No. 09-___

IN THE
Supreme Court of the United States

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

v.

THOMAS VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ROSEMARY LOVE, *ET AL.*,
Petitioners,

v.

THOMAS VILSACK, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Administrative Procedure Act ("APA"), "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U. S. C. §704 ("§704" or "APA 704"). In *Bowen v. Massachusetts*, this Court held that §704 precludes APA review only where "*existing procedures* for review of agency action" were in place "*[a]t the time the APA was enacted . . .*" 487 U. S. 879, 903 (1988) (emphasis added); *accord Darby v. Cisneros*, 509 U.S. 137, 146 (1993). But in this case the District of Columbia Circuit, as it has for years, relied instead on the contrary authority of its own pre-*Bowen* case, *Council of & for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F. 2d 1521 (D.C. Cir. 1983) (*en banc*). Accordingly, the court of appeals affirmed the dismissal of petitioners' APA claims challenging unlawful acts by the United States Department of Agriculture ("USDA"), namely that USDA refused to process and investigate claims of discrimination against Hispanic farmers and women farmers. In the court's view, a statute passed long after the APA's enactment, section 741 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub L. No. 105-277, 112 Stat. 2681-31 ("§741") (codified at 7 U.S.C. §2279 note), constituted an "other adequate remedy in a court" as defined in 5 U.S.C. §704. The question presented is:

Whether a statute, such as §741, that was enacted subsequent to the passage of the APA and that does not expressly displace APA remedies,

precludes judicial review of unlawful agency action under the APA?

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The defendant in this action is Tom Vilsack in his capacity as Secretary of the United States Department of Agriculture.

RULE 26.6 STATEMENT

None of the petitioners has a parent company or is a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Guadalupe L. Garcia, Jr., G.A. Garcia and Sons Farm, Tony and Patricia Jimenez, Edward and Norma Flores, Gloria Moralez, Beatrice and Rodolfo Garza, Larry and Robert Chavarria, Rigoberto Banuelos, Modesto Rodriguez, Ruperto R. Rodriguez, Modesta Salazar, Rodriguez Brothers, Inc., on behalf of themselves and similarly situated individuals and entities ("the *Garcia* petitioners"), and Rosemary Love, on behalf of herself and similarly situated individuals and entities ("the *Love* petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-20a) is reported at 563 F.3d 519. The opinion of the district court denying petitioners' claims based upon the Department of Agriculture's refusal to process and investigate their discrimination complaints is reported at 525 F. Supp. 2d 155 (App. 25a-39a). Prior decisions of the court of appeals are reported at 444 F.3d 625 (App. 40a-67a) and 439 F.3d 723 (App. 68a-92a); and prior decisions of the district court are reported at 2002 WL 33004124 (App. 93a-99a), 211 F.R.D. 15 (App. 100a-127a), 224 F.R.D. 8 and 224 F.R.D. 240 (App. 128a-173a).

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2009 (App. 20a-22a). Timely petitions for rehearing were denied on June 18, 2009 (App. 23a-24a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(7).

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Administrative Procedure Act, 5 U.S.C. §559, §704, and §741 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-31 (codified as 7 U.S.C. §2279 note); and the Equal Credit Opportunity Act, 15 U.S.C. §§1691 *et seq.* are set forth at Appendix 174a-185a.

STATEMENT OF THE CASE

This case presents important issues of administrative law arising from shameful agency misconduct: the surreptitious dismantling by the USDA of its civil rights enforcement capability. It is undisputed in this case that USDA denied minority farmers equal access to both farm credit and non-credit benefit programs. It is also undisputed that, in the 1980s, USDA secretly shut down its entire enforcement operation without informing Congress or the minority farmers who were adversely affected by the agency's pervasive, longstanding discriminatory practices. Unbeknownst to farmers who complained of the agency's unlawful actions, USDA conducted no investigations and undertook no

remedial steps whatsoever. Accordingly, it is also undisputed that contrary to law, and to its own regulations, USDA's pretense of civil rights enforcement was a complete sham. It still is.

In all of American history there have been few episodes of such odious governmental lawlessness. In prior situations, the courts correctly perceived that Congress had provided a judicial forum for redress. But in this case, the court of appeals denied a judicial forum for petitioners' failure-to-investigate claims, holding that petitioners must instead pursue the very administrative processes that USDA dismantled and that simply do not exist.

This Court's review is warranted for multiple compelling reasons. First, the case presents a vitally important and frequently recurring question under §10c of the APA, 5 U.S.C. §704 (hereinafter, "§704"). Contrary to this Court's authoritative interpretation of §704 in *Bowen v. Massachusetts,* 487 U.S. 879 (1988), the court of appeals clings to an irreconcilable, and erroneously broad, pre-*Bowen* view it articulated in *Council of & for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983) (*en banc*).

Second, the erroneous legal pronouncements on which the judgment below are based take on added significance because of the central role the D.C. Circuit plays in the development of administrative law. With a docket heavily laden with appeals from agency decisions, the D.C. Circuit's interpretation of §704 reverberates nationwide with exceptional force. This Court

should, accordingly, be vigilant to ensure that the D.C. Circuit's repeated departures from *Bowen* not go uncorrected.

Third, this case is particularly worthy of review because the federal courts themselves have played an extraordinary role in isolating the specific minority groups that will bear the entire brunt of this governmental discrimination and of this total breakdown of agency process. Although all minority groups suffered USDA's well-documented discriminatory actions, only Hispanic farmers and women farmers – the petitioners in this case – have been denied a judicial forum to pursue class-wide relief. In contrast, identical cases brought by African-American and Native American farmers were permitted to proceed as class actions on the basis of USDA's admitted failure to investigate their discrimination complaints and, in the case of African American farmers, resulted in a redress of grievances.

For years, the USDA has denied minority farmers equal access to farm credit in violation of ECOA, and non-credit benefit programs in violation of the APA, while urging farmers to complain to USDA of such discrimination. In the early 1980s, USDA secretly dismantled its civil rights enforcement capability, making any pretense of civil rights enforcement by USDA a total sham. Thereafter, USDA, in contravention of its own regulations, refused and still refuses to investigate their complaints. Secretary Glickman, the original defendant in these cases, testified before Congress that USDA had a "long history" of unlawful

discrimination against minority farmers and that "[g]ood people lost their family land . . . because of the color of their skin." (App. 188a). Similarly, Rosalind Gray, the former director of the USDA Office of Civil Rights, testified that "the systemic exclusion of minority farmers remains the standard operating procedure of FSA [Farm Service Agency]," the USDA agency that administers farm credit and non-credit farm benefit programs. (App. 215a, ¶ 28).

Upon learning that USDA had secretly dismantled its civil right enforcement capability, Congress enacted §741 (part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999), which waived the statute of limitations for farmers who filed complaints with USDA "before July 1, 1997 . . . alleg[ing] discrimination at any time . . . [from] January 1, 1981 . . . [through] December 31, 1996," (App. 177a-179a), and permitted them to file civil actions directly in court (7 U.S.C. §2279 note) or to pursue an *optional* administrative process. *See* §741 (b) ("The complainant *may*, in lieu of filing a civil action seek a determination on the merits of the eligible complaint by the [USDA] . . . .") (emphasis added) (App. 177a). Senator Robb, the principal sponsor of the provision, explained the need for the waiver:

> [T]he investigative unit at USDA's [OCR] was abolished in 1983. Farmers whose complaints were pending at the time were led to believe their complaints were still being investigated, when they were not. Farmers who filed

> the complaints [there]after ...were also led to believe that their complaints would be...investigated, despite the fact that USDA had no resources with which to conduct such investigations....[N]one of these complaints were ever considered – but none of the farmers were told that was the case.

(App. 223a-224a). Despite the passage of §741, USDA has not only refused to investigate minority farmers' discrimination complaints, but has taken steps to thwart Congress' efforts to address discrimination in the farm programs. (App. 235a-237a).

Eventually, African-American, Hispanic, Native-American and women farmers filed virtually identical suits in the United States District Court for the District of Columbia to remedy USDA's unlawful discrimination.[1] Just like the African-American farmers (in *Pigford*) and the Native-American farmers (in *Keepseagle*), the Hispanic and women farmers in this case allege that USDA discriminates against them in the administration of its farm credit programs, in violation of ECOA, and non-credit benefit programs, in violation of the APA. They

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

further allege that when they complain of discrimination in those programs, USDA refuses to investigate their complaints, in violation of the APA. The district court certified classes in the African American and Native American cases on the basis of USDA's admitted failure to investigate the discrimination complaints of African American and Native American farmers and, with the approval of the D.C. Circuit, those cases proceeded.[2] In the Hispanic and women farmers' cases, however, Judge Robertson ruled that such allegations do not state a cause of action under ECOA or the APA and hence refused to certify those cases as class actions. (App. 93a-99a). In earlier appeals, the D.C. Circuit

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[2] *Pigford v. Glickman*, 206 F. 3d 1212 (D.C. Cir. 2000) (approving consent decree); *Pigford v. Veneman*, 355 F. Supp. 2d 148, 151 (D.D.C. 2005); *Pigford v. Glickman*, 182 F.R.D. 341, 343 (D.D.C. 1998) (certifying class to pursue claims that "USDA failed properly to investigate those complaints" of discrimination in farm credit and non-credit farm benefit programs). In *Keepseagle*, Judge Sullivan certified a class pursuant to Fed. R. Civ. P. 23(b)(2) noting that "the systematic failure to process complaints of discrimination is a unifying characteristic of the class and raises common questions of fact and law." *Keepseagle*, 2001 U.S. Dist. LEXIS 25220, at *29; *accord Pigford*, 182 F.R.D. at 348-49. In dismissing the government's Fed. R. Civ. P. 23(f) petition, the D.C. Circuit held that it did not "see anything either novel or manifestly erroneous . . . about the district court's conclusion that the farmers' allegations concerning . . . [USDA's] 'failure to . . . investigate discrimination complaints,' which 'affected each class member,' satisfy Rule 23(a)'s commonality and typicality requirements." *In re Veneman*, 309 F. 3d 789, 794 (D.C. Cir. 2002); *see also In re Veneman*, No. 04-5031, 2004 U.S. App. LEXIS 4219 (D.C. Cir. Mar. 3, 2004) (denying petition for a writ of mandamus).

affirmed the district court's dismissals in the *Garcia* and *Love* cases of petitioners' failure-to-investigate claims based on ECOA and remanded for further development of those same claims based upon the APA. *Garcia v. Johanns*, 444 F.3d 625, 637 (D.C. Cir. 2006) (App. 40a-67a); *Love v. Johanns,* 439 F. 3d 723 (D.C. Cir. 2006) (App. 68a-92a). On remand, the district court reaffirmed its dismissals of the APA failure-to-investigate claims in a single opinion applicable to both the *Garcia* and *Love* cases. *See Love v. Connor*, 525 F. Supp. 2d 155 (D.D.C. 2007). (App. 25a-39a).

The D.C. Circuit affirmed. (App. 1a-22a). In so ruling, the court of appeals acknowledged that "[i]n *Bowen* . . . the Supreme Court interpreted §704 as precluding APA review where Congress has otherwise provided a 'special and adequate review procedure.'" 563 F.3d at 522 (quoting *Bowen*, 487 U.S. at 904) (App. 9a). Significantly, however, the court of appeals, in following its holding in *Council of & for the Blind*, selectively quoted from *Bowen* and ignored *Bowen*'s explicit definition of "'the special and adequate review procedure'" that would preclude judicial review under APA §704. The D.C. Circuit concluded that §741, which extended the applicable statutes of limitations and purported to give aggrieved farmers the option of filing suit in district court or resubmitting their complaints to USDA, and more generally ECOA provided the "special and adequate" review procedures that *Bowen* held would preclude an APA claim. 563 F.3d at 522 (App. 7a-10a). The D.C. Circuit also faulted plaintiffs, some of whom had waited for nearly twenty years to have

their complaints heard, for not attempting to use §741's optional administrative process despite what the court conceded was unrebutted evidence that USDA had sabotaged the process, thus making its use utterly futile. *Id.* at 524 & n.5 (App. 13a). According to the D.C. Circuit, because at some indeterminate point years in the future judicial review might be available, the utterly futile optional administrative process constitutes an "adequate remedy in a court" within the meaning of §704. *Id.* at 524 (App. 13a).

REASONS FOR GRANTING THE PETITION

Throughout our history, the courts have fulfilled the honored role of ensuring that the government complies with Constitutional standards and with governing legal norms. Especially in those instances – fortunately very few – when other branches of the federal government have suffered a total breakdown of adherence to the law, the judiciary has been a beacon of rectitude. But in this case, the lower courts have failed. Indeed, they have exacerbated the underlying problem through the selective provision of remedies – for the same discriminatory conduct – to some minority groups, but not to others. Accordingly, this case would warrant review even if it lacked other traditional indicia of worthiness for certiorari. S. Ct. Rule 10.

But there is no paucity of Rule 10 justifications for review. In denying petitioners a judicial forum for their failure-to-investigate claims, the D.C. Circuit misconstrued §704, contrary to this Court's authoritative interpretation of that section

in *Bowen*. Rather than conform to this Court's reading of the statute, the D.C. Circuit relied instead on its own pre-*Bowen* precedent. The D.C. Circuit's indefensible antipathy to *Bowen* is deeply engrained. For years, that court has preferred to hearken back to the standards it created prior to *Bowen*. There is, accordingly, ample reason for this Court to step in now and assure that §704 is correctly interpreted to provide the judicial forum for review of agency lawlessness that Congress plainly intended.

I. THE PANEL'S CONSTRUCTION OF APA §704 CONFLICTS WITH THIS COURT'S AUTHORITATIVE CONSTRUCTION.

A. *Bowen* Narrowly Defined §704 To Avoid Duplication Of Review Procedures Existing When The APA Was Enacted.

Section 704 provides, in relevant part, that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." In *Bowen*, this Court made clear that the statute's "'other adequate remedy in any court'" language was intended merely to make certain that the APA would not provide additional judicial review of agency actions in those circumstances where Congress had already enacted special administrative review provisions for specific agencies prior to the APA's enactment. 487 U.S. at 901-02 n.32 (quoting 5 U.S.C. §704). Five years later, this Court expressly reiterated its construction of §704, stating that "*Congress intended by that provision simply to avoid*

duplicating previously established special statutory procedures for review of agency actions." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (emphasis added).

In *Bowen*, this Court also held that "[t]he exception that was intended to avoid such duplication should not be construed to defeat *the central purpose of providing a broad spectrum of judicial review of agency action.*" 487 U.S. at 903-04 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967)) (emphasis added). As the Court, quoting §704, explained, "'[t]he legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation.'" *Bowen*, 487 U.S. at 903-04 (quoting *Abbot Labs.*, 387 U.S. at 140-41). Under the standard this Court has articulated, petitioners failure-to-investigate claims surely should have been permitted to proceed. In contrast to this Court's instruction, the D.C. Circuit has been incorrectly restrictive in affording judicial review of agency decisions under §704.

B. The Court of Appeals' Relied On A Construction Of §704 That Predates And Contradicts This Court's Construction Of That Section in *Bowen*.

Given this Court's clear guidance, there is no valid justification for the D.C. Circuit's longstanding, and continuing, preference for its own pre-*Bowen*

decision. The opinion in this case is an unfortunately typical example of the D.C. Circuit's elevation of its older precedent over this Court's governing standards. In the decision below, the court of appeals relied principally on *Council of & for the Blind* and its progeny. But the D.C. Circuit decided *Council of & for the Blind* five years before this Court's decision in *Bowen*. And, with just one exception, none of the post-*Bowen* circuit opinions dealing with §704 upon which the decision below relied even cites *Bowen*. This persistent avoidance of *Bowen* is as inexplicable as it is incorrect.

Of the §704 cases that the opinion below cites, the only one that even mentions *Bowen* is *El Rio Santa Cruz Neighborhood Health Center v. HHS*, 396 F.3d 1265 (D.C. Cir. 2005) ("*El Rio Santa Cruz*"). And, contrary to the *ipse dixit* in the decision below, *El Rio Santa Cruz* is not "consistent with the Supreme Court's construction of the APA in *Bowen*" (563 F.3d at 525). For example, the D.C. Circuit opinion in *El Rio Santa Cruz* states (396 F.3d at 1270 (citations omitted)):

> In *Bowen* . . . the Supreme Court addressed the meaning of "adequate remedy" under § 704 of the APA. While observing that § 704 was not intended to provide additional judicial remedies "where the Congress has provided special and adequate review procedures," the Court explained that "the exception that was intended to avoid such duplication should not be construed to defeat the central purpose

> of providing a broad spectrum of judicial review of agency action." In that case, the Court concluded that relief in the Claims Court "is plainly not the kind of 'special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA."

But the full quote from *Bowen* is as follows:

> However, although the primary thrust of § 704 was to codify the exhaustion requirement, the provision as enacted also makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action. As Attorney General Clark put it the following year, § 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." At the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action; for example, Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals, and Interstate Commerce Commission orders were subject to review in specially constituted three-judge district courts. When Congress enacted the

> APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies.

487 U.S. at 903 (emphasis added; footnotes omitted). In proper context, the full quote from *Bowen* leaves no doubt whatsoever about the "special and adequate review procedures" that this Court held would bar review under §704. Significantly, this Court's explicit description of those "special and adequate review procedures" is completely missing from the D.C. Circuit's discussion in *El Rio Santa Cruz*. By truncating the quote, the D.C. Circuit removed the express temporal limitations that this Court placed upon its interpretation of §704, which precluded APA review only where there were "*existing procedures for review of agency action*" in place "*[a]t the time the APA was enacted. . . .*" *Bowen*, 487 U.S. at 903 (emphasis added).

This Court's authoritative construction of the statute is plainly correct and is further reinforced by comparing the separate sections of the APA dealing with pre-existing and later-enacted statutory remedies (APA §§10(c) and 12). As this Court made clear in *Bowen*, the relevant portion of §704 was contained in §10(c) of the APA and addressed statutory review procedures that existed at the time Congress enacted the APA. By contrast, the effect on the APA of future legislation was addressed in §12: "'[N]o subsequent legislation shall be held to

supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.'" *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50-51 (1955) (quoting §12); *see* 5 U.S.C. §559 (App. 174a-175a). In short, for §704 purposes, legislation passed after the APA was enacted must be assessed differently from legislation pre-dating the APA.

But in *El Rio Santa Cruz* the D.C. Circuit expressly acknowledged that in a series of cases beginning with *Council of & for the Blind* its §704 analysis focused simply on "whether a statute provides an independent cause of action or an alternative review procedure," *El Rio Santa Cruz*, 396 F.3d at 1270 (citing cases), regardless of when enacted rather than following this Court's careful definition limited to "previously established special statutory procedures relating to specific agencies" that were "existing . . . [a]t the time the APA was enacted." *Bowen*, 487 U.S. at 903; *see also El Rio Santa Cruz*, 396 F.3d at 1271 (recognizing that although the D.C. Circuit had "originally defer[ed] to congressional intent to provide a remedy . . ." the court "later embraced the doctrinal view disfavoring suits directly against federal enforcement authorities administering anti-discrimination laws . . .").

The D.C. Circuit's departure from this Court's construction of §704 is accordingly, deeply rooted, longstanding and undeniable. This case provides an ideal vehicle for this Court to set the court of appeals on the correct course that *stare decisis* requires. *See, e.g., United States v. Hatter*, 532 U.S. 557, 567 (2001) ("'it is this Court's prerogative alone to overrule one of its precedents'") (quoting *State Oil Co. v. Khan*,

522 U.S. 3, 20 (1997)); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("[o]ur decisions remain binding precedent until we see fit to reconsider them"); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts . . .").

The D.C. Circuit's pervasive avoidance of *Bowen* is unmistakable. Aside from *El Rio Santa Cruz*, only two other post-*Bowen* opinions of the D.C. Circuit construing §704 even cite *Bowen*. They are *Esch v. Yeutter,* 876 F.2d 976 (D.C. Cir. 1989), and *National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004). In *Esch*, the D.C. Circuit dutifully followed and expressly acknowledged *Bowen*'s narrow reading of APA §704, observing that "[g]iven the limited purposes for Section 704's enactment, the Court said, it is to be read narrowly." 876 F.2d at 982. But the decision below in this case made short shrift of *Esch*: it discounted *Esch* as merely holding that "the potential availability of a [Tucker Act] cause of action in the Claims Court was not an adequate remedy because that court lacked equitable jurisdiction and it was doubtful that court had jurisdiction over the plaintiffs claims." 563 F.3d at 526 (App. 118a-119a). In essence, the D.C. Circuit dismissed *Esch* precisely because *Esch* reached the same substantive conclusion as this Court in *Bowen,* and despite the fact that *Esch* is on all fours with *Bowen* in construing §704. *Esch* focused directly on the critical passage in *Bowen* (487 U.S. at 903) in which this Court explicitly described the "'special

and adequate review procedures' that would constitute an 'adequate remedy in a court' within the contemplation of Section 704." *Esch*, 876 F.2d at 982 (citation omitted).

In *National Wrestling Coaches*, not cited in the opinion below, *Bowen*, along with *Esch*, is cited only in Judge Williams' dissenting opinion, noting that "[a]s the Supreme Court explained in *Bowen* . . . § 704 is to be read narrowly so as not 'to defeat the central purpose of providing a broad spectrum of judicial review of agency action.'" 366 F.3d at 958 (Williams, J. dissenting) (quoting *Bowen*, 487 U.S. at 903.).

The D.C. Circuit's other post-*Bowen* opinions construing §704 do not even cite *Bowen*.[3] As this history reflects, the D.C. Circuit has embarked on an incorrect path that is taking it further afield from the course this Court charted in *Bowen* and reaffirmed in *Darby*. Fidelity to the important Congressional purpose underlying the provision of a broad spectrum of judicial review of agency action strongly favors certiorari in this case.

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[3] *See, e.g., Coker v. Sullivan*, 902 F.2d 84 (D.C. Cir. 1990) (holding that plaintiff could not maintain an action under the APA against a federal agency for failure to investigate the wrongdoing of a third party where Congress had provided plaintiff with a right of action against the third party); *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990) (same).

C. This Court's Decisions Highlight The D.C. Circuit's Error In Holding That ECOA Provides An Adequate Judicial Remedy For Failure-To-Investigate Claims Based On USDA's Discriminatory Administration Of Non-Credit Farm Programs.

The broad extent of the D.C. Circuit's departure from *Bowen* is strikingly evident in a comment in the decision below about the administrative claims that certain petitioners *did* file. The court observed that "[t]wo *Garcia* appellants filed administrative complaints with the USDA regarding discrimination occurring after 1996" that were not "covered by Section 741," but it regarded that action to be "of no significance because we hold that all of the appellants have an adequate remedy at law in the ECOA for their failure-to-investigate claims." 563 F.3d at 522 n.3.[4] A basic reason why this holding is incompatible with *Bowen* is because ECOA does not cover such non-credit

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[4] As a preliminary factual matter, the record demonstrates that at least eight *Garcia* petitioners filed discrimination complaints with USDA after 1996 concerning USDA's non-credit disaster benefit programs and hence were not covered by §741. (App. 239a-252a). In any event, the D.C. Circuit fundamentally misapprehended petitioners' claims, noting that "[appellants] alleged that the USDA had discriminated against them with respect to credit transactions *and disaster benefits in violation of the ECOA* . . . ." 563 F.3d at 522 (emphasis added) (App. 7a-8a). Petitioners' disaster benefit claims are based on USDA's discriminatory administration of *non-credit* farm benefit programs in violation of the APA, not ECOA.

claims, as the district court clearly recognized. *Garcia v. Veneman*, No. Civ.A. 00-2445 (JR), 2002 WL 33004124 at 2 (D.D.C. Mar. 20, 2002). (App. 93a-99a). Thus, the *Garcia* petitioners asserting claims based upon discrimination in USDA's non-credit benefit programs are, by the D.C. Circuit's own admission, not covered by §741, and therefore cannot possibly have available to them, even under the D.C. Circuit's stated view of §704, "an adequate remedy at law in the ECOA for their failure-to-investigate claims." 563 F.3d at 522 n.3. (App. 8a-9a).

The D.C. Circuit's decision is also contrary to a long line of precedent "noting that the [APA's] 'generous review provisions' must be given a 'hospitable interpretation'" such that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs.*, 387 U.S. at 141. While the D.C. Circuit asserted that "there is clear and convincing evidence that in enacting Section 741 Congress did not intend for complainants who choose to proceed in the district court on their ECOA claims to pursue their failure-to-investigate claims under the APA simultaneously in the same lawsuit" (563 F.3d at 523) (App. 11a), the D.C. Circuit did not identify any such evidence. There is no evidence of a legislative intent to bar APA review of plaintiffs' failure-to-investigate claims, much less "*clear and convincing evidence*" of such an intent.

Not only is there an absence of evidence of a legislative intent to bar APA review of plaintiffs' failure-to-investigate claims, there is clear evidence

of Congress' approval of such claims. Indeed, Congress expressly provided that black farmers with refusal-to-investigate claims who missed the filing deadline to participate in the original *Pigford* settlement would be permitted an opportunity to have their claims heard on the merits in the manner prescribed by the *Pigford* consent decree. §§14011-14012 of the Food, Conservation and Energy Act of 2008, Pub. L. 110-246, 122 Stat. 1651 ("2008 Farm Bill"). (App. 253a-259a). Moreover, at the time Congress passed §§14011-14012, it was clearly aware of the other pending discrimination cases against USDA and the fact that the four virtually identical cases had received starkly different treatment in the district court, noting that "all pending claims and class actions brought against [USDA] by socially disadvantaged farmers . . . including Native American, Hispanic, and female farmers or ranchers based on racial, ethnic or gender discrimination in farm program participation should be resolved in an expeditious and just manner." Section 14011 of the 2008 Farm Bill. (App. 253a). Thus, in the absence of such "clear and convincing evidence" of a congressional intent to bar APA review of plaintiffs' failure-to-investigate claims, the D.C. Circuit was required to give "the [APA's] *'generous review provisions'* . . . a *'hospitable interpretation,'*" *Bowen*, 487 U.S. at 904 (quoting *Abbott Labs*, 387 U.S. at 140-41) (emphasis added), thereby fulfilling the APA's "central purpose of providing *a broad spectrum of judicial review of agency action*." *Id.* at 903 (emphasis added and citations omitted). In stark contrast to that requirement, the D.C. Circuit denied "access to judicial review."

D. USDA's Admittedly Sabotaged And Futile Administrative Process Does Not Constitute An Adequate Remedy.

The fact that §741, like other statutory schemes that routinely give parties to administrative proceedings the option of seeking rehearing, gave farmers the option of resubmitting their complaints to USDA did not preclude farmers from seeking review of USDA's failure to investigate their complaints under the APA. Under settled authority, the long passage of time during which USDA has refused to investigate discrimination complaints rendered those refusals final agency actions for purposes of APA § 704.[5] Moreover, APA § 704 expressly provides that "[e]xcept as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application . . . for any form of reconsideration . . . ." 5 U.S.C. §704. (App. 176a).

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

The D.C. Circuit did not question the finality of USDA's failure to investigate discrimination complaints for purposes of reviewability pursuant to §704. Nor did it undermine in any way the undisputed testimony of Rosalind Gray, the former director of USDA's Office of Civil Rights charged with the task of helping to implement §741, that USDA had sabotaged §741's implementation. (App. 12a-13a, 201a-217a, 233a-238a). Instead, the decision below concluded that because at some indeterminate point years in the future a court *might* review USDA's refusal to investigate resubmitted discrimination claims under the optional and, as a practical matter, non-existent §741 administrative process, an "adequate remedy in a court" bars petitioners' APA claims. 563 F.3d at 523. (App. 11a-12a). The D.C. Circuit's conclusion conflicts with prior authority in at least three respects. First, *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), relied upon by the D.C. Circuit, does not provide clear guidance on what constitutes unreasonable delay. *Id.* at 80. Second, the courts of appeals have found unreasonable delays ranging from five to twenty years.[6] Third, the D.C. Circuit's suggestions to the contrary notwithstanding, 563 F.3d at 524 (App. 11a-12a), there is no basis for any uncertainty about what might have happened in terms of having their complaints investigated, if farmers had "chosen" the §741 optional administrative process. Indeed, Hispanic farmers who filed discrimination complaints long before USDA purported to

[6] *See supra* note 5.

implement the optional §741 procedure, during the time of the purported implementation and subsequent thereto all have in common the fact that USDA still has not investigated their complaints (*See, e.g.*, App. 260a-270a).

Moreover, the D.C. Circuit's determination is fundamentally at odds with precedent from this Court recognizing that irreparable harm may result from delay in administrative decisionmaking procedures. *See McCarthy v. Madigan*, 503 U.S. 140, 146-47 (1992) (holding that administrative exhaustion may not be required where there is "an unreasonable or indefinite timeframe for administrative action."); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 587 (1989) ("Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures."); *Walker v. Southern Ry.*, 385 U.S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary); *Bowen v. New York*, 476 U.S. 467, 483 (1986) (finding that disability benefit claimants "would be irreparably injured were the exhaustion requirement now enforced against them.").

As the D.C. Circuit noted, the testimony of Rosalind Gray, the former director of USDA's Office of Civil Rights, is unrebutted concerning (1) USDA's intentional efforts to sabotage the implementation of §741, which calls into question the supposed "choice" made by farmers to whom USDA, *inter alia*, intentionally denied notice of the program, and (2)

the utter failure of that optional process. (App. 12a). As former Director Gray testified,

> [f]or the few farmers that opted for the § 741 administrative procedure, their complaints and the staff initially designated to process them were soon merged into the processing of existing and new complaints that poured into OCR. . . . Ultimately, OCR staff was simply not prepared to do the work of the office. In the final analysis . . . despite my best efforts to make the system work properly, the complaint processing system collapsed and complaints, whether submitted pursuant to the optional § 741 procedure or otherwise, were caught up in the dysfunction that characterized OCR.

(App. 237a, ¶10).

For farmers who had already waited years to have their complaints heard, it cannot responsibly be maintained that an intentionally sabotaged and dysfunctional administrative process – that might require them to wait an additional five to twenty years before *perhaps* obtaining judicial review of their claims – constitutes an adequate remedy in a court. Moreover, for the D.C. Circuit to invoke this irredeemably failed process, beset by flaws and irregularities that USDA actively concealed from petitioners in order to claim that an "adequate remedy in a court" existed and then to fault

petitioners for not utilizing it elevates form over substance in a way that is flatly contrary to *Bowen,* 487 U.S. at 905 (noting the inadequacy of relief in the Court of Claims under the Tucker Act). In essence, the D.C. Circuit's invocation of the flawed and futile §741 optional administrative procedure creates a lose-lose scenario for petitioners.

In the past, this Court and other courts of appeals have been vigilant in ensuring the availability of practical judicial remedies for persons adversely affected by such total breakdowns by federal agencies. Take, for example, this Court's opinion in *Bowen v. New York.* In that case, a unanimous Court held that the Social Security Administration's "fixed clandestine policy against [claimants]," justified the district court's equitable tolling of the 60-day statute of limitations that applied to the claims at issue. 476 U.S. at 475. Moreover, the Court held that claimants were excused from exhausting their administrative remedies on the basis that "'[members] of the class could not attack a policy they could not be aware existed.'" *Id.* at 482 (citation omitted); *see also Curry v. Block*, 738 F.2d 1556, 1560-61 (11th Cir. 1984) (holding that the Farmers Home Administration was required to develop "substantive standards," otherwise the deferral relief program would be a mere "empty procedural shell."). The Court's reasoning in *Bowen v. New York* applies with equal force here – *i.e.*, just as claimants should not be required to "attack a policy they could not be aware existed," 476 U.S. at 482, here, petitioners should not

be required to exhaust administrative procedures that are demonstrably utterly defunct.

Finally, there is no principled basis upon which Hispanic farmers and women farmers can be denied the same right to pursue their claims as African American and Native American farmers. That the remedies available to African American farmers in *Pigford* and Native American farmers in *Keepseagle* received the D.C. Circuit's approval adds considerable weight to the Hispanic and women farmers' claims for the same remedies for the same pervasive discrimination. Indeed, to do otherwise would implicate basic questions of fairness regarding the administration of justice. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (noting the importance of fairness which gives "'the feeling, so important to a popular government, that justice has been done'") (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951)).

Accordingly, the issues in this case have far-reaching practical significance for the thousands of minority farmers nationwide who were victimized by USDA's pervasive, secretive, and indefensible discrimination, and for the sound administration of justice under the APA standards this Court articulated in *Bowen* to which the D.C. Circuit steadfastly refuses to adhere.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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