No. 21-11271

United States Court of Appeals for the Fifth Circuit

SID MILLER, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, **GREG MACHA**, **JAMES MEEK**, **LORINDA O'SHAUGHNESSY**, **JEFF PETERS**,

Plaintiffs-Appellees,

v.

TOM VILSACK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE,

Defendant-Appellee,

v.

FEDERATION OF SOUTHERN COOPERATIVES/LAND ASSISTANCE FUND,

Movant-Appellant.

Appeal from the U.S. District Court for the Northern District of Texas
Case No. 4:21-cv-00595 (Hon. Reed O'Connor)

BRIEF OF MOVANT-APPELLANT THE FEDERATION OF SOUTHERN COOPERATIVES

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CERTIFICATE OF INTERESTED PERSONS

The following persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that members of the Court may evaluate possible recusal.

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Movants-Conditional Interveners

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Dated: December 30, 2021

Respectfully submitted,
/s/ Andrew E. Tauber
Andrew E. Tauber

Counsel for Movant-Appellant The Federation of Southern Cooperatives/Land Assistance Fund

STATEMENT REGARDING ORAL ARGUMENT

The Federation of Southern Cooperatives/Land Assistance Fund believes that oral argument would assist the court in proper resolution of this appeal but is prepared to waive oral argument if waiver is necessary for expedited consideration of the appeal.

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INTRODUCTION

This litigation involves Section 1005 of the American Rescue Plan Act of 2021. Section 1005, which directs the United States Department of Agriculture ("USDA") to deliver debt relief to socially disadvantaged farmers, is intended to remedy the continuing effects of USDA discrimination against Black and other minority farmers. Arguing that Section 1005 violates the Constitution, White farmers have sued to block implementation of Section 1005. The provision is being defended by the Secretary of Agriculture, the head of the very agency that has long discriminated—and continues to discriminate—against Black and other minority farmers.

The question on appeal is whether the Secretary of Agriculture adequately represents the interests of Black farmers in defending Section 1005. He does not.

Appellant Federation of Southern Cooperatives/Land Assistance Fund (the "Federation"), an association of Black farmers, moved to intervene in defense of Section 1005. The district court denied its motion, holding that the Federation was not entitled to intervene as a matter of right because, according to the court, the Secretary adequately represents the interests of the Federation and its members. That was legal error.

The Federation showed that the Secretary's interests diverge from and conflict with those of the Federation and its members in material ways. Among other things, the Federation showed that, consistent with his

institutional interests, the Secretary will present no evidence of current or recent discrimination by USDA against Black farmers even though such evidence, which the Federation would present, would significantly enhance the chances of Section 1005 being held constitutional. The Federation also showed that, in threatening to foreclose on Black farmers' farms during the pendency of this litigation, the Secretary has a clear conflict of interest that undermines his ability to vigorously defend Section 1005.

Because the Federation demonstrated that the Secretary does not adequately represent its interests and there is no dispute that the Federation satisfied each of the other criteria set forth in Rule 24(a) of the Federal Rules of Civil Procedure, the district court erred in denying the Federation's motion to intervene as a matter of right.

The district court also clearly abused its discretion in denying the Federation's alternative request for permissive intervention. The court reached a patently erroneous result based on factual errors, erroneous conclusions of law, and a misapplication of the law to the facts of the case.

Unless the district court is reversed, the constitutionality of Section 1005 will be decided on an incomplete record and without full briefing of all relevant issues. That is contrary to not only the Federation's interest but also the public interest.

This Court should therefore overturn the decision below and allow the Federation to intervene in defense of Section 1005.

JURISDICTIONAL STATEMENT

The district court has jurisdiction over the underlying litigation pursuant to 28 U.S.C. §§ 1331 and 1343. The district court entered an order denying the Federation's motion to intervene on December 8, 2021. ROA.2546-2551. "The denial of a motion to intervene of right is an appealable final order under 28 U.S.C. § 1291." *Edwards v. City of Hous.*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc); *accord Rotstain v. Mendez*, 986 F.3d 931, 936 (5th Cir. 2021). The Federation filed a timely notice of appeal on December 17, 2021. ROA.2561-2564. Thus, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred when it held that the Federation is not entitled to intervene as a matter of right.

2. Whether the district court abused its discretion in denying the Federation permissive intervention.

STATEMENT OF THE CASE

A. Section 1005 and the Department of Agriculture's racially discriminatory loan practices

Section 1005 of the American Rescue Plan Act directs the USDA to deliver debt relief through loan assistance for socially disadvantaged farmers and ranchers. Section 1005 authorizes the Secretary of the USDA to give a "payment in an amount up to 120 percent of the outstanding indebtedness

of each socially disadvantaged farmer or rancher as of January 1, 2021, to pay off the loan directly or to the socially disadvantaged farmer or rancher." Am. Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005(a)(2), 135 Stat. 4. The USDA defines "socially disadvantaged" farmers and ranchers ("SDFR") consistent with Section 2501 of the Food, Agriculture, Conservation, and Trade Act of 1990, 7 U.S.C. 2279(a) ("Section 2501"). According to Section 2501, an SDFR is a farmer or rancher of a socially disadvantaged group whose members have been subjected to racial or ethnic prejudice with no regard to their individual qualities. *Id*. The USDA has interpreted the term SDFR as including, but not limited to, "American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos." Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28,329, 28,330 (May 26, 2021).

USDA's definition of "socially disadvantaged" farmers and ranchers is appropriate considering the decades-long history of and continuing discrimination against minority famers in USDA loan programs. The Farm Service Agency ("FSA"), housed under the USDA, was created in 1933 as a part of the New Deal to address the fall of crop prices after the Great Depression and provide loans to family-sized farms that were not able to obtain credit from commercial banks or other lenders. History of USDA's Farm Service Agency. Agency History, USDA, https://www.fsa.usda.gov/

about-fsa/history-and-mission/agency-history/index (last accessed Dec. 27, 2021); *Garcia v. Vilsack*: A Policy and Legal Analysis of a USDA Discrimination Case, 3-4 (2013), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R40988.pdf.

Between 1937 and 1961, four congressional changes to USDA loan programs had a disproportionate adverse impact on Black farmers. Jonathan Coppess, The History and Development of USDA Farm Loan Programs, Part 3: 1946 to 1961, Mar. 25, 2021, https://farmdocdaily.illinois.edu/2021/03/the-history-and-development-of-usda-farm-loan-programs-part-3-1946-to-1961.html. The Acts of 1937, 1946, 1956, and 1961 revised eligibility for USDA loans. *Id.* The revisions ultimately shifted loan eligibility from farm tenants, laborers, and sharecroppers to family farm owner-operators with farm background and either farming training or experience who were unable to get credit elsewhere. *Id.* The revisions made it easier for FSA county committees—which exercise "vast discretion and ability to impact the loan making decision" and consist almost entirely of White men—to deny loans to Black farmers, sharecroppers, and laborers. *Id.*; *see also* ROA.2329 (Declaration of Cornelius Blanding ("Blanding Decl.") ¶ 9). As a direct and proximate result, the number of Black farmers in the country decreased by a staggering 90.6% between 1920 and 1969. *See* Coppess, *supra* (citing census data that showed 925,708 Black farm operators in 1920, versus 88,393 in 1969).

Since 1965, the federal government has continued its pattern of discrimination against Black farmers. *See* Environmental Working Group, Timeline: Black Farmers and the USDA, 1920 to Present, https://www.ewg.org/research/black-farmer-usda-timeline/ (last accessed Dec. 27, 2021). In 1997, the USDA created the Civil Rights Action Team ("CRAT"). In a report issued that year, CRAT found that Black farmers were experiencing the same discrimination documented in reports dating back to 1965. USDA, Civil Rights Action Team, Civil Rights at the United States Department of Agriculture 14 (1997), https://acresofancestry.org/wp-content/uploads/2021/01/CRAT-Report-.pdf (last accessed Dec. 27, 2021). The report found:

> The minority or limited-resource farmer tries to apply for a farm operating loan through the FSA county office well in advance of planting season. The FSA County office might claim to have no applications available and ask the farmer to return later. Upon returning, the farmer might receive an application without any assistance in completing it, then be asked repeatedly to correct mistakes or complete oversights in the loan application. Often those requests for correcting the application could be stretched for months …. By the time processing is completed, even when the loan is approved, planting season has already passed and . . . the farmer's profit is then reduced. If the farmer's promised FSA loan finally does arrive, it may have been arbitrarily reduced.... [I]n some cases, the FSA loan never arrives ….

Id. at 15.

Tragically, the pattern of discriminatory conduct with respect to FSA loans continues, and many Black farmers today face substantial debt because of this discrimination. *See generally* ROA.2321 (Declaration of Marcus

Anton Batten); ROA.2333 (Declaration of Kelvin James Cannon); ROA.2338 (Declaration of Fredrick Hall); ROA.2342 (Declaration of Brandon Smith); ROA.2345 (Declaration of Bobby L. Wilson).

The benefits conferred by Section 1005 are a crucial lifeline for these Black farmers whose debts affect the viability of their farms. *See* ROA.2324 (Batten Decl. ¶ 19); ROA.2336 (Cannon Decl. ¶ 16); ROA.2340 (Hall Decl. ¶ 19); ROA.2348 (Wilson Decl. ¶ 34). Without the promised loan forgiveness, many farmers will lose their farms to foreclosure and bankruptcy. *See, e.g.*, ROA.2324 (Batten Decl. ¶ 19). After learning that they were eligible for assistance through Section 1005, many Black farmers made significant farming plans and purchases in foreseeable reliance on the provision's promised debt relief. Conversely, they will face severe, life-changing disadvantage—if not outright ruin—if the relief does not come through. *See* ROA.2331 (Blanding Decl. ¶ 17); ROA.2324 (Batten Decl. ¶ 15); ROA.2335-2336 (Cannon Decl. ¶ 15); ROA.2340 (Hall Decl. ¶ 16); ROA.2343 (Smith Decl. ¶ 6); ROA.2346, 2348 (Wilson Decl. ¶¶ 18, 34).

B. The underlying litigation

On April 26, 2021, Plaintiff Sid Miller—who describes himself as "overwhelmingly white" (ROA.57 (¶ 13))—filed this lawsuit on behalf of himself "and others similarly situated." ROA.52. Naming Tom Vilsack in his official capacity as Secretary of Agriculture as the defendant, Miller alleged that Section 1005 violates Title VI of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000d, and the United States Constitution, because it allegedly "exclude[s him] from the benefits of programs for 'socially disadvantaged farmers and ranchers' on account of his race." ROA.57 (¶ 14).

On June 2, 2021, Miller and four others—each of whom self-identifies as "white" (ROA.386, 390 (¶¶ 4–7, 20–23)) filed an amended complaint "on behalf of themselves and others similarly situated," raising identical claims under Title VI and the U.S. Constitution. ROA.384.

That same day, Plaintiffs moved for class certification (ROA.649-651) and for a preliminary injunction to prevent the Secretary "from discriminating on account of race or ethnicity in administering section 1005 of the American Rescue Plan Act." ROA.719-721.

On June 29, 2021, the Secretary answered Plaintiffs' Amended Complaint but moved to dismiss the statutory claim it asserted, arguing that the Secretary is not subject to Title VI of the Civil Rights Act of 1964. ROA.1356-1358; ROA.1381-1389.

On June 30, 2021, the district court held a hearing on Plaintiffs' motions for class certification and a preliminary injunction. ROA.36. It granted both in an omnibus order entered the next day, July 1, 2021. ROA.1497-1520.

The district court's July 1 order enjoins the government from providing loan forgiveness to Black farmers and other SDFRs pursuant to Section 1005. In particular, the injunction prohibits USDA from

> (a) considering or using an applicant Class Member's race or ethnicity as a criterion in determining whether that applicant will obtain loan assistance, forgiveness, or payments; and (b) considering or using any criterion that is intended to serve as a proxy for race or ethnicity in determining whether an applicant Class Member will obtain loan assistance, forgiveness, or payments.

ROA.1520.

In granting the preliminary injunction, the court concluded that "that Plaintiffs are likely to succeed on the merits of their claim that the Government's use of race- and ethnicity-based preferences in the administration of the loan-forgiveness program violates equal protection under the Constitution." ROA.1511. That conclusion rested in part on the Government's "admi[ssion] that the USDA is not currently discriminating against any socially disadvantaged farmers or ranchers." ROA.1512 (citing ROA.2598-2698); *cf.* ROA.2629.

On September 22, 2021, the district court stayed Plaintiffs' deadline to respond to the Secretary's motion to dismiss and granted Plaintiffs leave to file a second amended complaint. ROA.1909-1910. Plaintiffs filed their Second Amended Complaint that same day. ROA.1912-2172. On October 6, 2021, the Secretary moved to dismiss Plaintiffs' Second Amended Complaint in part, again arguing that the Secretary is not subject to Title VI. ROA.2250-2252.

On November 12, 2021, the district court granted Plaintiffs leave to file their Third Amended Complaint and dismissed the Secretary's pending

motion to dismiss as moot. ROA.2477. The same day, Plaintiffs filed their Third Amended Complaint, which dropped their Title VI claim. ROA.2478-2486. The Secretary has not moved to dismiss Plaintiffs' remaining constitutional claim.

Under the current scheduling order, discovery closes on February 25, 2022, and motions for summary judgment are due March 11, 2022. ROA.1909.

C. The Federation's motion to intervene.

On October 12, 2021, a month before Plaintiffs filed their Third Amended Complaint, the Federation filed a motion seeking intervention as of right or, in the alternative, permissive intervention. ROA.2285-2288.

The Federation, created in 1967, is a nonprofit association of Black farmers, landowners, and cooperatives. ROA.2326 (¶ 2). The Federation has roughly 20,000 members. ROA.2327 (¶ 2). Its membership is almost exclusively Black, and many of the farmers who are part of the Federation are multigenerational farmers. ROA.2327 (¶ 2). Members are located all over the southeast United States, including in Texas, Louisiana, Mississippi, Georgia, Alabama, Florida, and South Carolina. ROA.2327 (¶ 2). Thousands of Black farmers, including approximately 150 Federation members, would qualify for debt relief under Section 1005. ROA.2330 (¶ 13).

In its motion, the Federation argued that it was entitled to intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure

because its timely motion showed that the Federation—an association of Black farmers—had an interest in the litigation, that resolution of the litigation in Plaintiffs' favor would materially impair the Federation's interest, and that the Secretary did not adequately represent the Federation's interest. As for the latter factor, the Federation observed that "the Secretary of Agriculture can hardly be expected to articulate the USDA's present-day and historical discrimination against minority farmers and inadequacies of previous reforms—certainly not to the same extent that victims of that discrimination will, particularly when doing so could expose his agency to liability and constitute evidence in potential later suits claiming discrimination." ROA.2313. Substantiating that observation, the Federation submitted affidavits from several of its members describing recent and current discrimination in USDA's loan practices and the financial harm that they are experiencing as a result. ROA.2321-2325; ROA.2333-2349; *see also* ROA.2326-2332.

Plaintiffs and the Secretary opposed the Federation's motion to intervene as a matter of right. ROA.2487-2506; ROA.2507-2511. Neither disputed that the Federation's motion to intervene was timely, that the Federation had an interest in the litigation, or that resolution of the litigation in Plaintiffs' favor would impair the Federation's interest. Their only argument in opposition to intervention as a matter of right was the contention that the Secretary adequately represents the Federation's

interest. ROA.2497-2503; ROA.2507-2508.

Although the Secretary opposed intervention as a matter of right, he did not oppose permissive intervention (subject to certain conditions). ROA.2503-2505. Plaintiffs opposed permissive intervention on the ground that the Federation "does not 'have' a claim or defense against any of the litigants." ROA.2509 (implicitly citing Fed. R. Civ. P. 24(b)(1)).

During briefing on the Federation's motion to intervene, counsel for the Federation learned that USDA had shortly before sent letters to Federation members informing them that, notwithstanding their eligibility for debt relief under Section 1005, USDA "will take legal action to collect all the money" they "owe to the Agency." ROA.2541. The letters stated that USDA "intends to accelerate" members' loans and then "start foreclosure proceedings" so that it can "repossess or … sell" their "real estate, personal property, crops, livestock, equipment, or … other assets in which the Agency has a security interest." ROA.2541.

On December 8, 2021, the district court denied the Federation's motion to intervene.

Holding that it was not entitled to intervene as of right, the court found that the Federation had failed to show that the government "do[es] not 'adequately represent [the Federation's] interest" in the matter. ROA.2548. In reaching that conclusion, the court addressed neither the Secretary's reluctance to present evidence of "USDA's present-day … discrimination

against minority farmers" nor the conflict created by USDA's stated intent to "initiate foreclosure proceedings" against Federation members. ROA.2313; ROA.2529 (citing ROA.2540-2545); *cf.* ROA.2547-2550.

The district court also denied permissive intervention, concluding that "[t]he Federation's interests are significantly similar to the Secretary's" and that "[t]heir arguments are virtually identical." ROA.2550. Once again, the court addressed neither the Federation and Secretary's divergent interests in presenting evidence of current discrimination by USDA nor the conflict of interest created by USDA's threat to begin foreclosure proceedings against Federation members. *Cf.* ROA.2550.

Having denied the Federation's motion to intervene, the district court expressed a "belie[f] that permitting the Federation to proceed as amicus will enable it to fully voice its position in this case." ROA.2550. In so concluding, the court did not address any of the reasons why "the Federation's interests in this case are not fully served by filing an amicus brief." ROA.2532. For example, despite the Federation's interest in presenting evidence of an argument based on current discrimination by the USDA that the Secretary will not present, the court did not address case law holding that amici generally "'cannot raise an issue raised by neither party'" and are "'limited to advising a court on issues of law, not issues of fact.'" ROA.2532 (quoting *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991); *Baugh v. City of Jacksonville*, 2008 U.S. Dist. LEXIS 100443, at

*2 (E.D. Tex. 2008)).

On December 17, 2021, the Federation filed its notice of appeal (ROA.2561-2564) and, shortly thereafter, a motion to expedite consideration of its appeal. This Court granted the motion to expedite on December 28.

SUMMARY OF ARGUMENT

The district court erred in denying the Federation intervention as a matter of right.

A prospective intervenor is entitled to intervene as a matter of right if it satisfies the four elements set forth in Rule 24(a) of the Federal Rules of Civil Procedure. The only question in this case is whether the Federation satisfied the fourth element, which requires that the prospective intervenor show that the parties to the case will not adequately represent its interests. The burden of showing inadequate representation is minimal, and the Federation easily carried that burden.

The Federation demonstrated that its interests diverge from the Secretary's interests in relevant ways. In particular, the Federation showed that unlike the Secretary, who has contrary institutional interests, the Federation will present evidence of—and argument based on—current and recent USDA discrimination.

There is, moreover, a direct conflict between the Federation's interests and those of the Secretary given USDA's declared intent to initiate

foreclosure proceedings against Federation members despite their entitlement to debt relief under Section 1005. The agency's threat to foreclose on Black farmers' farms is not only a direct attack on Federation members but also undermines the Secretary's simultaneous assertion that timely debt relief for minority farmers is necessary to remedy the continuing effects of past USDA discrimination and that Section 1005 therefore passes constitutional muster.

For these reasons, the Secretary is not an adequate representative of the Federation's interests, and the district court erred in concluding otherwise.

The district court also clearly abused its discretion in denying the Federation permissive intervention. It relied on clearly erroneous factual findings and equally erroneous conclusions of law, and misapplied the law to the facts of this case, to reach a patently erroneous result.

The district court order denying the Federation intervention should therefore be reversed.

STANDARD OF REVIEW

Denial of intervention as a matter of right "is reviewed *de novo*" and denial of permissive intervention "is reviewed for a clear abuse of discretion." *Edwards*, 78 F.3d at 995.

ARGUMENT

I. The Federation is entitled to intervene as a matter of right because the Secretary does not adequately represent the Federation's interests.

Intervention by right is governed by Federal Rule of Civil Procedure 24(a). Absent a statutory right to intervene, "the prospective intervenor … must meet each of the four requirements of Rule 24(a)(2)." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015). In particular,

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Id. (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984)); *accord Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014). Here, there is no dispute that the Federation meets the first three criteria. *Cf.* ROA.2491; ROA.2507-2508. The only question is whether the Federation also "me[ets] the fourth element." ROA.2548. It does, and the district court erred in holding otherwise.

Rule 24(a) is written in mandatory language: a court "*must* permit" intervention if the prospective intervenor satisfies the four criteria set forth in the rule. Fed. R. Civ. P. 24(a) (emphasis added). "Rule 24 is to be liberally construed." *Brumfield*, 749 F.3d at 341. Thus, "[t]he applicant has the burden of demonstrating inadequate representation, but this burden is

'minimal.'" *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Because "'[t]he burden on the movant is not a substantial one,'" the movant "'need not show that the representation by existing parties will be, for certain, inadequate.'" *Brumfield*, 749 F.3d at 345 (quoting 6 James W. Moore et al., MOORE'S FEDERAL PRACTICE § 24.03[4][a], at 24–47 (3d ed. 2008)). "Instead, 'the Rule is satisfied if the applicant shows that the representation of his interest 'may be' inadequate." *Texas*, 805 F.3d at 661 (quoting *Trbovich*, 404 U.S. at 538 n.10). A "lack of unity" between the relevant party and the prospective intervenor "in all objectives, combined with real and legitimate additional or contrary arguments, is sufficient to demonstrate that the representation *may* be inadequate." *Brumfield*, 749 F.3d at 346.

Applying these standards, the Federation has amply carried its "*de minimis*" burden of demonstrating that the Secretary—who heads the very agency that has long discriminated against Black farmers and does so to this day—does not adequately represent the Federation's interests. *Edwards*, 78 F.3d at 1006. This is so for at least two reasons: First, unlike the Federation, the Secretary is unwilling to present evidence of, or argument based on, recent and current discrimination by USDA. Second, notwithstanding the debt relief promised to Black farmers by Section 1005, the Secretary is formally threatening Federation members with foreclosure for failure to repay their loans.

A. Unlike the Secretary, the Federation will present evidence of—and argument based on—harm from recent and current discrimination by USDA.

"In order to show adversity of interest, an intervenor must demonstrate that its interests diverge from the putative representative's interests in a manner germane to the case." *Texas*, 805 F.3d at 662. Here, the Federation has shown that its interests diverge from the Secretary's interests in precisely that manner.

Plaintiffs challenge the constitutionality of Section 1005 as interpreted by USDA, alleging that the provision impermissibly "discriminat[es] on account of race." ROA.2483. Race-based governmental action survives strict scrutiny if it is narrowly tailored to further a compelling governmental interest. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). According to the district court, for this standard to be met there must be "a 'strong basis in evidence" to "conclu[de] that remedial action [i]s necessary'" to counteract the effects of intentional discrimination by the government. ROA.1512 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)).

Because of a fundamental conflict of interest, the Secretary will not present some of the most compelling evidence that Section 1005 is necessary to counteract the effects of intentional discrimination in USDA loan programs. Specifically, the Secretary will not present evidence of recent or current discrimination by USDA because doing so would harm USDA's

reputation and expose the agency to potential liability to the victims of such discrimination.

The Secretary's failure to present such evidence has already materially affected the litigation. In issuing the preliminary injunction, the district court relied, in part, on the fact that "the Government put[] forward no evidence of intentional discrimination by the USDA in at least the past decade" and went so far as to "admit[] that the USDA is not currently discriminating against any socially disadvantaged farmers." ROA.1512-1513 (citing ROA.2598-2698).

The Federation, by contrast, would present testimonial and statistical evidence of recent and current USDA discrimination—and its present-day impact on Black farmers. The Federation would, for example, offer proof of "discriminatory treatment from [Farm Service Agency ("FSA")] representatives" in not only 2017 but "in 2019 and 2020 as well." ROA.2334 (¶¶ 6–9); *see also* ROA.2323 (¶¶ 11–12).[1] That proof would include, for example, evidence that "in March 2020" a Black farmer "was told that [he] was prohibited from entering the FSA office because of coronavirus protocols" but "saw white farmers in the office with the local FSA agents during that same time despite their coronavirus protocols." ROA.2335

[1] This Court "must" assume that the Federation's "factual allegations are true" for purposes of this appeal. *Texas*, 805 F.3d at 660.

(¶ 10).

The Federation's proof of recent and current discrimination would also include evidence "link[ing]" the discrimination against Black farmers to the fact that many Farm Service Agency ("FSA") "decisionmakers are white farmers … in direct competition with Black farmers for loans." ROA.2329 (¶ 8). Indeed, the Federation's evidence would show that to this day "[t]he vast majority" of those who sit on the FSA county committees that "act as the gatekeepers for USDA loan programs" are "white males." ROA.2329 (¶ 9). As one Federation member, a Black farmer in Georgia, has explained, "[t]he local FSA committee has five or six white farmers" who "have to approve [his] loan application." ROA.2339 (¶ 9). Although he has "been farming for 35 years" in the area, he has "never been asked to join the committee." ROA.2338-2339 (¶¶ 3, 9).

According to the district court, the fact "[t]hat the Federation may be able to make the Secretary's case 'more comprehensively and compellingly' … does not demonstrate the inadequacy of representation necessary for intervention." ROA.2549. Not so.

The Federation's evidence of recent and current discrimination could be pivotal. To survive strict scrutiny, race-based governmental action must advance a compelling governmental interest, such as the remediation of past discrimination. *Grutter*, 539 U.S. at 327. One district court considering the constitutionality of Section 1005 has stated that evidence of historical

discrimination by USDA "does little to address the need for continued remediation through Section 1005" because Congress has already taken "significant remedial measures" to "correct USDA's past discrimination against" socially disadvantaged farmers and ranchers. *Wynn v. Vilsack*, 2021 WL 2580678, at *5 (M.D. Fla. 2021). Against this backdrop, "evidence of continued discrimination becomes *crucial*." *Id.* (emphasis added). It is precisely such evidence that the Federation, unlike the Secretary, would present.

That both the Federation and the Secretary "share the same objective" of vindicating the constitutionality of Section 1005 (ROA.2548) does not mean that the Secretary adequately represents the Federation's interests. Even when "the would-be intervenor has the same ultimate objective as a party to the suit," there is inadequate representation within the meaning of Rule 24(a) if the prospective intervenor shows an "adversity of interest" between it and the relevant party. *Edwards*, 78 F.3d at 1005; *accord Texas*, 805 F.3d at 662. Here, the Federation has shown such adversity.

Unlike the Federation, the Secretary has "many interests in this case." *Brumfield*, 749 F.3d at 346. Understandably concerned with the Department's reputation and the risk of liability to the victims of discrimination, the Secretary has an institutional interest in denying current and recent discrimination by USDA—and has litigated accordingly. The Federation, by contrast, has only one interest in this case: defending the

constitutionality of Section 1005. In short, the Secretary "has more extensive interests to balance" than the Federation does. *Id.* To establish inadequate representation under Rule 24(a), a prospective intervenor need only show that its interests and those of the relevant party to the litigation "may not align precisely." *Id.* at 345. Even if one could not "say for sure that the [Secretary's] more extensive interests will *in fact* result in inadequate representation, … surely they might, which is all that the rule requires." *Id.* at 346; *accord, e.g.*, *Edwards*, 78 F.3d at 1005 ("The Supreme Court has decided" that the inadequate-representation "'requirement … is satisfied if the applicant shows that representation of his interest 'may be' inadequate[.]'") (quoting *Trbovich*, 404 U.S. at 538 n.10).

B. The Secretary is acting contrary to the Federation's interests by seeking to foreclose on members' farms.

The Secretary also is an inadequate representative of the Federation's interests because he has a clear conflict of interest.

If a farmer or rancher defaults on a USDA loan, the agency's recourse is foreclosure on the debtor's farm. The agency's financial interest in foreclosure is directly contrary to the interest of debtors, including Federation members who have fallen behind on their loan repayments.

While this litigation has been pending, USDA has sent letters to Federation members informing them that even though they may be eligible for debt relief under Section 1005, USDA "will take legal action to collect all

the money" they "owe to the Agency." ROA.2541. The letters declare that USDA "intends to accelerate" members' loans and then "start foreclosure proceedings" so that it can "repossess or … sell" their "real estate, personal property, crops, livestock, equipment, or … other assets in which the Agency has a security interest." ROA.2541.

Although the Secretary has argued that "timely debt relief for minority farmers [is] necessary to remedy the lingering effects" of USDA discrimination and that "the thousands of minority farmers" who stand "disproportionately on the brink of foreclosure … have a strong interest in receiving the debt relief to which they are entitled" under Section 1005 (ROA.1091-1092), those arguments are undercut by USDA's declared intention to accelerate delinquent loans and initiate foreclosure proceedings against Federation members and other minority farmers. The tension between the Secretary's position in this case and his position with respect to foreclosures diminishes his ability to effectively defend Section 1005 against Plaintiffs' attack. It also undermines trust and confidence on the part of those farmers whose livelihoods are at stake in this case that the Secretary will in fact zealously represent their interests.

A "lawyer shall not represent a client if representation involves a concurrent conflict of interest." ABA Model Rule of Professional Conduct 1.7(a). Such a conflict cannot be waived if the lawyer's "representation … involve[s] the assertion of a claim by one client against another client

represented by the lawyer," regardless whether that claim is asserted "in the same litigation or [an]other proceeding before a tribunal." ABA Model Rule of Professional Conduct 1.7(b)(3). That is, effectively, the situation here, where the Secretary claims to be an adequate representative of the Federation and its members but is simultaneously threatening to initiate "legal action" against Federation members "to collect all the money" that they "owe [USDA]." ROA.2541. Given the conflicting interests of the Secretary and the Federation with respect to foreclosures—a conflict that the district court did not address (*see supra* at 12–13)—the Secretary cannot adequately represent the Federation's interests.

* * *

A prospective intervenor's "burden of showing inadequate representation is minimal." *Edwards*, 78 F.3d at 1005. "The applicant need only show that representation 'may be' inadequate." *Sierra Club*, 18 F.3d at 1207. Here, the Federation has shown that "its interests diverge from the putative representative's interests in a manner germane to the case." *Texas*, 805 F.3d at 662; *cf. supra* at 18–24. This "lack of unity in all objectives, combined with" the Federation's "real and legitimate additional … arguments, is sufficient to demonstrate that the [Secretary's] representation" of the Federation's interests "may be inadequate." *Brumfield*, 749 F.3d at 346. Accordingly, contrary to what the district court held, the inadequate-representation "requirement of Rule 24(a) is met." *Id.*

II. The district court abused its discretion when it denied the Federation permissive intervention.

A court "may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "If this threshold requirement is met, then the district court must exercise its discretion in deciding whether intervention should be allowed." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977). When exercising its discretion, "it is proper" for a district court "to consider, among other things, whether the intervenors' interests are adequately represented by other parties and whether they will significantly contribute to full development of the underlying factual issues in the suit." *New Orleans Pub. Serv., Inc.*, 732 F.2d at 472 (quotation marks omitted).

Here, "exercising its discretion," the district court "decline[d] to permit intervention." ROA.2550. That was a clear abuse of its discretion.

"A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (quotation marks omitted).

In this case, the district court committed each of these independently sufficient errors. First, the court clearly erred in finding that the arguments made by the Federation "are virtually identical" to those advanced by the Secretary. ROA.2550. That factual finding ignores the Federation's

arguments based on current and recent—rather than merely historical—USDA discrimination. *See supra* at 18–22. Second, the district court, which acknowledged that adequacy of representation is relevant to permissive intervention, implicitly relied on its erroneous conclusion that as a matter of law the Federation is not entitled to intervene as a matter of right given the Secretary's purportedly adequate representation of the Federation's interests. ROA.2550. Finally, the district court misapplied the law to the facts of the case when it concluded that "[t]he Federation's interests are significantly similar to the Secretary's." ROA.2550. As explained above (*supra* at 18–24), the interests of the Federation and those of the Secretary diverge in ways germane to the litigation. Because the Federation intends to offer evidence of recent and current discrimination that the Secretary will not present, the Federation's intervention would "significantly contribute to full development of the underlying factual issues in the suit." *New Orleans Pub. Serv., Inc.*, 732 F.2d at 472. Similarly, the district court misapplied the law to the facts of the case when it ignored the Secretary's conflict of interest with respect to foreclosures. *See supra* at 12–13, 24. For each of these reasons, the district court abused its discretion in denying permissive intervention.

"An 'abuse of discretion' becomes a 'clear abuse of discretion' when it 'produce[s] a patently erroneous result.'" *In re Abbott*, 956 F.3d 696, 707 (5th Cir. 2020) (quoting *In re Volkswagen*, 545 F.3d at 310), *cert. granted,*

judgment vacated on other grounds sub nom. Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021). That is, for all the reasons set forth above, the case here.

CONCLUSION

The order below should be reversed, and the Federation should be allowed to intervene.

Dated: December 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this brief was served on all participating counsel on December 30, 2021, via the CM/ECF system.

Dated: December 30, 2021

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the type-volume limit of Fed R. App. P. 27(d)(2)(A), the typeface requirement of Fed. R. App. P. 32(a)(5), and the type-style requirements of Fed. R. App. P. 32(a)(6). The document uses a proportional-spaced typeface, fourteen-point Georgia Pro font. Based on a count under Microsoft Office Word 2016 for Windows, the document contains 5,900 words, excluding the parts of the document exempted by Fed R. App. P. 32(f).

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