United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 6, 2006 Decided March 31, 2006

Nos. 04-5448 and 05-5002

GUADALUPE L. GARCIA
FOR HIMSELF AND ON BEHALF OF
G.A. GARCIA AND SONS FARM *ET AL.*,

APPELLANTS

v.

MICHAEL JOHANNS, SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE,

APPELLEE

Appeals from the United States District Court
for the District of Columbia
(No. 00cv02445)

Stephen S. Hill argued the cause for the appellants. *Alan M. Wiseman, Robert L. Green* and *Kenneth C. Anderson* were on brief.

Charles W. Scarborough, Attorney, United States Department of Justice, argued the cause for the appellee. *Peter D. Keisler*, Assistant Attorney General, *Kenneth L. Wainstein*, United States Attorney, and *Robert M. Loeb*, Attorney, United States Department of Justice, were on brief.

Glen D. Nager, *Shay Dvoretzky*, *Jason J. Jarvis* and *Robin S. Conrad* were on brief for *amicus curiae* Chamber of Commerce of the United States of America.

Before: SENTELLE and HENDERSON, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: This appeal arises from one of several actions brought against the United States Department of Agriculture (Department or USDA) alleging discrimination in the administration of various federally-funded loan and benefit programs for American farmers.[1] The appellants, individual Hispanic farmers, seek to represent a class of similarly situated Hispanic farmers throughout the nation who claim that the Department discriminated against them in denying them farm loans and other benefits because of their ethnicity and that it failed to investigate the discrimination complaints they subsequently filed with the Department. In the district court, the appellants sought class certification and the USDA moved to dismiss, inter alia, the failure-to-investigate claim. The district court granted the Department's motion to dismiss and denied class certification, concluding that the appellants had failed to meet the requirements of Federal Rule of Civil Procedure 23(a) and 23(b). For the reasons that follow, we affirm in part and remand in part.

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[1] *See, e.g.*, *Pigford v. Johanns*, 416 F.3d 12, 14 (D.C. Cir. 2005) (black farmers); *Keepseagle v. Glickman*, 194 F.R.D. 1 (D.D.C. 2000) (Native American farmers). A related appeal challenging the district court's denial of class certification to women farmers was heard the same day as this appeal. *See Love v. Johanns*, No. 04-5449, slip op. (D.C. Cir. March 3, 2006).

I.

The Farm Service Administration (FSA)[2] administers the Department's various loan programs for American farmers through county committees, the members of which are selected locally and are located in over 2,700 counties nationwide. A farmer seeking a loan must first obtain an application from his county committee. 7 C.F.R. § 1910.4(b). He then submits the completed application to the committee which determines whether the farmer meets specific USDA loan criteria, including, inter alia, citizenship, legal capacity to incur debt, education and farming experience, farm size, inability to obtain sufficient credit elsewhere and character. *Id.* §§ 1941.12 (2006), 1943.12(a) (2006), 1943.12 (1988), 764.4 (2006). If an unsuccessful applicant believes the committee discriminated against him in denying his application, he may lodge a complaint with either the USDA Secretary or the USDA Office of Civil Rights. *Id.* § 15.6. USDA regulations provide that complaints "shall be investigated in the manner determined by the Assistant Secretary for Civil Rights and such further action taken by the Agency or the Secretary as may be warranted." *Id.*

On October 13, 2000, ten Hispanic farmers filed this action in the district court. The complaint set forth three counts.[3] Count I sought a declaratory judgment to determine "the rights of plaintiffs and the Class members under the defendant's farm programs including their right to equal credit, and equal participation in farm program, and their right to full and timely

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[2]In 1994, the Farmers Home Administration (FmHA) was combined with other Department entities to form the FSA. *See United States v. Lewis County*, 175 F.3d 671, 673 n.2 (9th Cir. 1999) (citing 7 U.S.C. § 6932 (Supp. 1998)). All references are to the FSA.

[3]Although they subsequently amended their original complaint twice, *see infra*, n.5, the substantive counts did not change.

enforcement of racial discrimination complaints." 2d Am. Compl. at 56, *reprinted in* Joint Appendix (JA) 83. The second count alleged a violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691 *et seq.*[4] JA 84. Specifically, the appellants alleged that the "[d]efendant's acts of denying plaintiffs and Class members credit and other benefits and systematically failing to properly process their discrimination complaints was racially discriminatory and contrary to the [ECOA]." JA 84. Finally, the appellants alleged a violation of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* JA 84. The appellants sought declaratory relief as well as $20 billion in damages. JA 85. Their complaint also proposed a class of

> all Hispanic participants in FSA farm programs who *petitioned* or would have petitioned had they not been

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[4]ECOA creates a private right of action against a creditor, including the United States, 15 U.S.C. § 1691e(a), who "discriminate[s] against any applicant, with respect to any aspect of a credit transaction" "on the basis of race, color, religion, national origin, sex or marital status, or age" or "because the applicant has in good faith exercised any right under this chapter." *Id.* § 1691(a). The regulations governing ECOA define a "credit transaction" as "every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures)." 12 C.F.R. § 202.2(m). Although ECOA claims are subject to a two-year statute of limitations, *see* 15 U.S.C. § 1691e(f), the Congress retroactively extended the limitations period for individuals who had filed administrative complaints with the USDA between January 1, 1981, and July 1, 1997 for alleged acts of discrimination occurring between January 1, 1981 and December 31, 1996. *See* Pub. L. No. 105-277, § 741, 112 Stat. 2681 (*reprinted in* 7 U.S.C.A. § 2279 notes).

> . . . prevented from timely filing a complaint [against] USDA at any time between January 1, 1981, and the present for relief from . . . racial discrimination . . . and who, because of the failings in the USDA civil rights complaint processing system . . . were denied equal protection . . . and due process in the handling of their . . . complaints.

JA 78 (emphasis in original).[5]

On December 22, 2000, the Department moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), contending that the court lacked jurisdiction over the ECOA claim because the appellants had not exhausted their administrative remedies and that, in any event, their claims were time-barred. In addition, the Department moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the appellants had failed to state a claim under ECOA, the APA or the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.* On March 20, 2002, the district denied the motion in part and granted it in part, relying on its earlier—and similar—order in *Love v. Johanns*, No. 00-2502 (D.D.C. Dec. 13, 2001). *Garcia v. Veneman*, No. 00-2445 (D.D.C. Mar. 20, 2002), *reprinted in* JA 95-99. Of relevance here, the court dismissed the failure-to-investigate claim, concluding that the appellants failed to state a claim under ECOA because the investigation of a discrimination complaint is not a "credit transaction" within the meaning of ECOA. JA 97-98. It further held that the claim was not cognizable under the APA because ECOA provides "an adequate remedy." JA 97-98.

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[5]All references are to the appellants' Second Amended Complaint. The appellants eventually moved to file a Third Amended Complaint, which the district court denied. *See Garcia v. Veneman*, 224 F.R.D. 8, 16 (D.D.C. 2004); *see also infra* n.13.

On December 2, 2002, the district court denied class certification. *Garcia v. Veneman*, 211 F.R.D. 15 (D.D.C. 2002) (*Garcia I*). It concluded that the appellants failed to show the required "commonality" under Federal Rule of Civil Procedure 23(a)(2) and did not represent a certifiable class under Rule 23(b). They did not show commonality, the court concluded, because they did not demonstrate that the Department operated under a general policy of discrimination nor did they identify a common USDA policy or practice that disparately affected them. *Id.* at 19-22. The court then considered whether the requested class could be certified under Rule 23(b) and concluded that Rule 23(b)(2) certification was inappropriate because the $20 billion in damages they sought predominated over their request for equitable relief. *Id.* at 22-23. The court also found Rule 23(b)(3) certification inappropriate because they had not shown that common questions predominated. *Id.* at 23-24.

After additional discovery, the appellants submitted a supplemental brief on the issue of commonality, which the district court treated as a renewed motion for class certification. *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (*Garcia II*). They had obtained in discovery 37 USDA loan and disaster benefit files as well as two USDA databases which, they alleged, showed the requisite commonality for both their disparate impact and their disparate treatment allegations of discrimination. *Id.* at 10. They argued that the files revealed that the USDA had denied Hispanic farmers' applications based on the subjective, rather than the objective, eligibility criteria set forth in 7 C.F.R. § 15.6 and that, as a result, the use of subjective criteria had a disparate impact on them. *Id.* at 13-15. They also claimed that the USDA as a "single actor" had treated them discriminatorily through a pattern and practice of discrimination. *Id.* at 10. They listed five sub-patterns of discrimination, including (i) refusal to provide Hispanic farmers with loan applications or assistance in completing applications; (ii)

subjecting Hispanic farmers to protracted delays in processing and funding their loans; (iii) using subjective criteria to reject the applications of Hispanic farmers; (iv) unnecessarily subjecting Hispanic farmers to the inconvenience of supervised bank accounts; and (v) delaying or denying loan servicing for Hispanic farmers. *Id.* at 10. The court nevertheless concluded that, even with their supplementation, they failed to demonstrate commonality.

On September 24, 2004, the appellants moved the district court to certify the order dismissing their failure-to-investigate claim for interlocutory appeal under 28 U.S.C. § 1292(b), which motion the court granted. *Garcia v. Veneman*, No. 00-2445 (D.D.C. Sept. 27, 2004). In accordance with Federal Rule of Civil Procedure 23(f), the appellants petitioned this court on September 22, 2004 for leave to file an interlocutory appeal of the class certification denial, which petition we granted. *In re Garcia*, No. 04-8008 (D.C. Cir. Dec. 16, 2004). Before us for review, then, are three orders, namely *Garcia*, No. 00-2445 (D.D.C. Mar. 20, 2002) (granting motion to dismiss), *Garcia I*, 211 F.R.D. 15 (D.D.C. 2004) (denying class certification), and *Garcia II*, 224 F.R.D. 8 (D.D.C. 2004) (denying class certification again).

II.

As we have recognized, the district court is "uniquely well situated" to rule on class certification matters. *Wagner v. Taylor*, 836 F.2d 578, 586 (D.C. Cir. 1987). Accordingly, we review a certification ruling "conservatively only to ensure against abuse of discretion or erroneous application of legal criteria," *id.*, and we will affirm the district court even if we would have ruled differently in the first instance. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984).

Under Federal Rule of Civil Procedure 23(a), a plaintiff seeking class certification must show that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Failure to adequately demonstrate any of the four is fatal to class certification. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 106 (D.C. Cir. 2002). The district court found that the appellants failed to show "questions of law or fact common to the class" or "commonality" under Rule 23(a)(2). We affirm that ruling.[6]

To establish commonality under Rule 23(a)(2), a plaintiff must identify at least one question common to all members of the class. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004). Not every common question, however, suffices under subsection (a)(2). As the United States Supreme Court declared of an alleged disparate treatment class in a Title VII action,

> there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the

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[6]If a plaintiff meets the requirements of Rule 23(a), he must then establish that class certification is appropriate under one of the three alternatives of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-16 (1997). Although the district court found that certification was also inappropriate under subsections (b)(2) and (3), we do not reach that holding because of our affirmance of its subsection (a)(2) holding. *See Love v. Johanns*, No. 04-5449, slip op. at 13 n.3 (D.C. Cir. March 3, 2006).

> same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982).[7] Following *Falcon*, we have required a plaintiff seeking to certify a disparate treatment class under Title VII to "make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." *Hartman v. Duffey*, 19 F.3d 1459, 1470 (D.C. Cir. 1994). And in *Love v. Veneman*, we held that a showing of commonality for a disparate treatment class under ECOA requires the plaintiff to show "(i) discrimination (ii) against a particular group (iii) of which the plaintiff is a member, *plus* (iv) some additional factor that 'permit[s] the court to infer that members of the class suffered from a common policy of discrimination.' " No. 04-5449, slip op. at 9. (emphasis in original) (citation omitted) (alteration in original).

Regarding the appellants' challenge to Department action with an allegedly class-wide discriminatory *impact*, they must make a showing sufficient to permit the court to infer that

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[7]Other courts have used Title VII precedent in cases involving ECOA. *See, e.g.*, *Mays v. Buckeye Rural Elec. Co-op., Inc.*, 277 F.3d 873, 876 (6th Cir. 2002) ("Given the similar purposes of the ECOA and Title VII, the burden-allocation system of federal employment discrimination law provides an analytical framework for claims of credit discrimination."); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) ("In interpreting the ECOA, this court looks to Title VII case law . . . ."); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1100 (5th Cir. 1987) ("The language [of ECOA] is closely related to that of Title VII of the Equal Employment Opportunity Act ("EEOA"), 42 U.S.C. § 2000e-2, and was intended to be interpreted similarly.").

members of the class experienced discrimination as a result of the disparate effect of a facially neutral policy. *See Cooper v. S. Co.*, 390 F.3d 695, 716 (11th Cir. 2004). That is, similar to our formulation of the commonality showing necessary for a disparate treatment class set out in *Love v. Johanns*, the appellants must show for their disparate *impact* class (i) a discriminatory impact, (ii) affecting a particular group, (iii) of which the plaintiffs are members, (iv) resulting from a common facially neutral policy or practice.

A.

First, the appellants contend that the district court erred in denying class certification of their discriminatory treatment claim based on the geographic spread of the local decisionmakers, labeling it a "pattern and practice" claim, *see* Appellants' Br. at 40. *But see Garcia I*, 211 F.R.D. at 22 ("Commonality is defeated . . . by the large numbers and geographic dispersion of the decision-makers . . . ."). As with a Title VII claim, to establish a charge of pattern and practice discrimination under ECOA, a putative class must prove that "discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (quoting *Teamsters v. United States,* 431 U.S. 324, 336 (1977)). Similarly, to show commonality under Federal Rule of Civil Procedure 23(a)(2), the plaintiff must "make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the [defendant's] challenged . . . decisions." *Hartman*, 19 F.3d at 1472.

"As is now well recognized, the class action commonality criteria are, in general, more easily met when a disparate impact rather than a disparate treatment theory underlies a class claim." *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 n.10 (4th Cir. 1980). Establishing commonality

for a disparate treatment class is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist. *Id* at 278-80 (reversing class certification because of geographic separation of workforce and autonomy of local decisionmakers); *see also Cooper*, 390 F.3d at 715. The appellants failed to identify any centralized, uniform policy or practice of discrimination by the USDA that formed the basis for discrimination against Hispanic loan applicants with varied eligibility criteria in over 2,700 counties nationwide over a 20-year period. Rather, despite the appellants' allegation that the USDA's actions are those of a "single actor," their claims arise from multiple individual decisions made by multiple individual committees. Moreover, they do not cite a single reversal of a district court's denial of class certification based on no commonality resulting from the geographic spread of the decisionmakers.[8] *Cf. Stastny*, 628 F.2d at 278-79 (district court abused discretion in certifying class of employees spread through "great number of geographically dispersed facilities" with "almost complete local autonomy"). Our standard of review is deferential and the appellants have failed to convince

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[8]The appellants contend that we cannot rely on the geographic spread of defendant decisionmakers in deciding whether to certify a disparate treatment class. Appellants' Br. at 40. They are wrong. *See, e.g., Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004) (no abuse of discretion in denying certification of class of all black employees at four separate facilities of defendant over 20 year period); *Cooper*, 390 F.3d at 715 (no abuse of discretion in denying class certification to employees working for different defendants throughout wide geographic area and encompassing range of working environments); *Stastny*, 628 F.2d at 278-79 (no abuse of discretion in denying class certification to employees working in different plants with local decisionmakers throughout state); *Webb v. Merck & Co., Inc.*, 206 F.R.D. 399, 406 (E.D. Pa. 2002) (denying class certification "cut[ting] across employment status, job categories, facilities and geographic regions").

us that the district court abused its discretion in denying class certification to the appellants' alleged disparate treatment class.

B.

We next consider the appellants' claim that the district court erred in failing to certify a class on whose members the Department's facially neutral action has had a discriminatorily disparate impact. Assuming without deciding that a disparate impact claim is cognizable under ECOA,[9] the claim would require a plaintiff to "identify a specific policy or practice which the defendant has used to discriminate and must also demonstrate with statistical evidence that the practice or policy has an adverse effect on the protected group." *Powell v. Am. Gen. Fin., Inc.*, 310 F. Supp. 2d 481, 487 (N.D.N.Y. 2004) (recognizing disparate impact claim under ECOA).

The appellants press two alternative theories to support their contention that the district court erred in not certifying a disparate impact class. First, they argue that they do not need to specify a facially neutral practice if it is impossible to determine which of the USDA eligibility criteria have had the discriminatory effect, instead borrowing from Title VII's "one

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[9]Both Title VII and the Age Discrimination in Employment Act (ADEA) prohibit actions that "otherwise adversely affect" a protected individual. *See* 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2). The Supreme Court has held that this language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. *See Smith v. City of Jackson*, 125 S. Ct. 1536, 1540 (2005) (ADEA); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (Title VII). ECOA contains no such language. We express no opinion about whether a disparate impact claim can be pursued under ECOA. *See Eisen v. Carlisle & Jacquelin*, 418 U.S. 156, 177-78 (1974) (court should not examine whether "plaintiffs have stated a cause of action or will prevail on the merits" in determining class certification *vel non*).

employment practice" notion.[10] Alternately, they argue the USDA's subjective decisionmaking process constitutes the common facially neutral practice. We reject both theories and instead affirm the district court's denial of class certification because the appellants failed to show a *common* facially neutral USDA farm loan policy, resulting in the disparate effect on them and the putative class of Hispanic farmers. *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999)

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[10]The appellants cite the"one employment practice" language of Title VII, *see* 42 U.S.C. § 2000e-2(k)(1)(B)(I), and argue that it relieves them from having to tie a disparate impact to a facially neutral USDA policy. Appellants Br. at 34-38. The Congress added the "one employment policy" language following the Supreme Court's holding in *Wards Cove Parking Co. v. Atonio*, 490 U.S. 642 (1989). It provides that "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(I). Assuming—again, without deciding—the "one employment practice" notion applies to an ECOA disparate impact claim, it does not alter the required commonality showing under Federal Rule of Civil Procedure 23(a)(2). The appellants erroneously confuse the commonality showing with the prima facie case of disparate impact discrimination. *See Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir. 2004) ("Plaintiffs cannot avoid the heavy lifting of showing eligibility for class certification by conflating two exceptions to separate rules for adjudicating discrimination cases."). Under Rule 23(a)(2), the appellants must show that the putative class members have something in common—they all suffered an adverse effect from the same facially neutral policy, *see id.*—and their showing must be "significant," *see Hartman*, 19 F.3d at 1470. On the other hand, courts have set a lower bar for establishing a prima facie discrimination case. *See, e.g., Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Bundy v. Jackson*, 641 F.2d 934, 950 (D.C. Cir. 1981) (recognizing difficulty plaintiff faces in proving motive behind employer's actions).

("Of course, class certification would not be warranted absent some showing that the challenged practice . . . has a disparate impact on African-American employees at Metro-North."). As the Supreme Court noted in *Falcon*—where class certification was denied—"[t]he mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Falcon*, 457 U.S. at 159 n.15.

In *Garcia I*, 211 F.R.D. at 21-22, the district court rejected the appellants' disparate impact claim because they did not connect disparate impact with a common facially neutral USDA policy. They had submitted the declaration of Jerry Hausman, an expert in econometrics and microeconomics, in which declaration he concluded that Hispanic farmers received a lower percentage of USDA loans than white farmers received in 1997. JA 123. Hausman, however, analyzed *all* farmers (white and Hispanic) as opposed to only those farmers (white and Hispanic) who had applied for USDA loans. After further discovery produced USDA loan databases, two of which the appellants used to support their renewed class certification motion, they submitted the declaration of statistician Karl Pavlovic, who found that 72 per cent of white applications were approved in the period from October 1997 to January 2003 while 59 per cent of Hispanic applications were approved in the same period. JA 477. In *Garcia II*, the district court assumed a disparate impact without discussion of Pavlovic's declaration. *Garcia II*, 224 F.R.D. at 11. The court, however, again concluded that the appellants had failed to connect the disparate impact to a common facially neutral USDA policy. *Id.* (rejecting appellants' argument because "[n]ot only does it 'leapfrog to the merits,' . . . but it also boils down to the proposition that unexplained discrepancies in the distribution of government benefits satisfy the commonality requirement of Rule 23(a)(2) without more").

The appellants attempted to connect the disparate impact to USDA's subjective loan decisionmaking criteria, relying in part on statistical evidence. But their statistical analyses were analytically flawed because they did not incorporate key relevant variables connecting disparate impact to loan decisionmaking criteria. *See Bazemore v. Friday*, 478 U.S. 385, 400 n.10 (1986) ("some regressions [are] so incomplete as to be inadmissible as irrelevant"). It does not suffice under Rule 23(a)(2) to show an ethnic imbalance in the USDA's award of loans to farmers; rather, the appellants must show that a common facially neutral policy caused the imbalance. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) ("[A] Title VII plaintiff does not make a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the work force."); *Caridad*, 191 F.3d at 292. The appellants could have done this, for instance, by employing multiple regression. *See Love v. Johanns*, No. 04-5449, slip op. at 16 ("Instead of conducting a relatively simple statistical analysis (such as a multiple regression) to control for any or all of these variables, O'Brien simply reported a series of elementary cross-tabulations, from which it is impossible—as a statistical matter—to draw meaningful conclusions."); *see also Segar v. Smith*, 738 F.2d 1249, 1261 (D.C. Cir. 1984) ("Multiple regression is a form of statistical analysis used increasingly in Title VII actions that measures the discrete influence independent variables have on a dependent variable such as salary levels."). The appellants' statistics failed to account for variables that affected the analyses such as whether fewer Hispanic farmers were U.S. citizens, whether Hispanic farmers had worse credit and whether Hispanic farmers had less experience. *Love*, No. 04-5449, slip. op. at 15-16.

The district court thus acted within its discretion in rejecting the appellants' statistical showing as insufficient to infer classwide discrimination arising from the Department's administration of the farmers' loan programs. Its decision to

deny class certification "did not constitute a clear error of judgment, nor [was it] otherwise outside the range of choices the district court was allowed to make." *Cooper*, 390 F.3d at 715. We, of course, do not suggest that statistical evidence alone could never show commonality; we simply believe that the district court did not abuse its discretion in finding the appellants' statistical evidence inadequate. *See Hartman*, 19 F.3d at 1473 ("While statistics can generally be probative of the question of commonality, we would feel uncomfortable in resting on the trial statistics in the present record for a final determination of commonality.").[11]

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[11]We think the class certification issue here is similar to that in *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004), in which the Eleventh Circuit affirmed the denial of class certification in a Title VII action. Seven African-American employees of Southern Company and several of its subsidiaries sought to represent a class alleging disparate impact and disparate treatment claims in connection with promotion opportunities, performance evaluations and compensation. The court found that the "plaintiffs' statistical evidence was insufficient to establish a presumption of discrimination *common* to the claims of all members of the putative class." *Id.* at 719 (emphasis in original). "[A]nalytical flaws in the statistical evidence" prevented the *Cooper* plaintiffs from making a showing sufficient to " 'raise a presumption of discrimination arising from the collective whole of Defendant's compensation and promotion policies. Thus, disparate impact analysis produce[d] no evidence *common* to the claims of all class members.' " *Id.* at 716 (quoting *Cooper v. S. Co.*, 205 F.R.D. 596, 613 (N.D. Ga. 2001)) (alteration and emphases in original). The statistical evidence there did not account for variables such as an employee's type or level of acquired skills and field of study, the quality, type and relevance of an employee's experience, an employee's job performance, etc., to ensure that black and white employees were similarly situated. *Compare id.* at 717 *with Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) (reversing denial of class certification because expert "controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action and promotion"). In addition, the statistical

The other evidence the appellants relied on—namely, the 37 USDA case files—arguably may have come closer to establishing commonality because it showed that the USDA often used the infeasibility of an applicant's farm plan as one reason for denying a loan. *See Garcia II*, 224 F.R.D. 14 (farm plan infeasibility given as one reason for almost half of loan rejections). Nonetheless, mindful of our limited scope of review, *see supra* at 9, we do not believe that the district court abused its discretion in denying class certification. The USDA denied loans for a variety of reasons, including inadequate farm plans and lack of funds.[12] Mem. in Response to the Court's July 15, 2003 Order with Respect to Commonality at app. 7, *Garcia v. Veneman*, No. 02-2445 (D.D.C. filed Dec. 5, 2003). The case files as well as the anecdotal evidence upon which the appellants relied showed that often the appellants were denied loans based on objective financial data. *See id.* In sum, the Department used an array of objective—and individual—justifications in denying the appellants loans.[13] Accordingly, we affirm the

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evidence did not reference the named plaintiffs or their specific similarly-situated comparators and, accordingly, the court found that they had not established "*commonality* among these named plaintiffs' claims and the overall affected class." *Cooper*, 390 F.3d at 718 (emphasis in original).

[12]For instance, Roberto Salinas and his son jointly applied for an ownership loan in 2000 and Roberto Salinas solely applied for an operating loan in the same year. The USDA denied both loans because of the infeasibility of the farm plan as well as inadequate verification of Roberto Salinas's debt. Mem. in Response to the Court's July 15, 2003 Order with Respect to Commonality at app. 7, *Garcia v. Veneman*, No. 02-2445 (D.D.C. Dec. 5, 2003).

[13]In addition to the disparate impact and treatment classes already discussed, the appellants sought certification of five subclasses. *Garcia II*, 224 F.R.D. at 15-16. The five subclasses were set forth in their proposed Third Amended Complaint, *see* JA 512-13, which the

district court's denial of class certification of the appellants' disparate impact claim.

III.

We have jurisdiction to review, in our discretion, the district court's dismissal of the appellants' failure-to-investigate claim under ECOA and the APA pursuant to 28 U.S.C. § 1292(b). The appellants must persuade us that exceptional circumstances justify a departure from the ordinary policy of postponing appellate review until after entry of final judgment. *See United States. v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1209 (D.C. Cir. 2005).

We exercise our jurisdiction over the dismissal of the ECOA failure-to-investigate claim, as we did in *Love v. Johanns*, and affirm the district court's dismissal for the same reason—the failure to investigate a discrimination complaint is not a "credit transaction" within the meaning of ECOA. *Love v. Veneman,* No. 04-5449, slip op. at 17-18. We decline, however, to exercise our jurisdiction regarding the appeal of the denial of the appellants' failure-to-investigate claim made under the APA. As in *Love*, the class certification issues took most of the trial court's and the parties' attention and unlike the straightforward statutory construction issue the appellants' ECOA failure-to-investigate claim presents, we think this claim will benefit from further development in the district court.[14] *Id.* at 18.

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district court denied without prejudice. *Garcia II*, 224 F.R.D. at 16. Their challenge to the district court's denial of their motion to amend is supported by conclusionary assertions only, *see* Appellants' Br. at 44, and they have therefore waived the issue. *See United States v. Yeh*, 278 F.3d 9, 16 n.4 (D.C. Cir. 2002).

[14]Before us, the appellants used slightly more than four pages of their 59-page brief and no time at oral argument addressing the APA failure-to-investigate claim.

For the foregoing reasons, we affirm the district court's denial of class certification as well as its dismissal of the failure-to-investigate claim asserted under ECOA. We dismiss the appeal of the APA failure-to-investigate claim and remand to the district court for further proceedings consistent with this opinion.

So ordered.

Guadalupe Garcia v. Thomas Vilsack, (D.C. Cir. 2009)

Federal Circuits

Docket Number: 08-5110

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Text

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 9, 2009 Decided April 24, 2009

No. 08-5110

GUADALUPE L. GARCIA, FOR HIMSELF AND ON BEHALF OF G.A. GARCIA AND SONS FARM, ET AL.,

APPELLANTS

v.

THOMAS VILSACK, SECRETARY,

UNITED STATES DEPARTMENT OF AGRICULTURE,

APPELLEE

Appeal from the United States District Court

for the District of Columbia

(No. 1:00-cv-02445-JR)

No. 08-5135

ROSEMARY LOVE, ET AL.,

APPELLANTS

v.

2 THOMAS VILSACK, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, APPELLEE 3 alleged that since 1981 the USDA has unlawfully discriminated against them in the administration of its farm benefit programs and failed to act on their administrative complaints in accordance with USDA regulations. This court affirmed the denial of class action certification and the dismissal of the failure-to-investigate claims brought under the Equal Credit Opportunity Act ("ECOA"), 15U.S.C. §§ 1691-1691f. Love v. Johanns, 439 F.3d 723 (D.C. Cir. 2006); Garcia v. Johanns, 444 F.3d 625 (D.C. Cir.

2006). The question in this second interlocutory appeal is whether appellants' failure-to-investigate claims are reviewable under the Administrative Procedure Act ("APA"), 5U.S.C. §§ 701-706. Because appellants fail to show they lack an adequate remedy in a court, we affirm the dismissals of their APA failureto-investigate claims and remand the cases to the district court.

I.

The ECOA provides that it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age." 15U.S.C. § 1691(a). The statute authorizes the recovery of actual damages from creditors, including the federal government, see id. §§ 1691a(e)-(f), 1691e(a), and a court "may grant such equitable and declaratory relief as is necessary to enforce [the ECOA]," as well as "reasonable attorney's fees" to applicants bringing a "successful action." Id. § 1691e(c)-(d). Claims under the ECOA must be filed within two years of the "date of the occurrence of the violation." Id. § 1691e(f).

USDA regulations have long provided that applicants alleging discrimination by the USDA in its direct benefit programs may file administrative complaints with the USDA.

See 7 C.F.R. § 15d.4; see also Love v. Connor, 525 F. Supp. 2d 4 155, 157-58 (D.D.C. 2007).1 Appellants allege, however, that for years the USDA ignored discrimination complaints like theirs.

Indeed, in 1997 the USDA publicly acknowledged that in the early 1980s it "effectively dismantled" its civil rights enforcement apparatus.2 In response, Congress enacted a special remedial statute in 1998 for applicants who had filed a "nonemployment related complaint" with the USDA before July 1, 1997 that alleged discrimination occurring between January 1, 1981 and December 31, 1996. Omnibus

Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 741(e), 112 Stat. 2681-31 (codified at 7U.S.C. § 2279 Note) (hereinafter "Section 741"). The statute extended the ECOA statute of limitations until October 21, 2000, and provided that such eligible complainants could either file an ECOA action in federal court, pursuant to Section 741(a), or renew their administrative complaints and obtain a determination on the merits of their claim from the USDA, pursuant to Section 741(b). Subsection (b) of the statute required the USDA to timely process renewed administrative complaints, to investigate the claims, and to issue merits determinations after a hearing on the record. Subsections 5 (d) and (g) provided that complainants denied administrative relief could seek de novo review in federal court.

Appellants, nearly all of whom appear to have filed complaints with the USDA before July 1, 1997,3 chose the first option: On the eve of the October 21, 2000 deadline, they filed complaints in the federal district court here under the ECOA and the Declaratory Judgment Act, 28U.S.C. § 2201(a). Their complaints also included claims under the APA.4 They alleged that the USDA had discriminated against them with respect to credit transactions and disaster benefits in violation of the ECOA, and also had systemically failed to investigate complaints of such discrimination in violation of USDA regulations. In the district court only appellants' ECOA credit transaction claims and the Garcia appellants' APA disaster benefit claims have survived the USDA's motion to dismiss. The district court also denied 6 appellants' motions for class certification on their remaining ECOA discrimination claims, and this court affirmed upon interlocutory review in 2006. See Love, 439 F.3d 723; Garcia, 444 F.3d 625. Following a remand of the APA failure-toinvestigate claims, the district court reaffirmed its dismissal of those claims on the ground that Section 741 provided appellants an adequate remedy at law. See Love v. Connor, 525 F. Supp. 2d 155; Order, Garcia v. Veneman, Civ. No. 00-2445. The district court certified its interlocutory ruling, and this court granted appellants' petition for leave to appeal pursuant to 28U.S.C.

§1292(b).

II.

The APA provides that "[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." 5U.S.C. § 704. In Bowen v. Massachusetts, 487 U.S. 879, 904 (1988), the Supreme Court interpreted § 704 as precluding APA review where Congress has otherwise provided a "special and adequate review procedure." Id. at 904 (internal quotations omitted). An alternative remedy will not be adequate under § 704 if the remedy offers only "doubtful and limited relief." Id. at 901.

So understood, this court has held that the alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the "same genre." El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs., 396 F.3d 1265, 1272 (D.C. Cir. 2005). Thus, for example, relief will be deemed adequate "where a statute affords an opportunity for de novo district-court review" of the agency action. Id. at 1270. In such cases, the court has reasoned that "Congress did not intend to permit a litigant challenging an administrative denial . . . to utilize simultaneously both [the review provision] and the APA." Id. at 1270 (quoting Envtl.

Defense Fund v. Reilly, 909 F.2d 1497, 1501 (D.C. Cir. 1990)) 7 (omission and alteration in original). Relief also will be deemed adequate "where there is a private cause of action against a third party otherwise subject to agency regulation." Id. at 1271. In evaluating the availability and adequacy of alternative remedies, however, the court must give the APA "`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.'" Id. at 1270 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967)); see also Bowen v. Massachusetts, 487 U.S. at 904.

Appellants contend that the district court erred in two respects in holding that they could not bring a claim under the APA challenging the USDA's failure to investigate their civil rights complaints: First, the district court misapplied Bowen by disregarding record evidence that under Section 741 there was no real adequate alternative remedy in a court for their failure-toinvestigate claims; second, the district court mistakenly relied on this court's precedents involving claims against an agency for failing to regulate third-party wrongdoers, and therefore failed to follow circuit precedent that permits a plaintiff to bring an APA claim for the agency's failure to follow its regulations in addition to a non-APA discrimination claim. Appellants emphasize that their survival as farmers depends in significant part on their ability to obtain federal benefits authorized by Congress to be administered by the USDA, and that when the USDA fails to comply with its regulations for handling and processing administrative complaints, the benefits systems envisioned by Congress are thwarted and their efforts to survive as farmers are stymied. Although this court has no occasion to doubt appellants' claims of harm, their legal challenges to the dismissal of their APA failure-to-investigate claims are unpersuasive.

First, there is clear and convincing evidence that in enacting Section 741 Congress did not intend for complainants who 8 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. In responding to the dilemma presented by the USDA's failure to investigate discrimination claims, Congress resurrected time-barred claims and gave such complainants two options: either file a complaint in the district court or renew their administrative complaint with the USDA with subsequent judicial review if the USDA denied relief. Although appellants had the option first to renew their administrative complaints with the USDA pursuant to Section 741(b), they chose not to do so. Had appellants done so, the USDA would have been obligated to process, investigate, and adjudicate appellants' complaints of discrimination in a timely fashion and absent relief de novo judicial review would be available. Having chosen instead to proceed directly to the district court pursuant to Section 741(a), appellants' complaints sought declaratory and injunctive relief that the USDA should have investigated their old, unrenewed administrative complaints about discrimination and requiring USDA to develop a better processing system for such claims -- in other words to grant appellants the relief that they chose to forego when they filed their lawsuits pursuant to Section 741(a). By extending the statute of limitations for administrative complaints and by providing for judicial review of USDA's determinations, Congress provided appellants an adequate remedy in court within the meaning of the APA. Appellants are therefore barred from relying on the APA to obtain relief they chose to forego.

Appellants contend, however, that they were entitled to seek a court order pursuant to the APA to remedy the USDA's failure to investigate their old administrative complaints because the alternative administrative option under Section 741(b) was illusory. To that end, appellants offered unrebutted evidence that the USDA never successfully implemented the required administrative process; they also suggested that no plaintiff has 9 yet obtained de novo district court review pursuant to Section 741(b).5 Because of the flaws in the Section 741(b) option, appellants conclude that they may obtain through their Section 741(a) complaint relief under the APA promised by Section 741(b).

There are two problems with appellants' approach. The first is simply a matter of statutory interpretation. Adoption of appellants' interpretation would effectively rewrite the statute that Congress specifically enacted in response to the USDA's failure to address discrimination complaints. The plain text of Section 741 required complainants to make a choice between going to court immediately or first renewing their administrative complaints. Congress required the USDA to process, investigate, and adjudicate the renewed administrative complaints and afforded complainants who obtained no relief the opportunity to seek de novo review in the district court. Each option afforded an in-court remedy. Moreover, had appellants renewed their administrative complaints pursuant to Section 741(b) and thereby attempted to obtain relief pursuant to the APA through the USDA's administrative process, and

been unable to obtain a final determination due to the USDA's unreasonable delay, they could have sought, as government counsel acknowledged during oral argument, relief in the district court under Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 79-80 (D.C. Cir.

1984). Cf. In re Core Commc'ns, Inc., 531 F.3d 849, 855, 860 (D.C. Cir. 2008); In re Tennant, 359 F.3d 523, 531 (D.C. Cir.

2004). Appellants' futility contention, then, fails to show that in enacting Section 741 Congress did not intend to require eligible complainants to make a choice between two remedial regimes. 10 Cf. Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1088-89 (D.C. Cir.

1996).

The second problem arises because, even giving credence to appellants' futility suggestion, they still would be unable to show that they lack an adequate remedy at law. Under the ECOA, to the extent appellants can offer proof that the USDA discriminated against them in the administration of its credit programs, appellants will be entitled to recover money damages and attorneys' fees, and, as appropriate, also injunctive and declaratory relief. 15U.S.C. § 1691e. This court's precedent in Council of and for the Blind of Delaware County Valley, Inc. v.

Regan, 709 F.2d 1521 (1983) (en banc), and its progeny -- Coker v. Sullivan, 902 F.2d 84 (1990), and Women's Equity Action League v. Cavazos ("WEAL"), 906 F.2d 742 (1990) -- make clear that an ECOA discrimination claim filed directly against the USDA would be adequate to preclude a cause of action under the APA. In those cases the court held that the plaintiff could not maintain an action under the APA directly against a federal agency for failure to investigate and rectify the wrongdoing of a third party where Congress had provided the plaintiff with a private right of action against the third party. See Council, 709 F.2d at 1531-33; Coker, 902 F.2d at 89-90; WEAL, 906 F.2d at 750-51. For example, in Council, the plaintiffs had alleged that the Office of Revenue Sharing had failed to process and resolve administrative complaints in a timely manner. On appeal, they contended that a national suit against the federal agency would be more effective. This court held that even so the remedy in the form of a private suit against state and local governments provided by Congress was adequate to address the alleged discrimination. Council, 709 F.2d at 1532-33.

The relevant question under the APA, then, is not whether private lawsuits against the third-party wrongdoer are as effective as an APA lawsuit against the regulating agency, but whether the 11 private suit remedy provided by Congress is adequate. See Council, 709 F.2d at 1532; WEAL, 906 F.2d at 751. As a result, the availability of actions against individuals may be adequate even if such actions "cannot redress the systemic lags and lapses by federal monitors" and even if such "[s]uits directly against the discriminating entities may be more arduous, and less effective in providing systemic relief, than continuing judicial oversight of federal government enforcement." WEAL, 906 F.2d at 751. This is because the court concluded in Council, Coker, and WEAL, "situation-specific litigation affords an adequate, even if imperfect, remedy." Id. As explained in El Rio Santa Cruz, third-party suits are an adequate remedy for the alleged victims of statutory violations, like unlawful discrimination, because they provide relief of "the same genre" as that offered by an APA claim. 396 F.3d at 1272 (quoting WEAL, 906 F.2d at 751).

Appellants' attempts to avoid this precedent are unpersuasive. The court has confirmed that its approach is consistent with the Supreme Court's construction of the APA in Bowen. In El Rio Santa Cruz, the court explained that, consistent with Bowen, Council, Coker, and WEAL held that an alternative adequate remedy at law exists where Congress chooses to grant those allegedly aggrieved by agency failure to remedy the wrongs of a regulated third parties a private cause of action against those third

parties. 396 F.3d at 1270-71. The fact that appellants fault the USDA's regulation of itself and not its regulation of a third party does not mean that Council and its progeny are inapposite, because there is no material difference between the adequacy of the ECOA remedy and the third-party actions in Council, Coker and WEAL. The suggestion that ECOA relief would not vindicate appellants' interest in ensuring that the USDA adheres to its dutyto-investigate regulations, was rejected in Council, Coker, and WEAL when the court concluded that a direct action against a regulated private party was an adequate remedy at law for whatever additional injury a plaintiff suffered as a result of a 12 federal agency's failure to remedy that violation administratively.

See Council, 709 F.2d at 1531-33; Coker, 902 F.2d at 89-90; WEAL, 906 F.2d at 750-51. If anything, an ECOA discrimination claim filed directly against the USDA affords a better remedy than those available in Council, Coker, and WEAL. If successful, a plaintiff can obtain declaratory and injunctive relief against the agency itself, in addition to money damages, and such remedies would presumably deter the USDA to the same extent as a successful APA claim from discriminating against plaintiff-credit applicants and failing to adhere to its duty-to-investigate regulations. On appellants' view of Council, Coker, and WEAL, the availability of a direct ECOA claim against a private creditor would constitute an adequate remedy barring APA challenges to the FTC's oversight of a private creditor, see 15U.S.C. §§ 1691c, 1691c(a)-(c); see also 22 Op. Off. Legal Counsel 11, 1998 WL 1180049, at *1, but the availability of a nearly identical claim against the USDA would not constitute an adequate remedy.

Appellants cannot show that Congress intended such disparate results.

McKenna v. Weinberger, 729 F.2d 783 (D.C. Cir. 1984), is of no assistance to appellants. In McKenna, the court held that Title VII of the Civil Rights Act of 1964, 42U.S.C. § 2000e, did not provide the exclusive judicial remedy for a probationary employee's claim that the agency failed to follow its regulations in effecting an allegedly discriminatory discharge. Id. at 791.

The court observed that "Ms. McKenna's claim under the APA is not one of discrimination. Rather, she charges that the agency, whether its motive was legal or illegal, failed to conform to its own regulations. She does not claim that these procedural violations constitute employment discrimination." Id. (emphasis in original). In other words, her claim related to a personnel matter that was completely distinct from her gender discrimination. Here, by contrast, appellants' APA failure-to 13 investigate and lending discrimination claims are inextricably linked.

As appellants read McKenna, it stands for the proposition that a plaintiff may always bring an APA claim alleging that an agency failed to follow its own regulations in processing or investigating discrimination allegations, notwithstanding the existence of other adequate remedies at law. But McKenna cannot bear the weight that appellants place upon it. In McKenna, the court did not address whether the judicial and administrative procedures under Title VII constituted an adequate remedy at law so as to preclude APA review and so cannot be read, as appellants urge, as inconsistent with Council and its progeny. Appellants cite to no case that reads McKenna that way, and such precedent as we have found does not support their position.6 In McKenna the court simply assumed without deciding that Title VII procedures did not constitute an adequate remedy at law. Cf. Trudeau v. FTC, 456 F.3d 178 (D.C. Cir.

2006). Appellants' other authorities also provide no support. For instance, their reliance on Esch v. Yeutter, 876 F.2d 976, 984-85 (D.C. Cir. 1989), is misplaced; the court held only that the potential availability of a 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.

Remaining are appellants' APA claims that the USDA discriminated in dispersing non-credit disaster

benefits, which are not covered by Section 741. We remand these claims. As to the Garcia appellants, the district court's dismissal did not address their non-credit claims. See Order, Garcia v. Veneman, Civ. No. 14 00-2445 (Nov. 30, 2007). As to the Love appellants, the district court's conclusion that there was no reason to allow them to proceed with their non-credit claims "at this time," Love, 525 F.

Supp. 2d at 161, was not a dismissal with prejudice, see Foremost Sales Promotions, Inc. v. Dir., Bureau of Alcohol, Tobacco & Firearms, 812 F.2d 1044, 1045-46 (7th Cir. 1987); 12 MOORE'S FEDERAL PRACTICE § 58.02. Finally, the court will not address the government's jurisdictional and other contentions for dismissal of these claims because the district court has yet to rule on them and they were not adequately briefed in this interlocutory appeal.

Accordingly, we affirm the dismissals of appellants' APA failure-to-investigate claims and otherwise remand the cases to the district court.

Appeal from the United States District Court for the District of Columbia (No. 1:00-cv-02502-JR) Stephen S. Hill argued the cause for appellants Guadalupe L. Garcia, Jr., et al. With him on the briefs were Alan M. Wiseman, Robert L. Green, and Kenneth C. Anderson. Barbara S. Wahl argued the cause for appellants Rosemary Love, et al. With her on the briefs were Marc L. Fleischaker, Kristine J. Dunne, Jennifer A. Fischer, Roderic V.O. Boggs, Susan E. Huhta, Alexander John Pires, Jr., and Phillip L. Fraas. Charles W. Scarborough, Attorney, U.S. Department of Justice, argued the causes the appellee. With him on the brief were Gregory G. Katsas, Assistant Attorney General, Jeffrey A. Taylor, U.S. Attorney, and Marleigh D. Dover, Attorney. Before: ROGERS and GRIFFITH, Circuit Judges, and EDWARDS, Senior Circuit Judge. Opinion for the Court by Circuit Judge ROGERS. ROGERS, Circuit Judge: These appeals relate to the continuing efforts by farmers to obtain relief from the discriminatory distribution of federal farm benefits by the United States Department of Agriculture ("USDA"). See, e.g., Pigford v. Glickman, 206 F.3d 1212 (D.C. Cir. 2000). This time the complaints were filed by female and Hispanic farmers who 1 The USDA regulations treat the filing of administrative complaints alleging discrimination as permissive, rather than mandatory. See Nondiscrimination in USDA Conducted Programs and Activities, 63 Fed. Reg. 62,962, 62,963 (proposed Nov. 10, 1998).

2 CIVIL RIGHTS ACTION TEAM, USDA, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 46-47 (1997); see also Pigford v. Veneman, 292 F.3d 918, 920 (D.C. Cir. 2002); Treatment of Minority and Limited Resource Producers by the U.S. Department of Agriculture: Hearings Before the H. Subcomm. on Dep't Operations, Nutrition and Foreign Agric. and the H. Comm. on Agric., 105th Cong. 97 (1997) (statement of the Secretary of the USDA).

3 Two Garcia appellants filed administrative complaints with the USDA regarding discrimination occurring after 1996. Those complaints would not be covered by Section 741. This is a circumstance 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. During oral argument government counsel acknowledged, however, that were agency action on the post1996-occurrence complaints unreasonably delayed, these Garcia appellants could seek judicial relief in the district court under Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 79-80 (D.C. Cir. 1984). Government counsel expressed no opinion on whether such delay had occurred as to these two administrative complaints. We leave for another day whether TRAC relief would be available given our holding that the ECOA provides an adequate remedy at law for failure-to-investigate claims.

4 See Love v. Veneman, Civ. No. 00-2502, slip op. at 1 (D.D.C. Dec. 13, 2001); Garcia v. Veneman, Civ. No. 00-2445, 2002 WL 33004124, at *1 (D.D.C. Mar. 20, 2002).

5 See, e.g., Decl. of Rosalind Gray, Former Director, USDA Office of Civil Rights, Apr. 6, 2002; Gray

Supp. Decl., Oct. 18, 2006; Gray Second Supp. Decl., Sept. 12, 2007; Benoit v. U.S. Dep't of Agric., 577 F. Supp. 2d 12 (D.D.C. 2008).

6 See Nichols v. Agency for Int'l Dev., 18 F. Supp. 2d 1, 3 & n.2 (D.D.C. 1998); Lynch v. Bennett, 665 F. Supp. 62, 64-65 (D.D.C. 1987).

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No. 09-333

In the Supreme Court of the United States

GUADALUPE L. GARCIA, ET AL., PETITIONERS

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 5 U.S.C. 704 precludes petitioners' claims under the Administrative Procedure Act alleging that the United States Department of Agriculture (USDA) systematically failed to investigate administrative com plaints of discrimination in lending programs because Congress specifically prescribed an "adequate remedy" for this injury by retroactively extending the limitations period for filing certain types of discrimination claims against USDA.

In the Supreme Court of the United States

No. 09-333

GUADALUPE L. GARCIA, ET AL., PETITIONERS

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) in these consolidated cases is reported at 563 F.3d 519. The interlocutory order of the district court in Love v. Connor (Pet. App. 25a-37a) is reported at 525 F. Supp. 2d 155. The interlocutory order of the district court in Garcia v. Veneman (Pet. App. 38a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2009. A petition for rehearing was denied on June 18, 2009 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on September 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, Hispanic and female farmers, filed suits alleging that, since 1981, the United States Department of Agriculture (USDA) discriminated against them in the administration of its farm benefit programs and failed to act on their discrimination complaints as re quired by USDA regulations, in violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 et seq., and the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq. Pet. App. 5a. Petitioners sought to pursue their claims as a class action, but the district court de nied class certification based on lack of commonality and dismissed petitioners' failure-to-investigate claims brought under ECOA. Id. at 40a-67a, 68a-92a. The United States Court of Appeals for the District of Co lumbia Circuit affirmed in prior appeals. Id. at 40a-67a, 68a-92a.

On remand, the district court considered petitioners' failure-to-investigate claims under the APA. Pet. App. 5a, 28a. The district court dismissed those claims, hold ing that the APA does not permit direct judicial review here because Congress provided to petitioners an ade quate alternative remedy by retroactively extending the statute of limitations period to allow certain types of discrimination complaints to proceed against USDA. Id. at 31a-36a. Petitioners filed an interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals affirmed the district court's dismissal of the failure-to-investigate APA claims. Pet. App. 9a-19a.

1. USDA administers a variety of credit and benefit programs through the Farm Service Agency (FSA). See Consolidated Farm and Rural Development Act, 7 U.S.C. 1921 et seq.; 7 C.F.R. 2.42(28); Pet. App. 44a, 73a. Like its predecessor the Farmers Home Adminis tration (FmHA), the FSA is authorized to make and guarantee loans to farmers who cannot obtain credit from commercial institutions. Id. at 44a-45a, 73a-74a. At the times relevant to this case, applications for loan programs were submitted to, and processed by, the FmHA's and the FSA's county offices, which deter mined whether an applicant was eligible for a loan. Ibid.; see also 7 C.F.R. 1910.3-1910.4 (1997).

Since 1966, USDA has had regulations prohibiting discrimination on various bases (including sex, race, and national origin) in the administration of any of its pro grams and activities. See 7 C.F.R. Pt. 15d; 31 Fed. Reg. 8175 (1966) (promulgating 7 C.F.R. 15.52 (1967), the predecessor to 7 C.F.R. 15d.4). The regulations permit a farmer who believes he or she has been discriminated against to file a complaint with either the USDA Secre tary or the USDA Office of Civil Rights. Pet. App. 45a, 74a. Although the USDA component charged with in vestigating discrimination complaints has varied some what over the years, see, e.g., 31 Fed. Reg. 8,175 (1966) (Office of the Inspector General); 50 Fed. Reg. 25,687 (1985); 54 Fed. Reg. 31,163, 31,164 (1989) (Office of Ad vocacy and Enterprise); 64 Fed. Reg. 66,709, 66,710 (1999) (Office of Civil Rights), the relevant component has always been authorized to take necessary corrective action if it concludes that a discrimination complaint has merit, 7 C.F.R. 15d.4; 7 C.F.R. 15.52(b) (1997).

In addition to USDA's administrative avenues for processing and investigating complaints of discrimina tion, aggrieved parties may seek relief in federal district court under ECOA, which makes it "unlawful for any creditor to discriminate against any applicant, with re spect to any aspect of a credit transaction * * * on the basis of race, color, religion, national origin, sex or mari tal status, or age." 15 U.S.C. 1691(a) (1). ECOA autho rizes successful plaintiffs to recover damages from creditors-including the federal government, see Moore v. USDA, 55 F.3d 991, 994 (5th Cir. 1995) (holding that ECOA waives sovereign immunity of United States)-as well as costs and attorneys fees. 15 U.S.C. 1691e(a) and (d). ECOA plaintiffs are not required to exhaust admin istrative remedies prior to filing suit. Pet. App. 75a; see 63 Fed. Reg. 62,962, 62,963 (1998). However, ECOA includes a two-year statute of limitations. 15 U.S.C. 1691e(f).

In the mid-1990s, USDA commissioned several stud ies and investigations in response to allegations that it had engaged in race, gender, and national origin dis crimination. One such investigation, conducted by USDA's Civil Rights Action Team, produced a report (the CRAT Report) finding that USDA had, over the course of a number of years, accumulated a significant backlog of discrimination complaints that needed prompt action. See Pigford v. Glickman, 206 F.3d 1212, 1214-1215 (D.C. Cir. 2000).

Congress responded to the CRAT Report by enact ing, on October 21, 1998, a special remedial statute gov erning non-employment-related complaints that had been filed with USDA before July 1, 1997, and that al leged that discrimination had occurred between January 1, 1981, and December 31, 1996. Pet. App. 6a-7a; id. at 177a-179a; Act of Oct. 21, 1998, Pub. L. No. 105-277, § 741, 112 Stat. 2681-30 to 2681-31 (Section 741) (codi fied at 7 U.S.C. 2279 note). Section 741 extended the statute of limitations for filing such claims of discrimina tion to two years from its enactment (i.e., to October 21, 2000). Pet. App. 177a. Congress's purpose in enacting Section 741 was to provide a remedy for individuals who claimed to have been victims of discrimination in the 1980s and early 1990s because Congress found that USDA's processes for reviewing civil rights complaints "did not function effectively" during much of the those decades. 63 Fed. Reg. 67,392 (1998); see also 144 Cong. Rec. 23,276-23,277 (1998) (statement of Sen. Robb).

The practical effect of Section 741 was to resurrect a number of discrimination claims against USDA that would otherwise have been time-barred. Congress achieved that goal by providing two distinct and alterna tive avenues by which claimants could seek relief. First, Section 741(a) extended until October 21, 2000, the time in which an individual with an eligible claim could file suit in federal district court under ECOA. Section 741(a), 112 Stat. 2681-30; Pet. App. 7a. Second, Section 741(b) created a new administrative remedy that al lowed individuals to "seek a determination on the merits of the[ir] eligible complaint" by USDA "in lieu of filing a civil action," provided they sought such relief by Octo ber 21, 2000. Section 741(b), 112 Stat. 2681-30 to 2681- 31; Pet. App. 7a. Subsection (b) required USDA to time ly process renewed administrative complaints, to inves tigate the claims therein, and to issue merits

determi nations-including the awarding of appropriate relief- after a hearing on the record. Ibid. Subsection (b) also directed USDA to issue decisions in such cases within 180 days if possible, and specified that USDA's denial of any such claim is subject to de novo judicial review in federal court. Ibid.

2. Days before the October 21, 2000 deadline, peti tioners-a putative class of Hispanic farmers (the Gar cia petitioners) and a putative class of female farmers (the Love petitioners)-filed separate actions in federal district court under, inter alia, ECOA, alleging that USDA discriminated against them in a variety of lend ing programs from 1981 through 1996. Pet. App. 7a, 27a-28a. In so doing, petitioners elected to proceed un der Section 741(a) rather than renewing their adminis trative complaints before the agency pursuant to Sec tion 741(b). Although petitioners chose to forego the administrative review of their claims, petitioners also asserted claims under the APA that USDA failed prop erly to investigate their earlier administrative com plaints of discrimination. Id. at 7a-8a, 28a. Petitioners in each case sought to proceed as a class action under Federal Rule of Civil Procedure 23.1

In separate rulings in Love and Garcia, the district court denied petitioners' motions for class certification. Pet. App. 128a-156a, 157a-173a. Petitioners filed inter locutory appeals pursuant to Federal Rule of Civil Pro cedure 23(f) and 28 U.S.C. 1292(b), and the court of ap peals affirmed the denials of class certification in both cases. Pet. App. 51a-65a, 78a-89a. The court of appeals also affirmed the district court's dismissal of petitioners' claim under ECOA that USDA failed to investigate dis crimination complaints, finding that such action does not qualify as a "credit transaction" under ECOA. Id. at 66a, 89a-91a. The court of appeals declined, however, to exercise jurisdiction over petitioners' appeal from the dismissal of their failure-to-investigate claims under the APA. Noting that "the class certification issues took most of the trial court's and the parties' attention," the court concluded that "this claim will benefit from fur ther development in the district court." Id. at 66a; see id. at 91a.

On remand, the district court reconsidered whether petitioners' allegations that USDA had previously failed to investigate their discrimination complaints are cogni zable under the APA, and held that they are not. Pet. App. 31a-36a. The court noted that "[t]he APA provides for judicial review only where plaintiffs have 'no other adequate remedy in a court.'" Id. at 31a (quoting 5 U.S.C. 704). Because the court found that "Congress has expressly addressed the exact injury of which plain tiffs complain, and provided a 'special' and 'adequate' remedy for their wrong," ibid. it concluded that plain tiffs were not permitted to seek review of that injury directly under the APA. Id. at 31a-36a. The court found that the remedy Congress provided in Section 741 is "plainly 'adequate,'" because it not only extended "all applicable periods of limitation for those prejudiced by agency inaction," but "also allowed any eligible com plainant to 'seek a determination on the merits of the eligible complaint by the Department of Agriculture'- in other words, to take up her complaint again with the agency." Id. at 32a (quoting Section 741(b)). Because Congress provided twin avenues of relief-renewed ad ministrative complaint or judicial action under ECOA- to remedy any injury caused by USDA's alleged failure to investigate complaints of discrimination, the court held that 5 U.S.C. 704 precludes petitioners from assert ing failure-to-investigate claims under the APA. Pet. App. 32a-36a.

3. With permission from the district court and the court of appeals, petitioners filed an interlocutory ap peal pursuant to 28 U.S.C. 1292(b), and a unanimous panel of the court of appeals affirmed. Pet. App. 1a-19a. The court noted that the APA, through 5 U.S.C. 704, permits judicial review of "final agency action" that is not expressly made reviewable by statute only when "there is no other adequate remedy in a court." Pet. App. 9a (quoting 5 U.S.C. 704). Relying on this Court's holding in Bowen v. Massachusetts, 487 U.S. 879, 904 (1988), that 5 U.S.C. 704 precludes APA review of agency action when Congress has otherwise provided a "special and adequate review procedure," Pet. App. 9a, the court concluded that the remedy provided in Section 741 is sufficient to preclude APA review of petitioners' failure-to-investigate claims, id. at 9a-16a.

The court reasoned that, "[b]y extending the statute of limitations for administrative complaints and by pro viding for judicial review of USDA's determinations, Congress provided [petitioners] an adequate remedy in court within the meaning of the APA." Pet. App. 12a. The court noted that "there is clear and convincing evi dence that in enacting Section 741 Congress did not in tend for complainants who choose to proceed in the dis trict court on their ECOA claims to pursue their failure- to-investigate claims under the APA simultaneously in the same lawsuit." Id. at 11a. The court explained that "Congress resurrected time-barred claims and gave such complainants two options: either file a complaint in the district court or renew their administrative com plaint with the USDA with subsequent judicial review if the USDA denied relief." Ibid. The court held that, because petitioners elected to proceed directly to dis trict court under Section 741(a), 5 U.S.C. 704 precludes them from simultaneously pursuing an APA claim seek ing "declaratory and injunctive relief that the USDA should have investigated their old, unrenewed adminis trative complaints." Pet. App. 12a. The court reasoned that allowing plaintiffs to proceed as petitioners wished "would effectively rewrite the statute that Congress specifically enacted in response to the USDA's failure to address discrimination complaints." Id. at 13a. The court observed that petitioners could have "renewed their administrative complaints pursuant to Section 741(b) and thereby attempted to obtain relief pursuant to the APA through the USDA's administrative pro cess." Ibid. Had they chosen this option, they would also have been able to compel any agency action that was unreasonably delayed. Id. at 13a-14a. The court of appeals found that it was not free to rewrite Section 741 by eliminating the provision requiring "eligible com plainants to make a choice between two remedial re gimes." Id. at 14a.

The court also held that petitioners' APA claims would be independently barred even if they were cor rect that it was futile to pursue the available administra tive avenue of relief because petitioners had an ade quate statutory remedy in ECOA. Pet. App. 14a-18a. "Under the ECOA," the court explained, "to the extent [petitioners] can offer proof that the USDA discrimi nated against them in the administration of its credit programs, [petitioners] will be entitled to recover money damages and attorneys' fees, and, as appropri ate, also injunctive and declaratory relief." Id. at 14a. Such a remedy, the court concluded is "adequate to pre clude a cause of action under the APA." Ibid.

ARGUMENT

The interlocutory decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's re view is therefore not warranted.

1. Initially, the interlocutory posture of this case makes it unsuitable for further review at this time. See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); VMI v. United States, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). On remand, peti tioners will be able to pursue their individual discrimi nation claims against USDA under ECOA and may well receive all of the relief to which each is entitled through that avenue of relief. If, when the district court issues a final order as to a particular petitioner's claims, that petitioner remains unsatisfied with her inability to pur sue a failure-to-investigate claim directly under the APA, she may seek this Court's review of the ultimate disposition of her individual case at that time.

2. Petitioners' primary contention is that the court of appeals' interpretation of 5 U.S.C. 704 conflicts with this Court's interpretation of that provision in Bowen v. Massachusetts, 487 U.S. 879 (1988). Petitioners are mistaken.

a. The Court in Bowen considered, inter alia, the interplay of two different provisions of the APA- 5 U.S.C. 702 and 5 U.S.C. 704. 487 U.S. at 891, 901-908. As a general matter, the APA provides a cause of action to challenge agency action in federal district court, sub ject to certain restrictions. District courts have juris diction over such suits pursuant to 28 U.S.C. 1331, see Chrysler Corp. v. Brown, 441

U.S. 281, 317 n.47 (1979); and 5 U.S.C. 702 expressly waives the United States' sovereign immunity to such suits to the extent they do not seek money damages, see Darby v. Cisneros, 509 U.S. 137, 152 (1993). Judicial review under Section 704 is limited, however to "final agency actions for which there is no other adequate remedy in a court." 5 U.S.C. 704. As this Court explained in Bowen, Section 704 "does not provide additional judicial remedies in situa tions where the Congress has provided special and ade quate review procedures." 487 U.S. at 903 (quoting Tom C. Clark, Attorney General's Manual on the Adminis trative Procedure Act 101 (1947)).

The Court in Bowen described the APA's place among other types of review of federal administrative action:

At the time the APA was enacted, a number of stat utes 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 re gional courts of appeals, and Interstate Commerce Commission orders were subject to review in spe cially constituted three-judge district courts. When Congress enacted the APA to provide a general au thorization for review of agency action in the district courts, it did not intend that general grant of juris diction to duplicate the previously established spe cial statutory procedures relating to specific agen cies.

487 U.S. at 903 (footnotes omitted). Petitioners rest their entire argument (see Pet. 10-17) on the final phrase of that passage-"previously established special statutory procedures relating to specific agencies"-arguing that Section 704 precludes judicial review of agency action only when an adequate alternative rem edy already existed at the time the APA was enacted. But the quoted passage merely describes the types of adequate alternative remedies Congress intended to be sufficient to preclude resort to the APA (remedies that by definition must have existed prior to the APA in or der for Congress to have had them in mind) as a way of introducing the Court's discussion of why the alterna tive remedy that the United States argued was adequate in that case (i.e., review in the Court of Claims) was not, in fact, adequate.

There is no basis for construing the Court's language in Bowen as imposing a temporal restriction on the types of alternative remedies that would preclude resort to the APA under Section 704. The opinion in Bowen makes clear that Congress's intent in enacting Section 704 was to authorize judicial review of final agency action where no other adequate remedy is avail able. 487 U.S. at 902-903. That intent remains the same regardless of whether the adequate alternative remedy in question in a particular case came into being before or after the APA was enacted. As petitioners note (see Pet. 12-17), the D.C. Circuit has an unbroken chain of precedent interpreting Section 704 and Bowen as pre venting plaintiffs from seeking judicial review of agency action under the APA when the plaintiffs have an alter native adequate remedy. See, e.g., El Rio Santa Cruz Neighborhood Health Ctr. v. HHS, 396 F.3d 1265, 1270 (2005); National Wrestling Coaches Ass'n v. Depart ment of Educ., 366 F.3d 930, 945-948 (2004); Washing ton Legal Found. v. Alexander, 984 F.2d 483, 486 (1993); Women's Equity Action League v. Cavazos, 906 F.2d 742, 750-751 (1990); Council of & for the Blind v. Regan, 709 F.2d 1521, 1531-1533 (1983) (en banc). In fact, petitioners do not cite a single case endorsing their view of Bowen or 5 U.S.C. 704.

b. Petitioners attempt (Pet. 14-15) to ground their proposed temporal restriction in 5 U.S.C. 559 (Section 12 of the APA as enacted, 79th Cong., ch. 324, 60 Stat. 244), which provides: "Subsequent statute may not be held to supersede or modify * * * chapter 7 [5 U.S.C. 701 et seq.] * * * , except to the extent that it does so expressly." See Pet. App. 174a-175a. Although petition ers do not spell out their argument in detail, presumably they mean to suggest that a statutory remedy enacted after the APA can never preclude a plaintiff from seek ing review of agency action under the APA unless the statute explicitly states its intention to do so. But that reading of 5 U.S.C. 559 misunderstands its plain text.

Statutory remedies enacted after the APA preclude petitioners' use of the APA to seek review of administra tive action when the remedies are "adequate" within the meaning of 5 U.S.C. 704. The fact that such an adequate remedy's enactment post-dates the APA's does not mean that the later-enacted remedy "supersede[s] or modif[ies]" Section 704 within the meaning of 5 U.S.C. 559. With or without the later-enacted remedy, Section 704 still requires that an alternative remedy be "ade quate" in order to preclude the use of the APA. The relevant question as to such a post-APA remedy is the same as it was in Bowen as to the pre-APA remedy: is it "adequate" within the meaning of Section 704? Thus, the court of appeals' interpretation of the meaning of 5 U.S.C. 704 is perfectly consistent with this Court's decision in Bowen.2

3. Petitioners also argue (Pet. 18-26) that the court of appeals erred in holding that the remedies Congress provided in Section 741 are adequate and therefore pre clude petitioners' filing of an APA action simultaneously with their ECOA actions. Petitioners do not contend that the court of appeals' decision on that issue directly conflicts with any decision of this Court or of any other court of appeals. Even if they could identify such a con flict, the court of appeals' decision would not warrant further review at this time because it is correct.

Petitioners do not dispute that Congress enacted Section 741 specifically to address the past deficiencies in USDA's investigation of discrimination complaints. Section 741 offers eligible farmers a choice of remedies: (1) they can pursue their claims that USDA discrimi nated against them in its lending programs directly un der ECOA in federal district court, Section 741(a); or (2) they can resurrect their original complaint by filing a renewed administrative complaint with USDA, Section 741(b). Petitioners all opted for the first choice, filing the underlying actions in district court under ECOA.

Petitioners argue (Pet. 18-19) that ECOA is not an adequate remedy because, as both the district court and the court of appeals found, plaintiffs cannot pursue their failure-to-investigate claims under ECOA. But that argument misses the point. Petitioners can pursue their discrimination-in-lending3 claims in district court di rectly under ECOA, and do not contend that ECOA is not an adequate remedy for those grievances. Petition ers' claims of discrimination are at the heart of this dis pute, and ECOA entitles prevailing parties to money damages and attorneys fees, as well as declaratory and injunctive relief. Pet. App. 14a. The court of appeals correctly held that petitioners' ability to sue USDA di rectly in federal court for discrimination in the adminis tration of its lending programs is an adequate alterna tive remedy within the meaning of 5 U.S.C. 704.

Petitioners also argue (Pet. 21-26) that the alterna tive remedy provided in Section 741(b)-the ability to file a renewed administrative complaint with USDA, the resolution of which will be subject to de novo judicial review-is inadequate and, therefore, cannot preclude petitioners' filing suit directly under the APA to assert their failure-to-investigate claims. As an initial matter, petitioners do not even attempt to explain why they can only be made whole by pursuing failure-to-investigate claims that are separate and apart from their discrimi nation claims under ECOA. Petitioners' discrimination- in-lending claims form the basis of their cases and they do not dispute that ECOA is an adequate remedy for those claims.

Instead, petitioners argue (Pet. 22-25) that USDA's administrative complaint process-a process none of them opted to pursue-continues to be plagued by prob lems and inefficiencies. Even if that were true (which the government does not concede), it would not under mine the adequacy of petitioners' remedy under ECOA. The result of USDA's failure over two decades to inves tigate claims of discrimination in lending by the agency and its subunits was that farmers who believed they had suffered discrimination in the agency's programs had nowhere to turn to seek redress. Congress fixed that problem by retroactively extending the statute of limita tions under ECOA for those farmers, and petitioners took advantage of that solution. The fact that Congress also provided an alternative revised administrative process-a process in which none of petitioners opted to participate-does not affect the adequacy of petitioners'

renewed opportunity to file ECOA claims in district court.

4. Finally, petitioners contend (Pet. 26) that review by this Court is warranted because principles of fairness and equity demand that they be allowed to pursue the same remedies in the exact same procedural posture (e.g., a class action) as the African-American farmers in Pigford and the Native-American farmers in Keepseagle. But the suitability of petitioners' claims for disposition as class actions was not before the court of appeals in this appeal and is not before this Court now. Petitioners appealed the district court's denial of mo tions to certify classes in a previous appeal, see Pet. App. 40a-67a, 68a-92a and chose not to seek certiorari review by this Court at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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1 At roughly the same time that petitioners filed their ECOA claims in these cases, a putative class of Native-American farmers filed a sep arate ECOA action in district court alleging discriminatory conduct by USDA similar to the conduct alleged here. See Keepseagle v. Veneman, No. 99-3119, 2001 WL 34676944 (D.D.C. Dec. 12, 2001). The district court in Keepseagle certified a class action under Federal Rule of Civil Procedure 23(b)(2) on the ground that the failure-to-investigate claim asserted in that case presented a common issue among the class members. Id. at *12-*15. The court of appeals dismissed USDA's in terlocutory appeal under Federal Rule of Civil Procedure 23(f) and refused to reach what it characterized as the "merits" question of whether the failure-to-investigate claim was cognizable under the APA. See In re Veneman, 309 F.3d 789, 793-796 (D.C. Cir. 2002).

2 In any event, because petitioners did not argue to the court of appeals that Bowen requires different treatment of alternative remedies enacted after the APA compared with remedies enacted prior to the APA, they waived that argument. See Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212-213 (1998).

3 Petitioners argue (Pet. 18-19) that the court of appeals' determina tion that ECOA is an adequate remedy for petitioners' claims is erroneous because some petitioners raise, as the court of appeals described them, "APA claims that the USDA discriminated in dispers ing non-credit disaster benefits, which are not covered by Section 741." Pet. App. 19a. Because the district court remanded those claims for further proceedings in the district court, however, ibid., they are not properly before this Court for further review.