers would instead incentivize farmland transition during the landowner’s lifetime.³³⁶ This tax policy could be modeled after Minnesota’s Beginning Farm Tax Credit.³³⁷ The tax credit incentivizes the sale of farmland to Minnesota residents who either are seeking to enter farming or entered into farming within the last ten years.³³⁸ Minnesota’s Rural Finance Authority (RFA) certifies beginning farmers and assists them in locating eligible financial management program options.³³⁹ RFA also certifies that owners of agricultural assets³⁴⁰ are eligible for the tax credit. Since it was launched in 2017, this program has granted over \$2 million in tax credits to more than 400 asset owners.³⁴¹

Federal tax policy could be modeled after Minnesota’s Beginning Farmer Tax Credit to provide agricultural landowners additional motivation to sell land or other agricultural assets once they retire. Reducing capital gains taxes for land sold to systemically marginalized and beginning farmers would allow the retired farmer to pass to his or her heirs the value of the land instead of the land itself, ensuring that the family is cared for while still passing the land to someone equipped to farm it. Selling during the farmer’s lifetime would also give the farmer liquidity in retirement, a time when farmers are often land-rich but cash-poor.

LEGISLATIVE OPPORTUNITY

Create federal capital gains tax exclusions for sale of agricultural conservation easements

Agricultural conservation easements protect farmland and ranchland from development in perpetuity.³⁴² Importantly, these easements can reduce the purchase price of land once protected, enabling farmers and ranchers



to buy land that would otherwise be unaffordable.³⁴³ Landowners who sell an agricultural conservation easement forgo the right to develop their land for non-farming purposes and thus are typically compensated based on the appraised value of the land and easement.³⁴⁴ Previous studies by American Farmland Trust have found that most farmers who sell an agricultural conservation easement use the proceeds to expand or improve their business or to facilitate the transfer of the farm to the next generation.³⁴⁵

Similar to the sale of farmland, capital gains taxes are imposed on proceeds from the sale of agricultural conservation easements. This discourages landowners from leaving a legacy of protected land and can adversely impact beginning and systemically marginalized farmers because there is so little affordable farmland.³⁴⁶ Congress should create a federal capital gains tax exclusion for proceeds from the sale of agricultural conservation easements in order to incentivize farmland protection while also making farmland more affordable and accessible to the next generation of farmers.

Leverage Buy-Protect-Sell to Facilitate Land Access

The high cost of purchasing land is a significant barrier for systemically marginalized and beginning farmers. One approach to making farmland more accessible is through buy-protect-sell (BPS) transactions, available through the Agricultural Land Easements portion of USDA's Agricultural Conservation Easement Program.³⁴⁷ ACEP-ALE, discussed in the prior section, is a voluntary federal conservation program that protects private agricultural land from being converted to non-agricultural uses.³⁴⁸ USDA's Natural Resources Conservation Service (NRCS) partners with eligible entities such as NGOs or state and local governments to purchase permanent agricultural conservation

easements and provides up to 50% of the fair market value of the easement.³⁴⁹ ACEP-ALE is a popular program even though it requires leveraging significant state, local, and landowner contributions towards its 50% non-federal match requirement.³⁵⁰

Under the standard ACEP-ALE transaction, an eligible entity obtains funds from NRCS to purchase an agricultural easement from an eligible landowner. In contrast, BPS transactions allow land owned by an eligible entity to be eligible for ACEP-ALE. BPS transactions require the original owner of the land, otherwise known as the BPS-eligible entity, to hold fee title to the land on a transitional basis. The BPS-eligible entity transfers the title, subject to an agricultural easement, to an eligible farmer or rancher at no more than the agricultural value.³⁵¹

BPS thus provides a mechanism for entities interested in promoting land access for systemically marginalized and beginning farmers to purchase land, protect it for agricultural purposes, and then sell it to a farmer or rancher at a more reasonable rate. As detailed below however, the complexity of the program may hinder its ability to serve this purpose.

ADMINISTRATIVE OPPORTUNITY

Develop additional guidance on legally permissible Buy-Protect-Sell transactions

There are two types of BPS transactions: pre-closing transfer and post-closing transfer.³⁵² The eligible entity must specify the transaction type that will be used to acquire the agricultural easement at the time of application. Pre-closing transfer requires the eligible entity to transfer fee title ownership of the land to a farmer or rancher at or prior to closing on the agricultural land easement. The eligible entity then holds the agricultural land easement. Post-closing transfer occurs when the eligible entity transfers



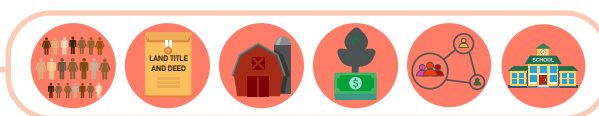


fee title ownership of the land to a farmer or rancher not later than three years after closing on the agricultural land easement.³⁵³ Post-closing transfers pose the most legal challenges because an entity is prohibited from being both the fee title landowner and the easement holder simultaneously. Thus, there are two approaches to post-closing transactions using an interim landowner or interim easement holder.³⁵⁴ At the time of easement closing, either an interim landowner holds the parcel and the BPS-eligible entity holds the easement, or there is an interim easement holder and the BPS-eligible entity owns the parcel.³⁵⁵ In either scenario, within three years of the easement closing, parcel ownership must be transferred to a qualified farmer or rancher and the BPS-eligible entity must hold the easement.³⁵⁶

One of the greatest challenges to eligible entities using BPS is determining the legal viability of the transaction, especially with

regard to post-closing transactions.³⁵⁷ For example, whether the interim landowner entity can be an LLC wholly owned by the BPS-eligible entity may require an evaluation by NRCS to determine the specific relationship and level of separation between the entities and whether the easement will be enforceable from the outset.³⁵⁸ Regardless of the transaction type, NRCS ultimately determines the legality of the proposed transaction.³⁵⁹

Participating entities lack guidance on how to engage in legally permissible BPS transactions. This uncertainty increases the complexity and administrative burden of BPS, thereby inhibiting its role in facilitating land access. To make the program more accessible, NRCS should provide more detail on acceptable models for BPS transactions and clarify what entities qualify as eligible entities to serve as the interim landowner of the parcel or interim easement holder for post-closing BPS transactions.³⁶⁰



GOAL IV



Increase Accessibility and Affordability of Agricultural Credit for Systemically Marginalized and Beginning Producers

Many producers, especially beginning farmers and ranchers and producers of color, consider access to land and credit to be the greatest challenges in establishing profitable, sustainable agricultural operations.³⁶¹ Systemically marginalized farmers—who often operate smaller farms—and beginning farmers rarely have sufficient cash to purchase land and equipment outright or cover other agriculture-related expenses,³⁶² making access to credit even more critical for these groups.³⁶³ To have a meaningful and beneficial impact, this credit must be both accessible and appropriate, recognizing that beginning, small, and mid-sized farmers need credit options that include smaller loan sizes, affordable interest rates, and reduced administrative burden.³⁶⁴

USDA plays a proportionately small but incredibly important role in the farm credit system. USDA's Farm Service Agency (FSA)—which oversees a number of farm programs and operations, including Farm Loans—offers both ownership and operating loans to farmers who are otherwise unable to obtain credit.³⁶⁵ FSA also guarantees timely payment of principal and interest on qualified farm loans made by commercial banks and the Farm Credit System (FCS). The Congressional Research Service reports that FSA's direct loans and loan guarantees comprise 3% and 4% of the market, respectively.³⁶⁶ FCS—which is not part

of USDA but is a federally-chartered private lender established to serve agricultural and rural credit needs—holds approximately 44% of farm debt but, unlike FSA, generally competes for the same borrowers as commercial banks.³⁶⁷ Described further below, FSA targets and reserves portions of its funding for socially disadvantaged groups (including women) and beginning farmers and ranchers. FCS does not have such targets but is statutorily required to offer services to “young, beginning, and smaller farmers and ranchers.”³⁶⁸

Despite these Congressional mandates, gaps remain in connecting systemically marginalized and beginning farmers and ranchers with affordable and accessible financing for agricultural land and equipment. The next farm bill offers an opportunity to better support these farmers through reforms to FSA loan programs as well as through new directives and programs to meet their needs.

Reform FSA Loan Programs to Better Serve Systemically Marginalized and Beginning Producers

FSA provides credit assistance to farmers who cannot obtain loans elsewhere, such as through commercial banks. Out of a \$441 billion market



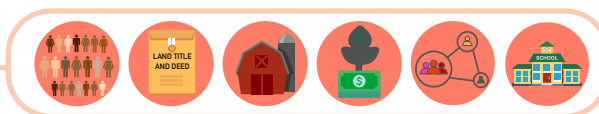
for farm debt, FSA has a direct market share of 3% of loans and an additional 4% market share in loan guarantees.³⁶⁹ Its loan program is designed to serve beginning and socially disadvantaged farmers in particular. The program reserves a portion of funding for direct and guaranteed loans for beginning farmers and ranchers.³⁷⁰ 75% of direct farm ownership loans and 50% of operating loans are reserved for beginning farmers for the first 11 months of each fiscal year.³⁷¹ 40% of guaranteed farm ownership and operating loans are reserved for beginning farmers for the first half of each fiscal year.³⁷² FSA also distributes funds with a goal of reaching socially disadvantaged farmers using target participation rates based on local demographics; the proportion of members of socially disadvantaged groups is also used to allocate loan funds distributed to counties.³⁷³ Direct farm ownership loan participation rates are based on the percentage of the total county population that is part of a socially disadvantaged group whereas direct operating loan targets are based on the percentage of farmers in a county that are part of a socially disadvantaged group.³⁷⁴

Although FSA holds a small share of the market, it continues to be a valuable lending option for smaller farms. Systemically marginalized and beginning farmers are more likely to face barriers in obtaining loans from private lenders, making FSA a crucial option for these farmers to begin or continue their agricultural operation.³⁷⁵ Still, certain aspects of the FSA loan program's design can disadvantage FSA borrowers relative to commercial borrowers, while other facets disproportionately impact the systemically marginalized and beginning borrowers who rely on the program. The legislative opportunities below describe several of these specific challenges and specify actions Congress should take in the next farm bill to close these gaps.

LEGISLATIVE OPPORTUNITY

Offer loan pre-approval for FSA borrowers

Loan pre-approval is a form of conditional loan approval with final loan approval contingent upon conditions such as the borrower's credit, financial situation, and prospective purchase. Beginning farmers looking to buy farmland



often need to have pre-approval for a farm loan in order for realtors to be willing to show them available property.³⁷⁶ Additionally, the farm real estate market is highly competitive, and sellers are often unwilling to delay the sale for potential buyers without loan pre-approval.

Unlike commercial lending services that provide pre-approval for loan applicants, FSA does not currently offer pre-approval to potential borrowers. This creates a significant obstacle for farmers seeking loans through FSA to compete with buyers obtaining commercial loans. Further, the current FSA loan application process is lengthy and prevents farmers from being able to quickly place a bid on a property.³⁷⁷ Without pre-approval, FSA loans are viable only in slower markets or in situations in which the landowner can afford to be patient with a potential buyer.³⁷⁸ FSA borrowers struggle to compete against other offers, some of which are cash.

Securing pre-approval to purchase farmland for an agricultural operation differs from securing pre-approval for a home mortgage, as the lender—FSA—takes into account the expected income from the proposed farming operation, which may vary from one available property to another. Nevertheless, in the same way mortgage pre-approval is not specific to a home or property, farm loan pre-approval merely indicates the lender’s determination that the buyer is financially able and can qualify for a loan. Further, farm loan pre-approval could include rigorous application requirements similar to those required for small business loan pre-approval, such as a business plan, financial statements, tax returns, and a resume or experience narrative. Thus, FSA loan pre-approval should be a feasible reform to implement.

Pre-approval supports the efficiency of closing—and, in turn, the appeal of an offer—by demonstrating that a potential buyer has financing secured. As the agriculture market is often fast-paced, allowing FSA borrowers to obtain loan pre-approval would bolster their competitiveness in the real estate market.³⁷⁹ Congress should therefore authorize and direct FSA to develop a mechanism for pre-approving farm loans.³⁸⁰

LEGISLATIVE OPPORTUNITY

Adjust loan limit amounts each year to reflect regional inflation

FSA offers two types of loans: direct and guaranteed. FSA guaranteed loan limits are adjusted yearly to account for inflation,³⁸¹ using the same formula throughout the country. Adjustment for inflation is an important way to ensure guaranteed loans remain adequate to cover the cost of farm real estate. However, *direct* loans are not adjusted for inflation each year.³⁸² Additionally, there is regional variation in both farmland value levels and growth trends.³⁸³ Regional farmland real estate values vary widely,



often due to differences in general economic conditions, local farm economic conditions, population growth and development pressures, and government policy.³⁸⁴

For farmers to be able to obtain loans sufficient to purchase land in their area, Congress should amend the governing statutes to adjust direct loan limitations to account for inflation.³⁸⁵ For both direct and guaranteed loans, it should require that the limits be indexed to regional farmland inflation rates (rather than national averages) to more accurately reflect local land prices.

LEGISLATIVE OPPORTUNITY

Eliminate FSA loan utilization term limits

To be eligible for FSA direct farm loans, applicants must not have exceeded the program's term limits (i.e., the maximum number of years a borrower may utilize FSA loans before being required to 'graduate' to private lending). With some exceptions, that limit is 10 years for direct ownership loans and 7 years for direct operating loans.³⁸⁶ The years do not need to be consecutive, and multiple loans received during a single year count against only one year of eligibility.³⁸⁷ Term limits do not apply to beginning farmers in their first 10 years of farming.³⁸⁸

USDA has noted an increase in the number of direct borrowers reaching the term limit in recent years.³⁸⁹ The Department reported, in 2016, that 78% of term-limited borrowers had "used most of their years of eligibility as beginning farmers," while non-beginning, socially disadvantaged farmers comprised about 15% of borrowers reaching term limits.³⁹⁰ Given that beginning and socially disadvantaged farmers are more likely to depend on FSA for their credit needs and make up the majority of loan obligations, this impact is not surprising. The same report noted

that most term-limited borrowers would face challenges obtaining commercial credit.³⁹¹

Congress should eliminate term limits altogether so that economically challenged farmers are not cut off from all available credit options. If term limits are maintained, Congress should ensure they do not negatively impact socially disadvantaged farmers by establishing a waiver for socially disadvantaged farmers to match that provided for beginning farmers and by exempting microloans issued to socially disadvantaged farmers and ranchers from the direct operating loan term limit as it does for microloans made to beginning farmers and veteran farmers.³⁹²

LEGISLATIVE OPPORTUNITY

Require that loan restructuring be pursued before liquidation or foreclosure where expected loss is comparable

Because, in addition to providing direct loans, FSA guarantees farm loans through commercial lenders, the lender, rather than the loan applicant, is FSA's customer. The loan is the property of the lender and the lender is responsible for loan servicing. A guaranteed loan is considered to be in default 30 days after the borrower has failed to make a payment or has otherwise violated the loan agreement.³⁹³ The lender is responsible for resolving loan default.³⁹⁴ Within 90 days of default, the lender must decide whether to restructure or liquidate the account.³⁹⁵ The lender may not initiate foreclosure action on the loan until 60 days after FSA has determined the eligibility of the borrower to participate in interest assistance programs.³⁹⁶ If the lender or the borrower does not wish to consider these options, it must be documented and reported to FSA and liquidation procedures can begin.³⁹⁷

Farmers, like other small businesses, can face unexpected challenges such as extreme weather conditions, unpredictable pests,



market fluctuations, and other unanticipated disruptions such as the COVID-19 pandemic.³⁹⁸ These unique risks require a flexible response through loan servicing. However, farmers of color are less likely to be afforded better rates and terms during loan servicing transactions, modifications, or restructuring and are instead often burdened with default, acceleration, bankruptcy, and foreclosure.³⁹⁹ A 2019 GAO report found that loan servicers are more likely to foreclose on socially disadvantaged borrowers who have fallen behind on loan payments (as compared to other borrowers) without providing repayment options that may have allowed the borrowers to continue their agricultural operations.⁴⁰⁰

In order to prevent such disparate loan servicing, the statute concerning servicing options for accounts in default should be revised to require that where the net recovery (i.e., the present value of the payments under the restructured loan) to the lender through loan restructuring is substantially equal to the net recovery value to the lender if the property were liquidated in bankruptcy, foreclosure, or involuntary liquidation, the lender is required to restructure the loan.⁴⁰¹ Finally, a process for appealing foreclosure decisions should be put in place to provide borrowers with an avenue to contest the decision and have it reconsidered.

ADMINISTRATIVE OPPORTUNITY

Reduce administrative complexity and improve accessibility to program applications and materials

Complex applications are also a barrier to accessing USDA loans.⁴⁰² FSA loan applications often require applicants to complete long, complex documents consisting of dozens of pages requesting detailed information. As USDA recognized in its Equity Action Plan, systemically marginalized and beginning farmers without the necessary experience or support may be dissuaded from submitting

time-consuming and overly involved applications for USDA programs, even loans. This is especially true given the history of discrimination by FSA personnel and the perceived likelihood of an applicant's success.

To address these concerns, USDA's Equity Action Plan outlines plans to invest in partnerships with technical assistance providers to provide services that include business planning, financial knowledge, and other technical skills for successful farm management.⁴⁰³ The Equity Action Plan also indicates USDA's intent to reduce barriers to programs and improve support to underserved farmers by expanding the availability of program information in non-English languages and eliminating cumbersome application requirements.⁴⁰⁴

In addition to the steps proposed in the Equity Action Plan, USDA should consider the following actions to improve loan accessibility and reduce instances of discriminatory service provision:

- Streamline application processes and universalize application requirements to the extent practicable to ease the burden of completing applications and enable technical assistance providers to offer more generalizable support.
- Expand language access for producers who do not speak or read English as their primary language. Currently, the FSA programs factsheet is available in five languages⁴⁰⁵ and FSA produces detailed guidebooks⁴⁰⁶ on farm loans that are available in English and in Spanish.⁴⁰⁷ Additionally, all FSA county offices offer a language line for interpretation services and post iSpeak posters to help county office staff identify the language needed. County office staff may also submit a request to the state to have materials translated.⁴⁰⁸ Nevertheless, the majority of program information, including



guidance documents, online resources, and webinars, are available exclusively in English. Additionally, the language line is not promoted robustly. These guidance materials and technical support services should be provided in multiple languages and formats, readily accessible on USDA webpages, and available in FSA county offices.

- Prioritize hiring diverse FSA field staff who are representative of the communities the office serves.⁴⁰⁹
- Establish cooperative agreements with trusted community organizations to provide technical assistance in languages commonly spoken within the local farming community.⁴¹⁰
- Explore the use of new technologies that may reduce opportunities for interpersonal discrimination. For example, artificial intelligence (AI) software may be available to detect and flag discriminatory practices and USDA databases and programs could be structured to reduce individual discretion that can perpetuate disparities.⁴¹¹
- Conduct an annual systematic review to analyze FSA officers' active loan portfolios for discriminatory practices. This process would also require immediate actions be taken where discrimination or other forms of abuse have become known, including but not limited to direct supervision, more in-depth investigation, probation, and dismissal.⁴¹²
- Reinforce and hold FSA offices accountable to a zero-tolerance policy of disparate treatment for any producer on the basis of race, gender, sexual orientation, or operation.

Introduce New Loan Program Features Targeted to Redressing the Effects of Discrimination

Of USDA's various agencies and programs, FSA has a particularly fraught history of discriminatory practices that led to the loss of millions of acres of Black-owned land and limited the participation of farmers of color in agricultural governance and local decision making. While the class action settlements and claims process achieved through *Pigford*, *Keepseagle*, *Love*, and *Garcia*, (detailed above on page 10–11) marked important remedial steps to address FSA and USDA's wrongdoing, discriminatory decisions and poor commitments to equity have caused disparities and injustice to persist into the 21st century. As Goal I emphasizes, a broad commitment from Congress and USDA to address discrimination and advance equity is critical. Additionally, given the important role FSA continues to play in providing financial lifelines to farmers across the country, Congress should implement the following Legislative Opportunities to redress the effects of discrimination through FSA loan programs.

LEGISLATIVE OPPORTUNITY

Provide FSA direct operating and farm ownership loans at no interest to systemically marginalized and beginning farmers

Accessible agricultural credit is crucial for systemically marginalized and beginning producers to start and maintain their agricultural operations. Prohibitive interest rates can be an obstacle to securing affordable loans to purchase farmland or cover operating costs. FSA direct loan interest rates are adjusted monthly, but once the loan is closed, the interest rate remains fixed for the loan term at the rate in effect on the date of loan approval or



loan closing, whichever is lower.⁴¹³ Current direct loan interest rates range between 1.5 to 4.25% depending on the type of loan.⁴¹⁴

To make FSA direct loans more accessible and support new or existing agricultural operations, FSA should establish a no-interest loan program for systemically marginalized and beginning farmers. This program could be modeled after Delaware's Young Farmer Loan Program.⁴¹⁵ The Young Farmer Loan Program offers a 30-year, no-interest loan to support young farmers in their purchase of land.⁴¹⁶ The loan covers up to 70% of the appraised value of the farm, to a maximum of \$500,000.⁴¹⁷ In exchange, the state's farmland protection program acquires a permanent agricultural conservation easement on the property. Since its inception in 2011, the program has provided over \$8 million in loans, with an average loan of over \$227,000, to support beginning farmers in purchasing and protecting over 2,800 acres of land.⁴¹⁸

Federal policy could be modeled after the Young Farmer Loan Program by providing no-interest loans to systemically marginalized and beginning farmers in exchange for the conservation and protection of agricultural lands. This would encourage and promote farming as a viable occupation and provide a means of facilitating land acquisition while ensuring the land is permanently kept available for agricultural use.⁴¹⁹

LEGISLATIVE OPPORTUNITY

Require the Secretary to consider FSA loan debt forgiveness for borrowers with discrimination complaints against the USDA

When FSA borrowers are unable to make payments due to reasons beyond their control, their FSA loan accounts may be serviced to avoid foreclosure and liquidation.⁴²⁰ Borrowers can be considered for debt restructuring through rescheduling, reamortization,



consolidation, deferral, or write-down of the amount owed, as long as FSA will receive an equal or greater net return than it would realize through foreclosure.⁴²¹ Importantly, FSA loan applicants may be ineligible for assistance if they have previously caused FSA a loss by receiving debt forgiveness unless the debt forgiveness is repaid.⁴²² Even if the debt forgiveness is repaid, FSA may still consider it in determining an applicant's creditworthiness.⁴²³ However, debt written off as part of the resolution of a discrimination complaint settlement, including debt written off in conjunction with *Pigford*, is not considered debt forgiveness for loan-making purposes.⁴²⁴

In addition to these servicing options, the Secretary of Agriculture has the authority to forgive the debt of FSA borrowers with direct and guaranteed loans.⁴²⁵ 7 U.S.C. § 1981(b)(4) authorizes the Secretary to "compromise, adjust, reduce, or charge-off debts or claims (including debts and claims arising from loan guarantees) . . . administered by the Consolidated Farm Service Agency[.]"⁴²⁶ The statute further provides that, "[a]fter consultation with a local or area county committee, the Secretary may release borrowers or others obligated on a debt."⁴²⁷ Although county committee approval or rejection of direct loan debt settlement or release of liability is not required, the consultation is still mandatory for the purpose



of disclosing additional information about the borrower.⁴²⁸ Congress cited this existing authority to modify loans in Section 22006 of the Inflation Reduction Act, where it appropriated \$3.1 billion for the Secretary to provide immediate relief to borrowers whose agricultural operations are at financial risk.⁴²⁹

Congress should modify the discrimination complaint process to require that once a discrimination claim is filed, the Secretary must review the complaint and make a preliminary determination on whether the claimant is eligible for debt relief under Section 1981. This review may be based on specific criteria established by the Secretary, such as the veracity of the claim and whether the claim alleges discrimination in lending practices. Where the Secretary has made a determination that debt forgiveness is appropriate to redress the alleged discrimination, the Secretary should utilize their authority to forgive the debt while maintaining the complainant's eligibility to receive additional FSA loans. This could be done by amending Section 2008h, as was proposed in the Justice for Black Farmers Act, to remove the eligibility restriction based on previous debt write-down or other loss.⁴³⁰ Additionally, Section 1981 requires the Secretary to consult with a county committee prior to releasing borrowers or others obligated on a debt. Given the historical and ongoing systematic racial discrimination perpetuated by county committees, discussed in Goal V below, the Section 1981 provision requiring county committee consultation should be eliminated. Further, the provision should be revised to give county committees the authority to identify and recommend borrowers meriting debt forgiveness, whom the Secretary is then required to consider.

LEGISLATIVE OPPORTUNITY

Revise the Farm Credit System declaration to explicitly stipulate the objective of providing appropriate and accessible

credit and promoting equity in agricultural lending

FCS is a nationwide network of rural lending institutions providing funding for farmers, ranchers, and aquatic producers.⁴³¹ The Congressional declaration of policy and objectives for FCS provides that the system be designed to “improv[e] the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.”⁴³² Further, FCS must be “responsive to the credit needs of all types of agricultural producers having a basis for credit, and to modernize and improve the authorizations and means for furnishing such credit . . . made available through the institutions constituting the Farm Credit System.” Although the language is broad, it lacks an affirmative mandate to promote equity through FCS's lending activities. The FCS declaration of policy language should be revised to emphasize the need for appropriate and accessible credit for systemically marginalized and beginning farmers and ranchers and for maintaining an equitable system that supports historically disadvantaged producers. Additional study on how the FCS charter should be revised to further these objectives may also be warranted.

LEGISLATIVE OPPORTUNITY

Collect and annually report demographic data of FSA loan applicants and recipients

FSA annually publishes total loan obligations for both direct and guaranteed operating loans and ownership loans.⁴³³ The data is separated out by state and loan type. However, data on socially disadvantaged farmers and ranchers is not readily available. Regulations generally prohibit private lenders from requiring demographic data from loan applicants,



making loan data challenging to acquire from commercial banks.⁴³⁴ A 2019 GAO report noted that some members of Congress and consumer advocates argue that the prohibition on data collection has limited the ability of researchers, regulators, Congress, and the public to monitor nonmortgage lending practices and identify possible discrimination.⁴³⁵

For FSA lending, however, much of that demographic information is collected. The 2018 Farm Bill imposed a new annual reporting requirement for direct and guaranteed farm ownership and operating loans that required reporting on the race, ethnicity, and gender of loan recipients.⁴³⁶ However, as of July 2022, the Congressional Research Service found that only one such report had been submitted to Congress (for FY2019) and no reports were readily available on FSA's public website despite the requirement to make reports publicly available.⁴³⁷ Although researchers can obtain more detailed information through Freedom of Information Act (FOIA) requests, published—and readily accessible—data would better promote transparency and accountability and is consistent with USDA's stated goal of facilitating external evaluation of USDA programs.⁴³⁸ GAO has also asserted that personal characteristic data would enhance transparency by helping researchers and others better assess the potential risk for discrimination.⁴³⁹ Without comprehensive published data, it is unclear whether FSA loan programs are effective and sufficiently supporting beginning producers and producers of color. This hinders transparency and the development of policy revisions to promote equity in loan access.

Congress should re-emphasize the importance of and expand FSA's reporting obligations in the next farm bill. Congress should expand reporting requirements to include:

- Demographic data concerning loan applications (in addition to the existing reporting required on outstanding loans).

- The ratio of FSA loan applications started versus completed, broken down by race and ethnicity.
- Average loan amount requested versus received, broken down by race and ethnicity.
- Average time-frame from application submission to funds received, broken down by race and ethnicity.
- Similar reporting obligations for all programs administered by FSA, such as payments distributed through the Conservation Reserve Program or from the Commodity Credit Corporation.

In order to preserve individual privacy, the data could be aggregated and reported at the census tract level.⁴⁴⁰ This would provide valuable insights into the portion of loans being provided to systemically marginalized groups relative to the demographic makeup of a specific geographic region. FSA should continue to permit borrowers who do not wish to self-identify to abstain. Finally, Congress should require USDA to keep and make accessible all demographic data concerning its programs, irrespective of administrative changes in the way the data is collected or reported.

While obtaining demographic information from commercial banks regarding agricultural lending has been a challenge to date, a rule proposed by the Consumer Financial Protection Bureau (CFPB) to require covered financial institutions to collect and report data on applications for credit for small businesses (under the Dodd-Frank Act) could change the landscape of available data.⁴⁴¹ Congress should direct USDA, upon finalization and implementation of the rule, to work with CFPB to obtain relevant loan data and to report on commercial agricultural lending trends as it does for FSA loans. These additional insights will provide a better picture of agricultural lending in the country and to what extent lending



institutions are meeting the needs of socially disadvantaged and beginning farmers.

Tie Debt Relief to Climate and Conservation Objectives

FSA offers a program that provides voluntary debt relief for FSA customers in exchange for taking certain lands out of production for a specified time period, known as the Conservation Contract Program (CCP).⁴⁴² The program is available to FSA borrowers with a loan secured by their land who are current or have fallen behind on their payments.⁴⁴³ Borrowers with new loans are also eligible.⁴⁴⁴ CCP's aim is conservation and it targets environmentally sensitive land; land eligible for enrollment includes: wetlands; highly erodible lands; lands containing aquatic life, endangered species, or wildlife habitat of local, regional, or national importance; lands in 100-year floodplains; areas of high water quality or scenic value; aquifer recharge areas, and several other categories.⁴⁴⁵ Contracts may have terms of 50, 30, or 10 years.⁴⁴⁶ Once the contract goes into effect, the use of the land placed under contract is restricted; it may not be used for agricultural production, grazing, or development.⁴⁴⁷

CCP offers a model for assisting FSA borrowers with managing debt and mitigating the potential for land loss. Congress should expand on this model to achieve aims beyond protecting environmentally sensitive land while still maintaining this important objective in appropriate circumstances.

LEGISLATIVE OPPORTUNITY

Establish a Debt for Working Lands Initiative

CCP should be revised to provide climate change mitigation and conservation-focused debt relief and restructuring tools in the form of a Debt for Working Lands Initiative.⁴⁴⁸ This Initiative would allow borrowers to reduce and restructure debt contingent upon implementation of sustainable or regenerative practices. For example, debt could be reduced if borrowers take measures to improve soil health, adopt practices to enhance carbon sequestration, or make changes to improve their energy efficiency.⁴⁴⁹ This would support farmer debt management while preserving viable agricultural land. CCP could also allow borrowers to reduce and restructure debt in exchange for a permanent agricultural conservation easement or non-development covenant, separate from or in combination with implementation of agreed upon practices. The duration for program participation should be sufficiently long to realize the anticipated environmental benefits and should be adequately monitored to ensure compliance. Rather than keeping environmentally sensitive land out of production, this modified version of CCP would encourage keeping highly productive agricultural land in production and support farmers seeking to maintain their agricultural operation.⁴⁵⁰ Additional opportunities to support climate-friendly practices on working lands can be found in FBLE's **Climate & Conservation** Report.



GOAL V



Reinvent the County Committee System of Local Agriculture Governance

USDA has far-reaching responsibilities that include crop insurance systems, conservation programs, and farm loans. To help administer these programs USDA relies on committees, known as county committees, of farmers who are elected to oversee local implementation.⁴⁵¹ There are nearly 8,000 farmers elected to these committees, and over 2,000 committees across the country, with one located in almost every county.⁴⁵² While they have traditionally been located in rural counties, USDA is piloting a program of urban and suburban county committees to better reflect the modern agriculture landscape.⁴⁵³

Beyond their wide geographic scope, several notable features of these county committees provide context for the Recommendations in this section. Congress initially established the committees in 1933 as part of the New Deal Agricultural Adjustment Act (AAA).⁴⁵⁴ At that time, USDA was transforming into a regulatory agency and needed significant human resources to apply the new agricultural regulations to the roughly 7 million farmers across the country.⁴⁵⁵ Using local committees made up of local farmers allowed USDA to have “boots on the ground” and to maintain trust with regulated farmers even as it made a significant pivot from research and education into economic regulation.

Despite their original purpose, there is no

clear picture of how these more than 2,000 committees actually operate today. Although their authority is immense, each committee operates differently and takes responsibility for a different set of programs.⁴⁵⁶ The original purpose of these committees was to implement the supply management programs of the AAA.⁴⁵⁷ The program paid farmers to reduce their output, limiting supply and therefore maintaining or raising the price of farm products, which had been extremely volatile before and during the Great Depression.⁴⁵⁸ Under the supply management program, each county had a total production limit, which the county committees would divide among the county’s farmers.⁴⁵⁹ The committees would then monitor each farm’s production to assure the farm was staying within its production quota, and the committees would impose fines for excess production, if necessary.⁴⁶⁰ In 1994, the USDA Reorganization Act gave the committees authority over virtually every USDA program.⁴⁶¹

Today, the committees are housed within the Farm Service Agency and “[can] technically do almost anything that USDA [can].”⁴⁶² In practice they typically do not, instead carrying out narrow, though important powers, such as determining the types of benefits available in their jurisdiction or setting policy on things like “final planting dates,” which are used to determine whether farmers are eligible for certain types of federal disaster relief.⁴⁶³ But



within the wide range of their authority, it is unclear how individual committees operate and it is therefore impossible to fairly assess and oversee the committees.

While there are aspects of the committees that have received praise, such as their early attempts to foster agricultural democracy and their ability to better connect some farmers to USDA programs,⁴⁶⁴ there have also been damning criticisms of the committees based on, among other things, their racism and the fact that they are unknown even within some farming communities.

What little has been written about these committees has primarily focused on their role in excluding and oppressing Black farmers.⁴⁶⁵ In the election process there are countless stories of threats, violence, misinformation, and outright lies used to keep Black candidates off the ballots and Black farmers away from the polls.⁴⁶⁶ As a consequence, in their first several decades of operation, there was not a single Black farmer on any committee in the South.⁴⁶⁷ The county committees have deprived Black farmers of the opportunity to participate in governance and the benefits of farm programs. Elected farmers would hide information about available funds or direct funding to themselves and their friends at the expense of other deserving farmers.⁴⁶⁸ When Black farmers were able to access information and apply for various federal supports, the all-white committees who acted as gate-keepers would punish those farmers by, for example, conducting investigations into their farming practices and reducing what meager federal benefits they already received.⁴⁶⁹ These discriminatory practices have had devastating impacts, contributing to Black land loss and the decline of Black farmer operators. There is a glaring, and understandable, lack of trust from Black farmers with respect to the committees.⁴⁷⁰ Even though the committees perform certain functions and alternative administrative structures will

have their own shortcomings, the committees are steeped in a legacy of discrimination. For that reason, the committees are unable to effectively serve many Black farmers and should be abolished. This abolition can lead to more just alternatives but, regardless, is an important signal that Congress hears and responds to the demands of Black farmers.

In addition, many farmers, regardless of race, are simply unaware that the committees exist or have significant and important authorities.⁴⁷¹ The elected county committees have operated under the radar for a long time, which allows their deepest troubles to go unremedied and reduces the options for addressing their more minor defects. An electoral system, for instance, should be responsive to the needs of its constituents. The farmer committees are not responsive because many farmer-electors are simply unaware that the committees exist or that they are elected. Farmers who participate in USDA programs are eligible to run for the county committees, and any farmer participating in FSA programs is also an eligible voter.⁴⁷² The committees are populated with three to five elected members, each serving a three-year term.⁴⁷³ After serving three terms, an elected member must “sit out” one election cycle before again running for a seat on the committee.⁴⁷⁴ While the USDA does promote the county committee elections, according to recent data, voter turnout for elections tops out at 15% of eligible voters and at times in the past there have been more candidates than voters.⁴⁷⁵ Scholars, judges, and even farm organizations themselves are often unaware of the committees’ existence.⁴⁷⁶ In a universe of significant power, huge variation in how that power is exercised, a history of racial discrimination and abuse, and a present with little scrutiny, it is time for Congress to seriously reconsider the role, and the existence, of these committees.

Though they wield significant federal authority,



USDA promotes the committees as merely advisory bodies that facilitate communication between USDA and farm communities.⁴⁷⁷ But the committees have played a powerful role in the history of agricultural policy, and they continue to influence farming in important ways. Given the variability of their practices and the way their power is understated, the committees pose a difficult challenge. The farm bill provides an opportunity to take on that challenge.

To begin, Congress should work toward eliminating the county committee system. The abuse and distrust run too deep to redeem the committees. Unfortunately, it may not be wise to repeal the committee structure immediately. There is too little public information about the full scope of committee authority. It is possible that immediate repeal would leave farmers without critical resources. For this reason, Congress should require a very specific and limited study to better understand committee functions in the lead up to repeal and replacement. Many people, especially those who have been the victims of government-sponsored discrimination, do not like studies, which have been used again and again to delay justice. This concern is valid. For this reason, Congress should mandate a strict timeline for completing the proposed study and Congress and USDA should take additional, interim steps to improve the committees while waiting on the results and ultimate repeal of the county committee system.

Begin a Transition Away from the Committee System

There are modern calls for doing away with the county committees because of their racist history, lack of representation, and the high level of existing mistrust.⁴⁷⁸ There are also compelling arguments that their structure of elected administration is simply not an effective way to govern an industry like agriculture.

Disbanding the committees will require careful analysis of the current scope of committee authority. Importantly, the study proposed below is meant to gather information to ensure Congress can abolish the committees without farmers falling through the cracks. The study is not meant to delay action. Therefore, Congress must impose a strict timeline and interim measures to change the committee structure during the course of the study.

LEGISLATIVE OPPORTUNITY

Conduct a study that assesses the roles that county committees play across the country and how those roles can be transferred

As the county committees are creatures of statute, only Congress has the authority to disband them. However, the committees carry out diverse responsibilities, operating slightly differently in every case, and certainly some committees carry out crucial responsibilities. It is therefore critical to understand the full range of operations of every committee and to envision how different units within FSA, or other appropriate entities, can take on these responsibilities. For instance, some committees establish a “final planting date” for crops within their jurisdiction. Farmers must plant before this date in order to be eligible for federal disaster relief.⁴⁷⁹ Committees also have authority to relieve farmers of conservation requirements in certain circumstances.⁴⁸⁰ Do all committees exercise these powers? If the committees do not exercise such powers, who does? And when the committees are disbanded, who will take responsibility?

USDA should undertake a study of committee operations and potential options for approaching their disbandment. The study should include a full census of operations across the county committees, clearly cataloging the various responsibilities that each committee carries out, identifying whether those responsibilities emerge from statutory,



regulatory, or sub-regulatory authority (e.g., guidance documents, staff manuals, internal memos, etc.), and indicating the processes the committees use to carry out each responsibility. The options for disbandment should identify which committee responsibilities are essential and which are optional. It should suggest existing and new entities to carry out essential responsibilities. It should consider which of the optional responsibilities should continue and which should terminate. It should also articulate which aspects of disbandment need to originate from Congress and which from administrative processes. Congress should provide USDA with 3 years to conduct the study, providing substantial time to gather information from all the committees but also ensuring completion prior to the subsequent farm bill. This study should be done in collaboration with the Equity Commission and include a diverse set of voices from outside USDA and the county committees. It may be useful for USDA to collaborate with the Administrative Conference of the United States or another external party that can add more distance and operational expertise.

Shift County Committees to an Interim Appointed Structure

While waiting for USDA to report back on transitioning or terminating the committees, Congress should convert the committees to an appointed structure to ensure representation of a wide variety of farmers, decrease corruption and discrimination, and improve administration. One criticism of the county committees is that their electoral make-up is an inappropriate structure for local administration of federal law. Majoritarian politicking is more likely to result in exclusion and oppression and is less likely to produce the most talented administrators. Part of committee responsibilities is making case-by-case fact-based judgments about

operations on individual farms, a quasi-judicial role that has not been carried out fairly. Finally, the elections do not produce committees that are representative of the farming community.⁴⁸¹ Congress has taken recent steps to address this last concern, allowing appointment of socially disadvantaged farmers and ranchers when the electoral process does not result in sufficient representation.⁴⁸² But that solution is an awkward fit and has drawn criticisms.⁴⁸³ For instance, there has been criticism of using appointments for some members of county committees while others are elected, and in any case, the fact that appointments are necessary suggests that electoral administration is not suitable in this context.⁴⁸⁴

LEGISLATIVE OPPORTUNITY

Amend statutory language to require secretarial appointment of three to five committee members representing specific agricultural identities

Congress should amend the statutory authority for county committee elections to shift to an appointment structure. Specifically, Congress should amend the language in 16 U.S.C. § 590h(b)(5)(B) by deleting the provisions for election and replacing those provisions with authority for secretarial appointment.

In order to avoid recreating the same committee make-up, Congress should require the Secretary to make identity-conscious appointments. Professor Brian Feinstein has used the term “identity-conscious administrative law” to describe appointment structures that require the appointing authority to consider specific characteristics, such as expertise, industry, or racial, ethnic, and gender identities.⁴⁸⁵ Such an appointment structure is not a departure from the current system, which is already identity conscious, as it allows only farmers who participate in FSA programs to serve on committees. Congress should simply expand this practice and direct the Secretary to



assure representation from various farm sizes; women farmers; Black farmers, Native American farmers, Latinx farmers, and Asian American and Pacific Islander farmers (depending on the demographics in a given county); beginning farmers; and farmworkers.

LEGISLATIVE OPPORTUNITY

Mandate secretarial appointments of non-owner/operator experts on county committees

In 1969, political science professor Grant McConnell critiqued “the unstated but implicit belief that agricultural legislation and administration are concerns of farmers only[.]”⁴⁸⁶ Recognizing that agriculture policy is food policy, health policy, environmental policy, and much more, Professor McConnell continued: “Stated thus bluntly, the idea is absurd; anything that affects the price or supply of food and clothing is certainly a matter of general concern. In fact, however, the idea is rarely stated thus bluntly and the insistence that farmers should make decisions on farm affairs enjoys much respect.”⁴⁸⁷ The legislative process and the administrative process today both allow input from non-farmers, but as institutions like the USDA county committees demonstrate, there is still a dramatic preference for letting the agricultural industry set its own

policy. Moreover, people who are central to the business of farming, such as farmworkers, have limited access to governance structures.⁴⁸⁸ Certainly, there is reason to prioritize the insights, experience, and hard work of farmers, but that prioritization is no justification for excluding others.

As long as county committees remain a part of farm governance, Congress should add non-farmer representatives to county committees, directing the Secretary to appoint, for instance, public health, nutrition, or environmental representatives, representatives of organized labor, or experts in poverty law. Congress should also direct USDA to appoint experts from diverse backgrounds and to assure that experts represent diverse racial and ethnic identities. Given that committees are made up of three to five members and we are not recommending an expansion in the size of these committees, it is not sensible for Congress to overwhelm agricultural perspectives on the committees by requiring appointments from each of these categories. Instead, Congress should reserve one seat on each committee for non-owner/operator representation and should consider requiring the Secretary to rotate through different stakeholder interests.



GOAL VI



Empower 1890 and 1994 Land-Grant Universities

The Morrill Act of 1862 first established land-grant universities with the purpose of creating a system of colleges and universities to democratize education for the working class.⁴⁸⁹ Today, these institutions continue to serve as a valuable resource to farmers and farming communities because of their diverse research and extension programs—the interdisciplinary outreach programs that connect the USDA, land grant schools, local government, and individual farmers. Land-grants directly participate in, and conduct research related to, agricultural governance. However, land-grant institutions were founded in the context of deep racial injustices that continue to affect the communities they serve today.

To create and fund these colleges, the Morrill Act provided states with land that the United States had violently seized from Native Americans through over 160 land grabs.⁴⁹⁰ The states built colleges or universities on the stolen land and sold excess portions to fund the institutions' endowments. Adjusting for inflation, the stolen land raised approximately \$490 million.⁴⁹¹

While the Morrill Act of 1862 itself did not exclude students of color from attending the new land-grant schools, many of the state legislatures or school administrations barred non-white applicants.⁴⁹² Often called 1862 Institutions, many of these first-generation land-grant institutions are commonly referred

to as predominantly white institutions (PWIs, a designation that can refer to non-land grant, predominantly white educational institutions as well). Some 1862 Institutions that originated as PWIs have also changed over time so that their current student demographics are no longer predominantly white. In 1890, the Second Morrill Act attempted to prohibit racial discrimination by requiring states to allow students of color to attend the land-grant college or create an institution of “like character” and provide an “equitable division of funds.”⁴⁹³ Eighteen states opted to create separate institutions rather than admit students of color. These states defined what “equitable” meant.⁴⁹⁴ Thus, 1890 Institutions were created, which are land-grant schools that are also designated as Historically Black Colleges and Universities (HBCUs).⁴⁹⁵

The 1890 Institutions were the first minority-serving land-grant universities. Succeeding legislation has continued to expand the communities that land-grant universities serve. Throughout the 1900s, the benefits of both Morrill Acts were slowly expanded to include institutions in insular areas, including Puerto Rico, the U.S. Virgin Islands, and Guam, among others.⁴⁹⁶ Despite the first Tribal College being established in 1968, Tribal Colleges and Universities (TCUs) did not become eligible for land-grant status until 1994.⁴⁹⁷ TCUs with land-grant status are often called 1994



Institutions. In 2008, the farm bill also created a Hispanic-serving agriculture colleges and universities (HSACUs) designation which allows an institution to benefit from competitive USDA grants.⁴⁹⁸ The term “minority-serving institutions” encompasses all of the above institutions.

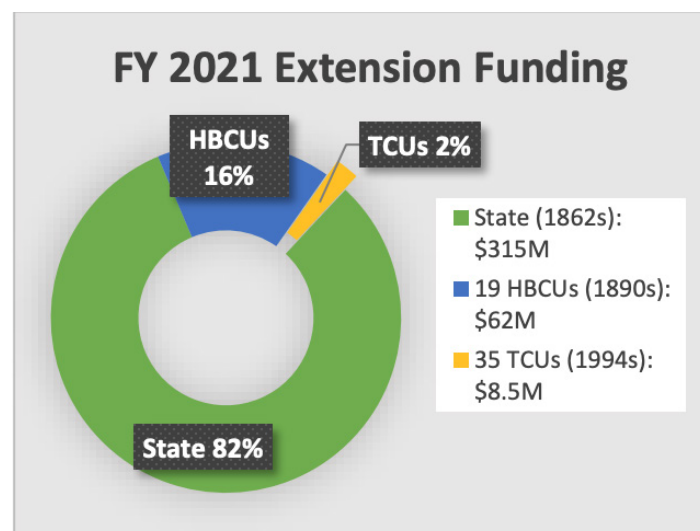
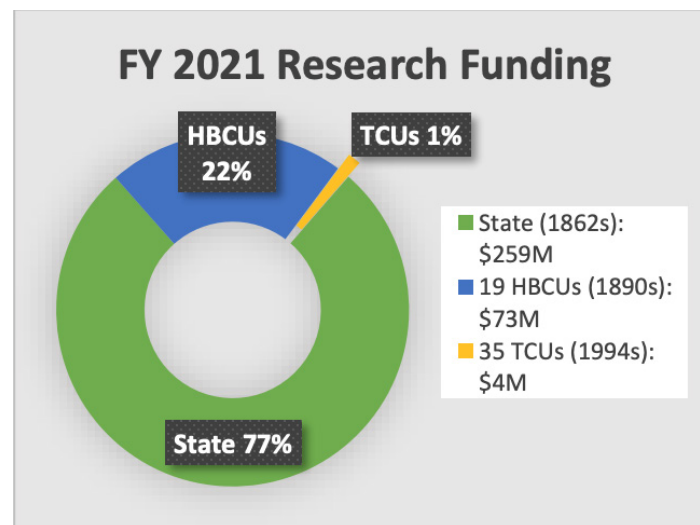
The most well-funded land-grant institutions are still the predominantly white 1862 Institutions. Unlike other land-grant institutions, the 1862 Institutions benefited from receiving stolen land along with large capital injections directly into their endowment shortly after their establishment. Additionally, the United States delayed providing 1890 and 1994 institutions with land-grant status—most notably, the Tribal colleges were not invited to join the land-grant family until 1994, a total of 132 years after the first Morrill Act. Upon the creation of minority-serving land-grant institutions, there was also delay in providing the institutions access to federal funds. 1890 Institutions were not provided research and extension funds until 1977, many decades after 1862 Institutions.⁴⁹⁹

These conditions, combined with the current disparities of funding allotments, continue to drive the inequities between types of institutions. Efforts to mitigate the consequences of this history and current practices will provide resources to and empower communities that are disproportionately left out of agricultural policy and decision making.

Secure Equitable Funding for 1890 and 1994 Land-Grant Institutions

For decades, there has been an unabated request, largely unanswered, from students and faculty at 1890 and 1994 Institutions for more equitable funding.⁵⁰⁰ Land-grant institutions receive federal funds through several mechanisms: direct appropriations to the

land-grant universities; capacity grants, which are recurring and provided on a formula basis; and competitive grants, to which institutions can apply through USDA. The American Indian Higher Education Consortium’s (AIHEC) report on *Fiscal Year 2022 Agriculture Appropriations Requests* compared research and extension funding allotted between types of land-grant institutions, as shown below.⁵⁰¹



Graphic Source: American Indian Higher Education Consortium

In this graphic, the AIHEC labels 1862 Institutions as “State” for state-supported



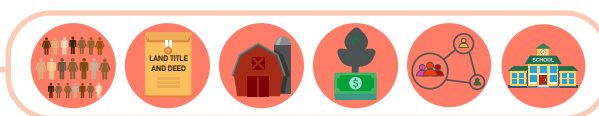
institutions. There are 57 federally recognized 1862 Institutions, which account for 51% of federally recognized land-grants, yet they receive a significantly higher percentage of research and extension funds. Large disparities in funding awarded by the National Institute of Food and Agriculture (NIFA) through the Agriculture and Food Research Initiative (AFRI), the largest competitive grants program for agricultural science research, further illustrate this point. NIFA's 2016 Annual Review Report displayed a stark disparity of AFRI funding, with 1862 Institutions receiving over 82% of the funding, 1890 Institutions receiving 1.2%, and 1994 Institutions receiving 0%.⁵⁰² These competitive grants are also available to private universities and colleges, which obtained more than fourfold the funds that 1890 Institutions and 1994 Institutions received combined, securing 5.85% of the dollars allocated.⁵⁰³

Some argue that the funding differences are appropriate in relation to the mission and metrics of the institutions.⁵⁰⁴ The metrics referenced in such justifications are frequently the performance-based metrics developed by states; however, these benchmarks are highly suspect given their origins in predominantly white educational settings and built-in biases for measuring student success. Often, these metrics focus on outcomes.⁵⁰⁵ For example, the State University System of Florida's performance-based metrics include percentage of graduates employed or continuing education, median wages of full-time employed graduates, and four year graduation rate.⁵⁰⁶ Its performance-based metrics only account for socioeconomic barriers by reviewing whether the student received a Pell Grant (a type of federal financial aid) their first year; they do not account for other important variables like number of first-generation college students. As John Michael Lee, Jr., the former Vice President of the Office of Access for Success at the Association of Public and Land-Grant Universities, has observed, funding sources

emphasize outputs and the need to address this inadequate measurement is a basic issue of fairness.⁵⁰⁷ PWIs shaped the current factors for 'measuring success.'⁵⁰⁸

There is ample empirical evidence demonstrating the academic and societal contributions that minority-serving educational institutions have made.⁵⁰⁹ Yet, these contributions often go unrecognized. For instance, despite the many accolades of Florida A&M University (FAMU) and its recognition as TIME Magazine's 1997 College of the Year,⁵¹⁰ the state legislature has continued to dismiss the university and its requests for funding.⁵¹¹ In FY2018, FAMU significantly increased its performance-based score, receiving its highest composite score to date. Despite this improvement, the institution received zero dollars from the State of Florida.⁵¹² In the face of this inequity, FAMU again increased its score and received \$13.3 million from the state in FY2020.⁵¹³ Within months, legislative leaders stated it would become a priority of the legislature to revisit the performance-based formula in order to provide University of Florida, a PWI, with more equitable funding.⁵¹⁴ The failure of the state's evaluation metrics to account for FAMU's success demonstrates their weakness as useful tools on which to base funding decisions.

Despite the funding inequities, 1890 Institutions and 1994 Institutions have been pioneers in education. More than half of the 1890 Institutions were at or exceeded the national graduation rates for African Americans.⁵¹⁵ When accounting for HBCUs' higher rates of students with lower socioeconomic status, studies suggest that HBCUs exceed PWIs in overall graduation rates.⁵¹⁶ Accounting for student demographics helps more accurately display the resources the institution is providing to students to support their success. Similarly, TCUs played a significant role in increasing Native American and Alaskan Native student



post-secondary certificates; their growth was so significant that it was more than six-fold the increase in post-secondary certificates of white students between 1991 and 2011.⁵¹⁷ Providing equitable funding will empower these institutions to better serve their students and expand their extension programs to better assist the farming communities surrounding them. Congress took a first step in the Inflation Reduction Act by appropriating \$250 million to support research, education, extension, and scholarships at 1890 Institutions, 1994 Institutions, Alaska Native and Native Hawaiian serving institutions, Hispanic-serving institutions, and insular area institutions of higher education.⁵¹⁸ The Opportunities discussed below will go even further to bridge the remaining gaps.

LEGISLATIVE OPPORTUNITY

Further Improve the HBCU funding waiver structure and transparency of state funding

In the Morrill Act of 1862 and the Second Morrill Act of 1890, the United States committed to providing federal funds to support the respective land-grant institutions if the states would provide additional funds on a one-to-one matching basis (i.e., one state dollar invested for every federal dollar granted).⁵¹⁹ If an institution does not receive adequate funds from the state, the institution itself is required to submit a waiver request to USDA or forfeit the federal capacity grants.⁵²⁰ Such waivers require the institutions to plead their case by demonstrating that the institution has experienced a natural disaster, that the state or institution is in a financial crisis, or that the institution has made good faith attempts to seek outside funds for the matching requirement and failed to do so.⁵²¹ This creates a deficit-laden public perspective of the institution which has tangible impacts on funding due to its negative effect on enrollment rates and support within state legislatures.⁵²²

All states provide 1862 Institutions with adequate funds.⁵²³ However, 1890 Institutions, in 10 of the 18 states where they are present, have been continuously underfunded, sometimes receiving no funding at all.⁵²⁴ The Association of Public Policy and Land-Grant Universities acknowledged this disparity and stated: “To be land-grant but unequal is a strange place to be for a land-grant system that was created to bring education to agricultural and industrial citizens in each state.”⁵²⁵

Congress made important strides in the last farm bill. For instance, the law has long allowed 1862 Institutions to carry-over their excess extension appropriations from fiscal year to fiscal year. The law now also permits 1890 Institutions to take advantage of this carry over.⁵²⁶ Likewise, the law now requires USDA to report on “allocations made to, and matching funds received by, 1890 Institutions.”⁵²⁷ Congress should continue its work to close the 1890 equity gap, promoting the original values that the Morrill Acts purported to encompass—the opportunity for secondary education to marginalized persons.⁵²⁸

There are three potential improvements Congress could make to build on the changes in 2018. First, Congress could eliminate the waiver application and make all federal funding contingent upon states granting 1862 Institutions and 1890 Institutions an equal percentage of the matching funds.⁵²⁹ Currently, a federal formula is used to calculate the funds needed for states to meet their one-to-one matching requirement.⁵³⁰ However, a study conducted by the Association of Public Policy and Land-Grant Universities revealed that some states provide over 100% of funds required for the 1862 Institutions one-to-one matching requirement, while not even meeting the minimum required for 1890 Institutions.⁵³¹ Congress could keep the same federal formula but require that 1890 Institutions and 1862 Institutions receive the same percentage of





recommended state funds before federal funds are allocated to either institution. This would allow the states to have flexibility in their budgets while encouraging parity in funding for the land-grant institutions.

Alternatively, Congress could shift the burden of submitting a waiver to the states, requiring them to demonstrate why they cannot meet the matching requirements for federal funding for the land-grant institutions in their state. Under this proposal, federal funds for all institutions in the state would be withheld until the state waiver is submitted. In addition, Congress could require that USDA withhold federal funds authorized under all provisions that authorize capacity grants until the state submits a waiver explaining why they cannot meet the matching requirements for 1890 Institutions or 1862 Institutions.⁵³²

Finally, Congress should require states to publicly report on their appropriations and other funding to 1890 Institutions. In the 2018 Farm Bill, Congress required USDA to report on funding allocations to 1890 Institutions, adding transparency to the process.⁵³³ Currently, it is difficult to determine the exact amount states allocate to 1890 Institutions because these allocations are often buried in lump-sum agriculture spending rather than appropriation line items.⁵³⁴ Congress should require the same transparency from states as it did from USDA in the 2018 Farm Bill by requiring states to report a line-item amount of matching funds provided to 1890 Institutions in comparison to funds allocated to 1862 Institutions. Not only does this add transparency and a clearer comparison but reporting line-item allocations assures USDA treats the allocations as matching funds and



reduces the risk that such funding is hidden from USDA in a lump-sum appropriation. Relatedly, whatever Congress does in the next farm bill, it must not undo any of the progress made in 2018.

LEGISLATIVE OPPORTUNITY

Provide direct endowment funding to minority-serving land-grant institutions

An endowment is a fund established and maintained for the purpose of generating income to support an institution. Endowments can greatly impact the quality and quantity of opportunities at an institution, increase an institution's financial resiliency, and help carry it through periods of state or federal divestment of higher education.⁵³⁵ Institutions that serve a larger population of low-income students are more limited in their ability to build endowment funds because they are unable to raise tuition.⁵³⁶ 1890 Institutions and 1994 Institutions continue to serve the nation's most financially vulnerable populations at higher rates than PWIs.⁵³⁷ Thus, external funding sources, such as federal grants, are crucial for 1890 Institutions and 1994 Institutions to build their endowments.

Endowments also provide institutions with the financial means to improve educational quality, such as through faculty recruitment and libraries.⁵³⁸ Such investments could increase students' interest in agriculture and combat the shrinking agriculture workforce.⁵³⁹ It is important that all minority-serving land-grants, especially 1890 Institutions and 1994 Institutions, have ample resources to empower the students and communities they serve to enter leadership roles in the agriculture industry.

When 1862 Institutions were first established, the U.S. government provided them with 17.4 million acres of stolen land, helping raise

approximately \$490 million (2020 dollars) for 52 universities.⁵⁴⁰ Other land-grant institutions did not receive land as a permanent endowment, which only further embedded inequities into funding mechanisms.⁵⁴¹ The 1890 Institutions have not received any federal funds as direct endowments and the federal funding for the endowment of 1994 Institutions was limited. Instead of providing 1994 Institutions with a direct endowment, the federal government established the Tribal College Endowment Program, which annually disperses funds to 1994 Institutions to use at their discretion.⁵⁴² However, the average allotment of interest for 2020 was \$138,078,⁵⁴³ as compared to the annual endowment spending between \$1,416,000 and \$1,770,000 for an average 4-year 1862 Institution.⁵⁴⁴

Given their unique ability to serve students of color and their unique role in U.S. education, Congress should authorize additional funds, as direct appropriations, for the endowments of all minority-serving land-grant institutions, the 1890 Institutions and 1994 Institutions in particular. The Tribal College Journal published one method of calculating such endowment appropriations:⁵⁴⁵

Here is what we propose as a starting point for righting the clearly unfair funding arrangement facing the 1890 and 1994 institutions: Assume the land seized and granted in 1862 is today worth a (conservative) value of \$1,000 per acre. In some regions, the value per acre can reach as high as \$10,000 per acre, so \$1,000 per acre is entirely reasonable. And, assume each of the 52 second tier land grants received the equivalent of a reasonable return, say 6% annually, on the present-day value of 90,000 acres (the least any 1862 institution received). Each of the 1890 and 1994 institutions would realize \$5.4 million dollars per year from the federal government as a very small step



for correcting past injustices and currently embedded insufficiencies in funding, enabling them to more effectively advance services to their students and more fully participate as a member of the land grant family. The total annual cost would be \$281 million, a tiny impact on the federal budget. But the payoff in terms of education progress and collective conscience clearing would be noteworthy indeed.

This formula was drafted as a starting point for discussion. Legislative staff should invite consideration of other formulas. These discussions should include representatives from both 1890 and 1994 Institutions, including but not limited to staff from the universities, AIHEC, and the 1890 Universities Foundation. These organizations have been pivotal in data collection, research, identifying the inequities Congress has created or failed to remedy, and establishing policy priorities.⁵⁴⁶ Congress could go a step further and provide each of these entities with financial support so they can continue their important work supporting 1890 and 1994 Institutions.

LEGISLATIVE OPPORTUNITY

Expand financial aid for TCU students

Given their unique history of oppression, Native Americans face distinct barriers to secondary education, including socioeconomic challenges and the geographic isolation of reservations. TCUs were created out of a recognition of these barriers and are currently some of the most affordable higher education institutions.⁵⁴⁷ Despite this, 78% of TCU students relied on Pell Grants to help pay for college and 90% applied for aid in FY2017.⁵⁴⁸ In FY2018 federal funding accounted for 56% of the scholarship funds within the Office of Navajo Nation Scholarship and Financial Assistance (ONNSFA), but ONNSFA was only able to provide funds for about half of those who applied.⁵⁴⁹ According to

AIHEC, “the amount of aid available, although significant, is inadequate to meet the needs of students and families living on reservations where poverty is high and unemployment rates range from 50–70% or higher.”⁵⁵⁰ The COVID-19 pandemic has only exacerbated the hardships.⁵⁵¹ Investing in TCU students has one of the highest rates of return; with every dollar that is invested, over five dollars goes back into the economy during the student’s career.⁵⁵²

Congress should expand the financial aid funds available for TCU students. The ONNFA receives federal funds through a contract with the Bureau of Indian Affairs.⁵⁵³ This funding source was at risk after the last Administration provided a budget recommendation with zero dollars allocated.⁵⁵⁴ Congress should ensure that ONNSFA is fully funded and collaborate with AIHEC to expand federal contributions to scholarship funds targeted toward Native American students. In addition, Congress should appropriate funds to the scholarship endowments, which allow TCU administrators to better plan long-term programming.



Capitalize on Expertise in the Cooperative Extension Programs

Land-grants are required to use cooperative extension service offices to build partnerships with local agricultural producers and community members. Those relationships are then supposed to provide land-grant institutions with information needed to further their academic research. Land-grant institutions collaborate with federal, state, and local governments when managing cooperative extension programs in nearly each of the country’s approximately 3,000 counties and territories.⁵⁵⁵ These existing relationships allow for a unique opportunity where land-grant institutions could support both systemically marginalized and beginning producers.



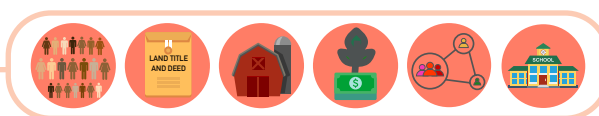
LEGISLATIVE OPPORTUNITY

Establish specific grants for extension programs at minority-serving land-grant institutions

As is discussed earlier in this report, accessibility to USDA programs is a substantial barrier to participation by both systemically marginalized and beginning producers. Extension programs, which have a strong reputation and are visible to many farmers, could be an additional avenue for providing assistance to these farmers. Extension programs already work between local producers and the federal government, putting them in a good position to serve, but additional grant funding with a specific mandate for assisting small, beginning, and systemically marginalized farmers would allow extension programs to take on greater responsibilities, such as more effectively providing educational

programming and assisting farmers in applying for USDA funding.

Most importantly, many minority-serving institutions reside in states where there are higher populations of producers of color. Empowering 1890 Institutions, 1994 Institutions, and other minority-serving institutions to expand their programs will support those local communities. To that end, Congress should create a distinct and permanent grant program to support extension at minority-serving land-grant institutions, with a specific focus on helping systemically marginalized producers grow their operations and access federal programs. This proposal is especially important given that producers of color are less likely to have relationships with, trust in, or have representation on the county committees that might otherwise be of support.



Conclusion

This 2023 Farm Bill is an opportunity to build on recent Congressional and Administrative momentum to meaningfully reform USDA systems, funding, and programs to advance equity for producers and constituents of color. Many voices contribute to the current calls for change and the articulation of what forms that change should take; the Goals and Recommendations discussed in the Report continue that dialogue. Robust engagement with producers and communities of color and allied advocacy organizations is critical to ensure that these ideas are revised and refined to meet their needs and reflect their priorities. Remedying historical and current discrimination and reckoning with structural racism requires serious attention to USDA governance, accountability, and farm support systems; land and credit access; and equitable investments in education. These issues have been heavily studied and the call to Congress and USDA is clear: now is the time to act boldly.



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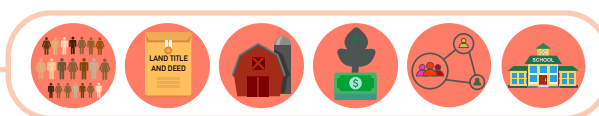


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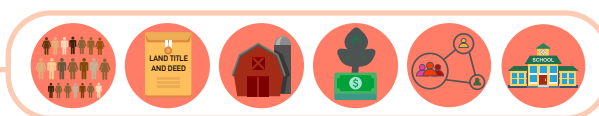
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- 239 States that have adopted the UHPA include: Alabama, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Maryland (substantially similar), Missouri, Mississippi, Montana, Nevada, New Mexico, New York, South Carolina, Texas, Utah, and Virginia (substantially similar). The U.S. Virgin Islands have also enacted the law. It has been introduced in the District of Columbia, Kentucky, Massachusetts, New Jersey, North Carolina, Oklahoma, and West Virginia. *Partition of Heirs Property Act*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/shared/docs/partition%20of%20heirs%20property/uphpa_final_10.pdf (last visited Aug. 22, 2022). See generally Jennifer Fay, *Two Bills to Support Farmers of Color Introduced*, FARM AID (Feb. 9, 2021), <https://www.farmaid.org/issues/farm-policy/two-bills-to-support-farmers-of-color-introduced/>.
- 240 See NAT’L CONF. OF COMMISSIONERS ON UNIFORM STATE LAW, UNIFORM PARTITION OF HEIRS PROPERTY ACT (2010), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6c504330-bbb6-f0e5-ec79-c32057701c8c&forceDialog=0>. UHPA also requires courts to consider the noneconomic value of the property, including its cultural or historical significance, when deciding whether to order a partition sale or divide the property physically. *Id.*



241 Castro & Willingham, *supra* note 14.

242 In states that have adopted UHPA, FSA will accept a court order verifying the land meets the definition of heirs' property as defined by the Act or a certification from the local recorder of deeds that the recorded owner of the land is deceased and at least one heir has initiated a procedure to retitle the land. FARM SERV. AGENCY, *supra* note 237.

243 In states that have not adopted UHPA, the documentation requirements include a tenancy-in-common agreement, approved by a majority of the owners, that gives the individual the right to manage and control a portion or all of the land, tax returns for the previous 5 years showing the individual has an undivided farming interest, self-certification that the individual has control of the land for purposes of operating a farm or ranch, and any other documentation acceptable by the FSA county office, that establishes that the individual has general control of the farming operation. *Id.*

244 *USDA Announces First Three Lenders for Heirs' Property Relending Program*, U.S. DEP'T OF AGRIC. (Aug. 18, 2022), <https://www.usda.gov/media/press-releases/2022/08/18/usda-announces-first-three-lenders-heirs-property-relending-program>.

245 Leah Douglas, *USDA puts \$67 million to new program for heirs' property owners*, THE FERN (July 29, 2021), https://thefern.org/ag_insider/usda-puts-67-million-to-new-program-for-heirs-property-owners/.

246 *Id.*

247 7 U.S.C. § 1936c(d). USDA accepted applications from intermediate lenders through October 30, 2021 but there has been no announcement of accepted relenders nor any other new information on the program issued.

248 *USDA Announces First Three Lenders for Heirs' Property Relending Program*, *supra* note 244.

249 U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-539, *supra* note 18, at 24.

250 Leah Douglas, *Deep in the farm bill, a step forward for black farmers on heirs' property*, THE FERN (July 24, 2018), https://thefern.org/ag_insider/deep-in-the-farm-bill-a-step-forward-for-black-farmers-on-heirs-property/ (quoting Josh Walden, attorney with the South Carolina-based Center for Heirs Property Preservation).

251 CHARLES DODSON & STEVEN KOENIG, FARM SERV. AGENCY, EVALUATING THE RELATIVE COST EFFECTIVENESS OF THE FARM SERVICE AGENCY'S FARM LOAN PROGRAMS 5 (Aug. 2006), https://www.fsa.usda.gov/Internet/FSA_File/farm_loan_study_august_06.pdf.

252 Conner Bailey et al., *Heirs' Property and Persistent Poverty among African Americans in the Southeastern United States*, in HEIRS' PROPERTY AND LAND FRACTIONATION: FOSTERING STABLE OWNERSHIP TO PREVENT LAND LOSS AND ABANDONMENT 16 (Cassandra Johnson Gaither et al., eds., 2019), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs244.pdf.

253 COWAN & FEDER, *supra* note 102, at 2.

254 *Id.*

255 7 U.S.C. § 6934a (enacted by the Agriculture Improvement Act of 2018).

256 *See USDA Stands Up New Team to Better Serve Beginning Farmers and Ranchers*, U.S. DEP'T OF AGRIC. (March 16, 2020), <https://www.usda.gov/media/press-releases/2020/03/16/usda-stands-new-team-better-serve-beginning-farmers-and-ranchers>.

257 *Mandatory CLE*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle> (last visited Aug. 9, 2021).

258 *Id.*

259 *Events & CLE FAQs*, AM. BAR ASS'N, https://www.americanbar.org/groups/departments_offices/abacle/clefaqs (last visited Aug. 9, 2021).

260 Howard University School of Law, North Carolina Central University School of Law, Texas Southern University Thurgood Marshall School of Law, Florida A&M College of Law, Southern University Law Center, & University of the District of Columbia David A. Clarke School of Law, the latter three being 1890 land-grant institutions.

261 *Glossary*, NAT'L INST. OF FOOD & AGRIC., <https://www.nifa.usda.gov/glossary#M>.

262 *See generally* HANNA LIEBERMAN, OVERCOMING BARRIERS THAT PREVENT LOW-INCOME PERSONS FROM RESOLVING CIVIL LEGAL PROBLEMS (2011), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/Is_MN_cls_2011.pdf; Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2018); AM. BAR. ASS'N, RURAL PRO BONO DELIVERY: A GUIDE TO PRO BONO LEGAL SERVICES IN RURAL AREAS (2003), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/as/aba_rural_book.pdf.

263 These new Centers should be available to all heirs' property owners. For urban heirs' property owners, the Centers could coordinate with U.S. agencies that provide services for housing in urban and rural areas.

264 Qualified entity modeled after the definition provided in Justice for Black Farmers Act of 2021, H.R. 1393 117th Cong. § 201(4) (2021), <https://www.congress.gov/117/bills/hr1393/BILLS-117hr1393ih.pdf>.

265 *Id.* at § 300.

266 *Agricultural Conservation Easement Program*, NAT'L SUSTAINABLE AGRIC. COAL., <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/agricultural-conservation-easement-program/> (last visited Aug. 22, 2022).

267 *Agricultural Conservation Easement Program*, NATURAL RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/>.



268 Funds gained from the sale of the agricultural conservation easement are commonly used to reinvest in their operation, reduce debt, fund retirement, or transfer the land to the next generation of producers. *See Maximizing the Economic and Environmental Benefits of ACEP-ALE*, AM. FARMLAND TRUST 2 (2020), <https://farmland.org/wp-content/uploads/2020/11/AFT-Maximizing-the-Economic-and-Environmental-Benefits-of-ACEP-ALE.pdf> (noting that the sale of an easement offers those who want to remain in agriculture or want their land to remain in agriculture a viable alternative to selling it for development).

269 Eligibility criteria and enrollment would need to be adapted to meet the needs of heirs' property owners. The FSA's documentation requirements for heirs' property owners to demonstrate ownership could be used as a model.

270 NATURAL RES. CONSERVATION SERV., REGIONAL CONSERVATION PARTNERSHIP PROGRAM (2019), https://www.nrcs.usda.gov/wps/PA_NRCSCConsumption/download?cid=nrcseprd1488819&ext=pdf.

271 *Id.*

272 *Sustainable Forestry and African American Land Retention Network*, U.S. ENDOWMENT FOR FORESTRY & CMTYS., <https://www.usendowment.org/sustainable-forestry-and-african-american-land-retention-program-sflr> (last visited Aug. 25, 2022).

273 *Id.*

274 *Advocating for Healthy Forests*, AM. FOREST FOUND. (May 13, 2019), <https://www.forestfoundation.org/2019-fly-in>.

275 U.S. ENDOWMENT FOR FORESTRY & CMTYS., SUSTAINABLE FORESTRY AND AFRICAN AMERICAN LAND RETENTION PROGRAM – MEASURING SUCCESS (2020), <https://www.usendowment.org/wp-content/uploads/2020/03/sustainable-forestry-and-african-american-land-retention-program-measuring-success.pdf>.

276 16 U.S.C. § 3871d.

277 “Historically underserved producers” includes beginning, socially disadvantaged, and veteran farmers. 16 U.S.C. § 3871e.

278 NAT’L YOUNG FARMERS COAL., BUILDING A FUTURE WITH FARMERS: RESULTS AND RECOMMENDATIONS FROM THE NATIONAL YOUNG FARMER SURVEY 78–79 (2017), https://www.youngfarmers.org/wp-content/uploads/2019/03/NYFC-Report-2017_LoRes_Revised.pdf.

279 *Bigger Farms, Bigger Problems: Farmland Consolidation is Harming US Rural Communities—and Better Policies Can Help*, UNION OF CONCERNED SCIENTISTS 5 (Apr 14, 2021), <https://www.ucsusa.org/resources/bigger-farms-bigger-problems>.

280 Chuck Abbot, ‘Justice’ Bill Would Transfer up to 32 Million Acres to Black Farmers, SUCCESSFUL FARMING (Nov. 20, 2020), <https://www.agriculture.com/news/business/justice-bill-would-transfer-up-to-32-million-acres-to-black-farmers>.

281 CONG. RSCH. SERV., R46969, RACIAL EQUITY IN U.S. FARMING: BACKGROUND IN BRIEF (2021), <https://crsreports.congress.gov/product/pdf/R/R46969>.

282 NAT’L AGRIC. STATS. SERV., *supra* note 1.

283 Laura-Anne Minkoff-Zern & Sea Sloat, *A New Era of Civil Rights? Latino Immigrant Farmers and Exclusion at the United States Department of Agriculture*, 34 AGRIC. & HUMAN VALUES 631 (2017).

284 Jessica A. Shoemaker, *Fee Simple Failures: Rural Landscapes and Race*, 118 MICH. L. REV. 1695, 1734 (2021) (evaluating the ownership and transfer of agricultural property within a family as an efficient, deeply entrenched means of generational wealth accumulation in the US).

285 *See, e.g.*, Paul N. Ellinger, Current Trends in Commercial Agriculture, Farm Credit Administration Symposium on Consolidation in the Farm Credit System 4 (Feb. 19, 2014), <https://www.fca.gov/template-fca/download/Symposium14/ellinger19feb2014.pdf>.

286 HOUSE SELECT COMM. ON THE CLIMATE CRISIS, SOLVING THE CLIMATE CRISIS 366 (2020), <https://climatecrisis.house.gov/sites/climatecrisis.house.gov/files/Climate%20Crisis%20Action%20Plan.pdf> (citing *Farm Legacy*, AM. FARMLAND TRUST, <https://farmland.org/project/farm-legacy/> (accessed June 2020)).

287 TIM FINK, AM. FARMLAND TRUST, ESTABLISHING A COMMISSION ON FARM TRANSITIONS 2 (2020), https://s30428.pcdn.co/wp-content/uploads/2020/11/AFT-Establishing_a_Commission_on_Farmland_Transition.pdf [https://perma.cc/9JTA-7PZ9]; *see also* NAT’L AGRIC. STATS. SERV., FARMLAND OWNERSHIP AND TENURE: RESULTS FROM THE 2014 TENURE, OWNERSHIP, AND TRANSITION OF AGRICULTURAL LAND SURVEY (2015), https://www.nass.usda.gov/Publications/Highlights/2015/TOTAL_Highlights.pdf (noting that of the nearly 92 million acres slated for ownership transfer between 2015-2019, only 21 million acres of land were expected to be sold to a non-relative, illustrating the challenges for farmers acquiring land through an open-market purchase).

288 FINK, *supra* note 287, at 2.

289 RAFTER FERGUSON, UNION OF CONCERNED SCIENTISTS, LOSING GROUND: FARMLAND CONSOLIDATION AND THREATS TO NEW AND BLACK FARMERS AND THE FUTURE OF FARMING 2 (2021), <https://www.ucsusa.org/resources/losing-ground>.

290 *Id.*

291 RIPPON-BUTLER, *supra* note 234, at 12.

292 Horst & Marion, *supra* note 4, at 5.

293 NAT’L AGRIC. STATS. SERV., *supra* note 287.

294 Horst & Marion, *supra* note 4, at 5.

295 NAT’L AGRIC. STAT. SERV., 2017 CENSUS OF AGRICULTURE; TABLE 69. NEW AND BEGINNING PRODUCERS - SELECTED FARM



CHARACTERISTICS: 2017 (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1_Chapter_1_US/st99_1_0069_0069.pdf (reporting that of the 516,235 farms where any principal producer is a new and beginning producer, 92,931 are tenants, or roughly 10%).

RIPPON-BUTLER, *supra* note 234, at 12 (citing SOPHIE ACKOFF ET AL., NAT’L YOUNG FARMERS COAL. BUILDING A FUTURE WITH FARMERS II (2017), https://www.youngfarmers.org/wp-content/uploads/2019/03/NYFC-Report-2017_LoRes_Revised.pdf).

DANIEL BIGELOW, ALLISON BORCHERS, & TODD HUBBS, ECON. RSCH. SERV., U.S. FARMLAND OWNERSHIP, TENURE, AND TRANSFER (2016), <https://www.ers.usda.gov/webdocs/publications/74672/eib-161.pdf>.

FERGUSON, *supra* note 289, at 2.

Id. at 4.

FINK, *supra* note 287, at 2 (citing Julia Freedgood et al., *Farms Under Threat: The State of the States*, AM. FARMLAND TRUST 20 (May 2020), <https://farmlandinfo.org/publications/farms-under-threat-the-state-of-the-states>).

Id.

JULIA FREEDGOOD ET AL., AM. FARMLAND TRUST, FARMS UNDER THREAT: THE STATE OF THE STATES 20 (2020), <https://farmlandinfo.org/publications/farms-under-threat-the-state-of-the-states>.

Jennifer Bjorhus, *Hot Money Turns From Stocks to Farmland*, STAR TRIB. (July 5, 2012), <https://www.startribune.com/part-2-hot-investments-turn-from-the-stock-market-to-farmland/160140665>.

FARM SERV. AGENCY, FOREIGN HOLDINGS OF U.S. AGRICULTURAL LAND THROUGH DECEMBER 31, 2019 (2020), <https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/EPAS/PDF/afida2019report.pdf>; Jamie Lutz & Caitlin Welsh, *Foreign Purchases of U.S. Agricultural Land: Facts, Figures, and an Assessment of Real Threats*, CTR. STRATEGIC & INT’L STUD. (Sept. 8, 2021), <https://www.csis.org/analysis/foreign-purchases-us-agricultural-land-facts-figures-and-assessment-real-threats>.

FINK, *supra* note 287, at 2.

Agriculture Improvement Act of 2018, Pub. L. No. 115–334, § 12609, 132 Stat. 4490, 5009 (2018).

FINK, *supra* note 287, at 2.

Id.

Id.

Recommendation obtained from National Young Farmers Coalition and American Farmland Trust.

See *Obstruction of Justice: USDA Undermines Historic Civil Rights Settlement with Black Farmers*, ENV’T WORKING GRP. (2004), <https://www.ewg.org/research/obstruction-justice>; CASSANDRA JOHNSON GAITHER, FOREST SERV., SOUTHERN RSCH. STATION, HEIRS’ PROPERTY IN THE SOUTHERN UNITED STATES 15 (2016), https://www.srs.fs.usda.gov/pubs/gtr/gtr_srs216.pdf.

Recommendation obtained from American Farmland Trust. See FINK, *supra* note 287.

Id. (The composition of the 10-member Commission is 3 members appointed by the Secretary, 3 members appointed by the Committee on Agriculture, Nutrition, and Forestry of the Senate, 3 members appointed by the Committee on Agriculture of the House of Representatives, and the Chief Economist of the Department of Agriculture).

FINK, *supra* note 287.

Id. at 1. See Agriculture Improvement Act of 2018, Pub. L. No. 115–334, § 12609, 132 Stat. 4490, 5009 (2018).

NAT’L YOUNG FARMERS COAL., FINDING FARMLAND: A FARMER’S GUIDE TO WORKING WITH LAND TRUSTS 5 (2015), <https://www.landcan.org/pdfs/NYFC-Finding-Affordable-Farmland.pdf>.

Id.

Castro & Willingham, *supra* note 14.

Recommendation modeled after Justice for Black Farmers Act of 2021, H.R. 1393, 117th Cong., § 203 (2021) (“USDA Secretary shall purchase from willing sellers at fair market value available agricultural land in the United States and convey grants of that land of up to 160 acres to eligible Black individuals at no cost”).

See Justice for Black Farmers Act of 2021, H.R. 1393, 117th Cong., § 201 (2021) (defining “qualified entity” as a 501(c)(3) nonprofit that has not less than 3 years of experience providing meaningful agricultural, business, and legal assistance or advocacy services to Black farmers or ranchers with a board of directors that is made up of at least 50% Black individuals, or an 1890 institution (land-grant HBCUs)).

Id. at § 203.

Shoemaker, *supra* note 284.

See *The Biden-Harris Plan to Build Back Better in Rural America*, BIDEN HARRIS, <https://joebiden.com/rural-plan/> (last visited June 14, 2021).

See FINK, *supra* note 287.

Id.

Agriculture Improvement Act of 2018, Pub. L. No. 115–334, § 12609(f), 132 Stat. 4490, 5009 (2018).

NAT’L YOUNG FARMERS COAL. ET AL., USING FEDERAL TAX POLICY TO HELP THE NEXT GENERATION OF FARMERS AND RANCHERS GAIN



ACCESS TO LAND 1 (2017), https://www.nrcs.usda.gov/wps/PA_NRCSConsumption/download?cid=nrcseprd1368452&ext=pdf (citing FARMLAND INFO. CTR., 2014 TENURE, OWNERSHIP, AND TRANSITION OF AGRICULTURAL LAND SURVEY TALKING POINTS 3 (2016), <https://farmlandinfo.org/publications/2014-tenure-ownership-and-transition-of-agricultural-land-survey-talking-points/>).

HOUSE SELECT COMM. ON THE CLIMATE CRISIS, *supra* note 286.

NAT'L YOUNG FARMERS COAL., *supra* note 278, at 78–79.

Id.

Id.

The rate depends on the farmer's ordinary income tax bracket (which includes off-farm income). Those in the 10% and 12% ordinary income tax brackets pay 0% in capital gains taxes; most of those in the 22%, 24%, 32% and 35% brackets pay a 15% capital gains tax rate; and those in the 37% income tax bracket pay a 20% capital gains tax rate. *IRS provides tax inflation adjustments for tax year 2021*, INTERNAL REVENUE SERV. (Oct. 26, 2020), <https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2021>; *Capital Gains and Losses*, INTERNAL REVENUE SERV., <https://www.irs.gov/taxtopics/tc409> (last visited Sept. 8, 2021).

RIPPON-BUTLER, *supra* note 234, at 24 (citing AM. FARMLAND TRUST ET AL., TAX REFORM AND FARMLAND ACCESS: CAPITAL GAINS TAX CHANGES TO SUPPORT THE NEXT GENERATION IN AGRICULTURE (2019)).

Id.

Some inherited farms would be subject to the federal estate tax, which might cause some farmers to prefer incurring the capital gains tax instead. However, the federal estate tax applies only to estates valued over \$12.06 million and twice that for married couples (for decedents dying in 2022), so many smaller farms would be exempt. Furthermore, the federal estate tax allows qualifying family farms to reduce the applicable farm value by up to \$1.23 million (in 2022). *See Frequently Asked Questions on Estate Taxes*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-estate-taxes> (last visited Aug. 25, 2022). Of course, state-level tax burdens must also be taken into account on an individual basis.

For FBLE's previous recommendation on this point, see FARM BILL L. ENTER., DIVERSIFIED AGRICULTURAL ECONOMIES 30–31 (2018), http://www.farmbilllaw.org/wp-content/uploads/2018/03/FBLE_Diversified-Agricultural-Economies_Final.pdf. *See also* RIPPON-BUTLER, *supra* note 234, at 12.

MINN. DEP'T AGRIC., BEGINNING FARMER TAX CREDIT FACT SHEET (2018), <https://www.mda.state.mn.us/sites/default/files/2019-07/bftcfactsheet%2C.pdf>.

Frequently Asked Questions on Estate Taxes, *supra* note 335.

MINN. DEP'T AGRIC., *supra* note 337 (The farmer should provide the majority of the labor and management of the farm, have adequate experience and knowledge of the type of farming for which they seek assistance, can provide positive projected earnings statements, are not directly related to the owner of the agricultural asset including parents, grandparents, siblings, spouses, children, and grandchild, and has a net worth no greater than \$836,000).

The agricultural asset owner, (with "agricultural asset" defined as agricultural land, livestock, facilities, buildings and machinery used for farming in Minnesota owned by an individual, trust, or a qualified pass-through entity), may claim credit in one of the following categories, up to the stated maximum: (1) 5% of the lesser of the sale price or fair market value of the agricultural asset up to a maximum of \$32,000; (2) 10% of the gross rental income in each of the 1st, 2nd, and 3rd years of the rental agreement, up to a maximum of \$7,000 per year, or (3) 15% of the cash equivalent of the gross rental income in each of the 1st, 2nd, and 3rd years of a share rent agreement, up to a maximum of \$10,000 per year.

RIPPON-BUTLER, *supra* note 234, at 12; *Beginning Farmer Tax Credit*, MINN. DEPT. AGRIC., <https://www.mda.state.mn.us/bftc> (last visited Nov. 29, 2021) (noting that this is a first come, first served initiative. The amount available in 2021 is about \$12 million).

NAT'L YOUNG FARMERS COAL. ET AL., *supra* note 327, at 3.

Id.

Id.

Id.

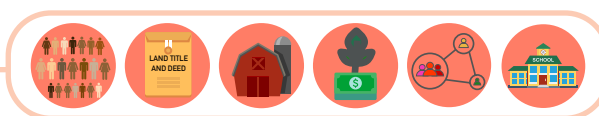
RIPPON-BUTLER, *supra* note 234, at 12.

Letter from Melissa Vatterott & Maisah Khan, Missouri Coalition for the Environment, to Matt Lohr Chief, Natural Resources Conservation Service, USDA 4 (Mar. 19, 2020), https://moenvironment.org/wp-content/uploads/2020/04/MCE_2020_ACEP_Comment-1.pdf.

FARMLAND INFO. CTR., ACEP-ALE FOR LANDOWNERS (2020), https://s30428.pcdn.co/wp-content/uploads/sites/2/2020/08/AFT_FIC_ACEP-Landowner-Overview-Jan-2021.pdf.

Id.

AM. FARMLAND TRUST, MAXIMIZING THE ECONOMIC AND ENVIRONMENTAL BENEFITS OF ACEP-ALE 2 (2020), https://farmland.org/wp-content/uploads/2020/11/AFT-Maximizing_the_Economic_and_Environmental_Benefits_of_ACEP-ALE.pdf.



351 Agricultural Conservation Easement Program, 85 Fed. Reg. 558, 561 (Jan. 6, 2020) (to be codified at 7 CFR pt. 1468).

352 NAT'L RES. CONSERVATION SERV., NAT'L INSTRUCTION, TITLE 300, PART 308, AGRICULTURAL CONSERVATION EASEMENT PROGRAM
- AGRICULTURAL LAND EASEMENT (ACEP-ALE) BUY-PROTECT-SELL TRANSACTIONS (2021), [https://directives.sc.egov.usda.gov/
OpenNonWebContent.aspx?content=46604.wba](https://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=46604.wba).

353 The eligible entity may apply for an extension up to 12-months.

354 Jessica Groves, *NRCS and Buy-Protect-Sell Webinar*, LAND TRUST ALLIANCE (Jun. 8, 2021) [https://farmlandinfo.org/media/nrcs-
and-buy-protect-sell/](https://farmlandinfo.org/media/nrcs-and-buy-protect-sell/).

355 *Id.*

356 *Id.*

357 AM. FARMLAND TRUST, *supra* note 350, at 4.

358 *Id.*

359 *ACEP-ALE Interim Rule Overview Webinar*, AM. FARMLAND TRUST (Jan. 30, 2020), [https://farmlandinfo.org/media/acep-ale-
interim-rule-overview/](https://farmlandinfo.org/media/acep-ale-interim-rule-overview/) (pre-closing BPS transaction ACEP-ALE funds are for reimbursement payments only, post-closing BPS
transactions requires the NRCS to determine whether the structure of the transaction as proposed by the eligible entity
conforms with legal requirements prior to entering into an ALE-agreement).

360 AM. FARMLAND TRUST, *supra* note 350, at 4.

361 NAT'L YOUNG FARMERS COAL., FARM SERVICE AGENCY LOANS: THE INS AND OUTS OF GROWING A FARM WITH FEDERAL LOANS 7 (2018),
https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Outreach/pdfs/Publications/NYFC_FSA_Loans_Guidebook.pdf.

362 *Path to the 2018 Farm Bill: Beginning and Socially Disadvantaged Farmers*, NAT'L SUSTAINABLE AGRIC. COAL. (Nov. 14, 2017),
<https://sustainableagriculture.net/blog/path-to-2018-farm-bill-bfr/>.

363 *Id.*

364 NAT'L SUSTAINABLE AGRIC. COAL., AN AGENDA FOR THE 2018 FARM BILL 78 (2017), [http://sustainableagriculture.net/wp-content/
uploads/2017/10/NSAC-2018-Farm-Bill-Platform-FINAL.pdf](http://sustainableagriculture.net/wp-content/uploads/2017/10/NSAC-2018-Farm-Bill-Platform-FINAL.pdf).

365 JIM MONKE, CONG. RSCH. SERV., R46768, AGRICULTURAL CREDIT: INSTITUTIONS AND ISSUES (2022), [https://crsreports.congress.
gov/product/pdf/R/R46768](https://crsreports.congress.gov/product/pdf/R/R46768). Direct farm ownership loans are limited to \$600,000 per borrower, operating loans are limited to
\$400,000, and microloans are limited to \$50,000 for both loan types. Guaranteed loans may be up to roughly \$1.7 million. Part
of the FSA Loan program is reserved for beginning farmers and ranchers. For direct loans, 75% of the funding for farm ownership
loans and 50% of operating loans are reserved for the first 11 months of the fiscal year. For guaranteed loans, 40% is reserved for
farm ownership and operating loans for the first half of the fiscal year.

366 *Id.*

367 *Id.* FCS is a private lender with a federal charter and a statutory mandate to serve creditworthy farmers and others seeking
agriculture-related loans. FCS is a government-sponsored entity and thus has tax advantages and lower costs of funds. Capital is
raised through the sale of bonds which banks allocate to regional credit associations to make loans to eligible borrowers. Loan
eligibility is limited to farmers, certain farm-related agribusinesses, rural homeowners in towns with a population of fewer than
2,500, and cooperatives.

368 12 U.S.C. § 2207.

369 MONKE, *supra* note 365.

370 *Id.* at 2.

371 7 U.S.C. § 1994(b)(2).

372 MONKE, *supra* note 365 (citing 7 U.S.C. § 1994(b)(2)).

373 7 U.S.C. § 2003(b).

374 MONKE, *supra* note 365 (citing 7 U.S.C. § 2003).

375 U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-539, *supra* note 18, at 24 (noting that beginning and socially disadvantaged farmers are
more likely to operate small farms, which can make it difficult for them to qualify for private credit).

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 as part of the resolution of a discrimination complaint against the Agency, prior debt forgiveness that has been repaid in its
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456 *Id.* at 1225–29. It may be that, with respect to certain programs, FSA “handbooks” serve as manuals for county committees and facilitate some consistency between committees. *E.g.*, FARM SERV. AGENCY, ACREAGE AND COMPLIANCE DETERMINATIONS, https://www.fsa.usda.gov/Internet/FSA_File/2-cp_r16_a16.pdf. To the extent these handbooks create a “rule of law” for county committees, it is important to note FSA does not appear to treat them as rules under the Administrative Procedure Act. They therefore do not go through the notice and comment process, are not published in the Federal Register, and are not binding on the public or agency staff.

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Id.

Id. at 5 (80% of respondents noted that the 1862 land-grant institutions receive more than a one-to-one matching of funds from their state (see Figure 6)).

1890 Institutions receive capacity funds pursuant to Sections 1444 and 1445 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977 (NARETPA); 1862 Institutions receive capacity funds pursuant to Sections 3(b) and (c) of the



Smith-Lever Act (7 U.S.C. §§ 343(b) and (c)) and Section 3 of the Hatch Act of 1887 (7 U.S.C. § 361c).

7 U.S.C. § 3221(a).

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