OPINION

Courts Say COVID-19 Relief Can't Discriminate.

Sweeping claims of "systemic racism" do not justify discriminating against white Americans.

By Jane Coleman | July 26, 2021

For many Americans struggling through a shut-down economy during the pandemic, government-sponsored coronavirus relief funds offered a lifeline. The funds were limited, however. As one court put it, "the key" to getting a government

grant was to "get in the queue before the money [ran] out." But for white American farmers like Robert Holman, there was to be *no* line to relief. The government's loan forgiveness program in the American Rescue Plan Act of 2021 (ARPA) allocated those funds based on race, and non-minority farmers need not apply.

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ARPA is the $1.9 trillion coronavirus relief package signed into law by President Biden this past March. Soon after it was enacted, critics seized on its bold provisions allocating funds to "socially disadvantaged" farmers and ranchers. According to the USDA, "socially disadvantaged" meant Blacks and other racial minorities. Relief to restaurant owners was similarly prioritized based on race and gender. The ARPA loan programs were so blatantly discriminatory that it was hard to see them as anything other than DOA once they could be placed in front of a fair-minded judge.

And so it happened earlier this month in *Holman v. Vilsack*, when United States District Court Judge S. Thomas Anderson issued a preliminary injunction to stop the Agriculture Department from awarding debt relief to farmers based on their race under Section 1005 of the $1.9 trillion American Rescue Plan. It was the latest in a line of cases where non-minority plaintiffs challenged the race-based pandemic relief programs. Aligning with decisions in four other courts, *Holman* reflects a judicial consensus that the government cannot rely on mere assertions of

"systemic racism" to justify discriminating against Americans based on race.

Robert Holman, a white fourth-generation farmer in Tennessee, sued the federal government over its ARPA program offering loan relief to Blacks and other minorities while expressly denying it to similarly situated white farmers. That practice, he argued, violated his right to be treated equally under the law,

and the court agreed.

PHOTO: FARMLAND.

CONSTITUTIONAL VIOLATIONS WARRANT EMERGENCY RELIEF

In his lawsuit, Holman asked the court to halt the program immediately, before the parties went to a full trial. A party requesting this type of emergency relief, called a "preliminary injunction," must meet a high standard in line with the "extraordinary and drastic" nature of the remedy. That standard focused the court's attention on whether Holman was likely to win his case should it go all the way to trial. Four other federal courts, including those reported on in Human

Events, had already answered "yes" to the same or similar questions and granted emergency relief. So the *Holman* court, now presented with essentially the same issue, was poised to reach the same result.

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To determine whether Holman would likely win his case, the court would have to decide whether the ARPA debt-relief program could pass constitutional muster. Policies that discriminate based on race are subject to yet another high standard, "strict scrutiny." That means the government has to show that the policy is "the least restrictive means of achieving a compelling state interest." In other words, even where the government can show it has a compelling interest, it still has to show that its program is "narrowly tailored" to serve that interest. As the Sixth Circuit observed, it is a "very demanding standard, which few [discriminatory] programs will survive."

In *Holman*, the government, meaning the Biden administration, failed both parts of the test.

First, it was unable to enunciate a compelling state interest to justify favoring one race over another. The government had claimed that offering to forgive a farmer's debt based on race was necessary "to remedy the lingering effects of long-standing racial discrimination in USDA programs"—in other words "systemic racism." According to the government:

> *"The evidence in the record reveals systemic racial discrimination by the USDA (and in particular the FSA) throughout the twentieth century which has compounded over time, resulting in bankruptcies, land loss, a reduced number of minority farmers, and diminished income for the remaining minority farmers. Defendants argue that Section 1005 is necessary to reverse the years of economic discrimination against minority farmers."*

But every one of the other four courts that ruled prior to *Holman v. Vilsack*—*Vitolo v. Guzman* (May 2021), *Faust v. Vilsack* (June 2021), *Wynn v. Vilsack* (June 2021), and *Miller v. Vilsack* (July 2021)— "rejected systemic racial discrimination as a compelling state interest to support race-based legislation."

That does not mean that remedial policies can *never* justify preferential treatment based on race. But, as the Sixth Circuit observed in *Vitolo v. Guzman* in May this year, "the bar is a high one." To establish a compelling state interest in remedying past discrimination, the government would have to meet (another) demanding test: It would first have to show that the policy targeted a "specific episode" of past discrimination. Second, it must provide "evidence of intentional discrimination in the past." And finally, "the government must have had a hand in the past discrimination it now seeks to remedy."

Here again, the government was unable to come up with the kind of concrete evidence necessary to make its case. Its sweeping claims of systemic racism were insufficient to demonstrate a compelling state interest:

> *"[T]he evidence does not show that Section 1005 targets a specific episode of past discrimination. Defendants have pointed to statistical and anecdotal evidence of a history of discrimination by the USDA. But it is well-settled that a 'generalized assertion that there has been past discrimination in an entire industry' cannot establish a compelling interest."*

Second, even if the government had shown a compelling state interest in remedying specific episodes of discrimination, the *Holman* court explained, it still would have to show that its program was "narrowly tailored" to serve that interest.

To do that, the government needed to establish, among other things, that Congress considered other, race-neutral, measures. But in *Holman* the government could not point to any race-neutral alternatives that Congress considered in creating the race-based loan relief program.

Moreover, quoting the court's decision in *Wynn*, the *Holman* court noted that

So Vitolo sued to "stop the government from handing out the grants based on… race and sex," claiming its policy violated his constitutional rights. The court agreed.

As in *Holman*, the government in *Vitolo* claimed it had a compelling interest in remedying societal discrimination—here against minority business owners. But when pressed by the court to back up that claim, the government could only say that "Congress identified a 'theme' that 'minority- and women-owned businesses' needed targeted relief from the pandemic because Congress's 'prior relief programs had failed to reach' them."

"Themes" and motifs may be useful devices for understanding literary fiction. But a vague reference to a "theme," the Vitolo court held, cannot justify race-based distribution of governmental relief funds. Simply put,

> *"[T]he government has not shown that it participated in the discrimination it seeks to remedy. An observation that prior,*

> *race-neutral relief efforts failed to reach minorities is no evidence at all that the government enacted or administered those policies in a discriminatory way.”*”

PHOTO: UNITED STATES SUPREME COURT BUILDING.

STOP DIVIDING AMERICANS UP BY RACE

By holding the government to account for its discriminatory laws, these courts have restored the element of fundamental fairness that was so lacking in the race-based relief programs. Note that the judges did not dispute the “sad history” of racism in our

country. And they carefully and painstakingly considered the government's claims that past system-wide discrimination against minorities justified denying benefits to white men. In the end, though, the government's evidence simply fell short, "as any past discrimination [was] too attenuated from any present-day lingering effects to justify race-based remedial action by Congress."

The government may have acted with the best of intentions to remedy past injustice. But denying someone a benefit, as the government did to white men under the ARPA, is, generally speaking, a penalty. Instead of penalizing people based on their skin color, the government should strive for fundamental fairness, equal opportunity, and equal protection under the law. The courts were right to nix dividing Americans up by race. As Chief Justice Roberts famously observed, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

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