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.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
No. 4:21-cv-0595-O (Hon. Reed O'Connor)

MOVANT-APPELLANT'S OPPOSED EMERGENCY MOTION FOR IMMEDIATE ISSUANCE OF MANDATE OR STAY OF DISTRICT COURT PROCEEDINGS

Jon Greenbaum
Dorian L. Spence
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
1500 K St. NW, Suite 900
Washington, DC 20005

Chase J. Cooper
WINSTON & STRAWN LLP
2121 N. Pearl Street, Suite 900
Dallas, TX 75201

Andrew E. Tauber
Counsel of Record
WINSTON & STRAWN LLP
1901 L St. NW
Washington, DC 20036
(202) 282-5288
atauber@winston.com

Mark D. Rosenbaum
Nisha Kashyap
PUBLIC COUNSEL
610 S. Ardmore Ave.
Los Angeles, CA 90005

Counsel for Movant-Appellant (additional counsel listed inside)

Kobi K. Brinson
WINSTON & STRAWN LLP
300 South Tryon Street, 16th Floor
Charlotte, NC 28202

George C. Lombardi
Julie A. Bauer
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601

Janelle Li-A-Ping
WINSTON & STRAWN LLP
333 South Grand Avenue
Los Angeles, CA 90071

Counsel for Movant-Appellant

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.

CERTIFICATE OF INTERESTED PERSONS

The following persons and entities as described in the fourth sentence of Fifth 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.

Plaintiffs-Appellees

1. Sid Miller
2. Greg Macha
3. James Meek
4. Lorinda O'Shaughnessy
5. Jeff Peters

Counsel for Plaintiffs-Appellees

6. Gene Patrick Hamilton, America First Legal Foundation
7. Jonathan F. Mitchell, Mitchell Law, PLLC

8. Charles W. Fillmore, The Fillmore Law Firm LLP

9. H. Dustin Fillmore III, The Fillmore Law Firm LLP

Defendant-Appellee

10. Tom Vilsack, in his capacity as Secretary of Agriculture

Counsel for Defendant-Appellee

11. Emily Sue Newton, U.S. Department of Justice – Counsel for Defendant-Appellee Tom Vilsack

12. Kyla Marie Snow, U.S. Department of Justice – Counsel for Defendant-Appellee Tom Vilsack

13. Michael Fraser Knapp, U.S. Department of Justice – Counsel for Defendant-Appellee Tom Vilsack

14. Alexander V. Sverdlov, U.S. Department of Justice – Counsel for Defendant-Appellee Tom Vilsack

15. Jeffrey Eric Sandberg, U.S. Department of Justice – Counsel for Defendant-Appellee Tom Vilsack

16. Marleigh D. Dover, U.S. Department of Justice – Counsel for Defendant-Appellee Tom Vilsack

17. Jack Starcher, U.S. Department of Justice – Counsel for Defendant-Appellee Tom Vilsack

Movant-Appellant

18. The Federation of Southern Cooperatives/Land Assistance Fund

Counsel for Movant-Appellant

19. Andrew E. Tauber, Winston & Strawn LLP – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

20. Chase J. Cooper, Winston & Strawn LLP – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

21. George Lombardi, Winston & Strawn LLP – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

22. Julie A. Bauer, Winston & Strawn LLP – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

23. Kobi K. Brinson, Winston & Strawn LLP – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

24. Janelle Alyssa Li-A-Ping, Winston & Strawn LLP – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

25. Rebecca Anne Carter, Winston & Strawn LLP – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

26. Dorian Lawrence Spence, Lawyers' Committee for Civil Rights Under Law – Counsel for the Defendant-Appellee Federation of Southern Cooperatives/Land Assistance Fund

27. Jon Marshall Greenbaum, Lawyers' Committee for Civil Rights Under Law – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

28. Maryum Jamal Jordan, Lawyers' Committee for Civil Rights Under Law – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

29. Phylicia Helena Hill, Lawyers' Committee for Civil Rights Under Law – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

30. Mark Dale Rosenbaum, Public Counsel – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

31. Nisha Kashyap, Public Counsel – Counsel for Movant-Appellant the Federation of Southern Cooperatives/Land Assistance Fund

Movants-Conditional Intervenors

32. National Black Farmers Association (NBFA)

33. Association of American Indian Farmers (AAIF)

Counsel for Movants-Conditional Intervenors

34. Scott Martin Hendler, Hendler Flores Law, PLLC – Counsel for Movants-Conditional Intervenors the National Black Farmers Association and the Association of American Indian Farmers

35. Rebecca R. Webber, Hendler Flores Law, PLLC – Counsel for Movants-Conditional Intervenors the National Black Farmers Association and the Association of American Indian Farmers

36. David S. Muraskin, Public Justice – Counsel for Movants-Conditional Intervenors the National Black Farmers Association and the Association of American Indian Farmers

37. Jessica L. Culpepper, Public Justice – Counsel for Movants-Conditional Intervenors the National Black Farmers Association and the Association of American Indian Farmers

38. Randolph T. Chen, Public Justice – Counsel for Movants-Conditional Intervenors the National Black Farmers Association and the Association of American Indian Farmers

Dated: March 24, 2022

Respectfully submitted,

/s/ Andrew Tauber
Andrew E. Tauber

Counsel for Movant-Appellant

STATEMENT OF FACTS SUPPORTING EMERGENCY CONSIDERATION

On March 22, 2022, this Court reversed the district court's denial of the Federation's motion to intervene.[1] Although the appeal was expedited, the Court's mandate is not scheduled to be issued until May 16, 2022, because the government is a party to the case. Until the mandate issues or a stay is entered, proceedings below will continue without the Federation's participation, even though this Court has determined that the Federation is entitled to participate as a matter of right. Given that the parties' pending cross-motions for summary judgment will be fully briefed by April 15, 2022, the district court could rule on them (and potentially resolve the case) before the Federation will have had the chance to participate as a party. Because the district court would lack jurisdiction to hear a stay motion filed by the Federation before issuance of the mandate and only this Court can issue the mandate, "moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i). That and the imminent risk of substantial harm that the Federation faces constitutes an emergency justifying disruption of the normal appellate process

The Federation respectfully requests that the Court either immediately issue its mandate or stay district-court proceedings until the mandate issues. The Federation has complied with all requirements under Fifth Circuit Rule

[1] This Court's opinion is attached as Exhibit 1.

27.3 and requests a ruling on this motion by March 31, 2022.

CERTIFICATE OF FACTS SUPPORTING EMERGENCY CONSIDERATION

I certify that the facts supporting emergency consideration of this motion are true and complete.

Dated: March 24, 2022

By: */s/ Andrew Tauber*
WINSTON & STRAWN LLP

Under Federal Rule of Appellate Procedure 8(a) and Fifth Circuit Rule 27.3, the Federation moves the Court on an emergency basis to issue its mandate immediately or to enter a stay of all proceedings below until the Court's mandate issues. If the mandate does not immediately issue, or the proceedings below are not stayed, the Federation will be irreparably harmed because it will lose the chance to meaningfully participate in the litigation.

INTRODUCTION

In this expedited appeal, the Court reversed the district court's denial of the Federation's request to intervene as a matter of right and directed the district court to permit the Federation's intervention. The Court held that the Federation's interest in developing and presenting evidence of current discrimination "is 'germane to the case' because evidence of continued discrimination may be highly relevant to proving a 'compelling state interest.'" Slip Op. at 7. But unless the mandate issues at once or the proceedings below are stayed, the district court may grant plaintiffs' pending summary judgment motion without consideration of this potentially "crucial" evidence. *Id.* (quoting *Wynn v. Vilsack* , 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021)). That would irreparably harm the Federation's interest in securing the benefits of Section 1005 for its members. It would, moreover, effectively negate this Court's ruling.

BACKGROUND

A. The underlying litigation

The facts regarding this case are well known to the Court. Last year, Congress enacted the American Rescue Plan Act of 2021. Intended to remedy the continuing effects of discrimination against Black and other minority farmers in Department of Agriculture ("USDA") loan programs, Section 1005 of the Act directs the Secretary of Agriculture (the "Secretary") to provide debt relief to "socially disadvantaged" farmers and ranchers, *i.e.*, farmers and ranchers who belong to a group "whose members have been subjected to racial or ethnic prejudice . . . without regard to their individual qualities." 7 U.S.C. § 2279(a)(6).

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. He was subsequently joined by four other plaintiffs, each of whom self-identifies as "white" (ROA.386, 390 (¶¶ 4–7, 20–23)). Plaintiffs allege that the Section 1005 violates the United States Constitution. *See* ROA.2534 ¶¶ 20–23.

On June 2, 2021, 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. The district court granted Plaintiffs' motions for class certification and preliminary injunction on July

1, 2021. ROA.1497-1520.

Pursuant to the district court's successively revised scheduling orders, expert reports were exchanged on January 7, 2022 (*cf.* ROA.2611); rebuttal reports were exchanged on February 25, 2022 (*cf.* Dkt. 163); and cross-motions for summary judgment were filed on March 11, 2022 (Dkt. Nos. 167–170).

B. The Federation's motion to intervene

On October 12, 2021, a month before Plaintiffs filed the operative Third Amended Complaint (ROA.2478–2486), the Federation—an association of Black farmers—filed a motion seeking intervention as of right or, in the alternative, permissive intervention. ROA.2285–2288.

On December 8, 2021, the district court denied the Federation's motion. ROA.2601. 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. Motion to Expedite, at 1, *Miller v. Vilsack*, No. 21-11271 (5th Cir. Dec. 28, 2021), ECF No. 516144118. This Court granted the motion to expedite on December 28, 2021. Order, at 1, *Miller v. Vilsack*, No. 21-11271 (5th Cir. Dec. 28, 2021), ECF No. 516147083.

C. The Federation's motion for stay in the district court

On December 22, 2021, the Federation filed in the district court an emergency motion to stay proceedings pending this Court's resolution of the Federation's appeal. ROA.2622. The Secretary opposed the motion

(ROA.2686–2690); Plaintiffs did not (ROA.2629). On December 29, 2021, the district court denied the Federation's motion. ROA.2699.

D. The Federation's first motion for stay in this Court

On January 7, 2022, the Federation filed in this Court an opposed emergency motion to stay proceedings pending this Court's resolution of the Federation's appeal. *See* Initial Motion to Stay, at 1, *Miller v. Vilsack*, No. 21-11271 (5th Cir. Jan. 7, 2022), ECF No. 516147083. The Court denied the motion in a one-sentence order issued the same day. *See* Order Denying Initial Motion to Stay, at 1, *Miller v. Vilsack*, No. 21-11271 (5th Cir. Jan. 7, 2022), ECF No. 516147083.

E. The cross-motions for summary judgment

On March 11, 2022, four days after this Court heard oral argument on the Federation's appeal, Plaintiffs and the Government filed cross-motions in the district court for summary judgment on the constitutionality of Section 1005. *See* Government's Motion for Summary Judgment, at 1, *Miller v. Vilsack*, No. 4:21-CV-595-O (N.D. Tex. Mar. 11, 2022), ECF Nos. 167; Plaintiffs' Motion for Summary Judgment, at 1, *Miller v. Vilsack*, No. 4:21-CV-595-O (N.D. Tex. Mar. 11, 2022), ECF No. 169. Under the district court's scheduling order, responses in opposition are due on April 1, 2022, and under the local rules, any replies must be filed by April 15, 2022. *See* N.D. Tex. L. Civ. R. 7.1.

F. This Court's opinion

On March 22, 2022, this Court issued an unpublished opinion reversing the district court's denial of the Federation's request to intervene as a matter of right and remanding the case to the district court "with the directive to permit the Federation's intervention." Slip Op. at 8. The Court concluded that "the Federation has met its 'minimal' burden [of] demonstrating inadequate representation." *Id.* (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994)).

The Court's mandate is scheduled to issue on May 16, 2022. *See* Fed. R. App. P. 40(a)(1); Fed. R. App. P. 41(b).

ARGUMENT

The Court should issue its mandate immediately or stay proceedings below until the mandate issues. Otherwise, the Federation will lose its opportunity to meaningfully participate in the litigation. Motions for summary judgment are pending, and the district court could rule on them as soon as April 15, 2022—more than a month before the Court's mandate would ordinarily issue.

The mandate should issue immediately to preserve the Federation's interest, to effectuate this Court's ruling, and to ensure that the district court considers all relevant evidence before entering its decision. The Court "may order immediate issuance of the mandate when 'satisfied (1) that [the] Court would not change its decision upon [re]hearing, much less hear the case *en*

banc, and (2) that there is no reasonable likelihood that the Supreme Court would grant review." *Johnson v. Bechtel Assocs. Pro. Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (per curiam) (quoting *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978)).

As for the first criterion, the Court's opinion is (a) legally correct, (b) unanimous, (c) unpublished, and (d) explicitly limited to the facts of this case. Each of these attributes suggests that the panel is unlikely to alter its decision and the full Court is unlikely to rehear the case en banc. *See, e.g.*, *Umana v. Davis*, 946 F.3d 281, 282 (5th Cir. 2020) (Smith, J., dissenting from denial of en banc rehearing) (noting the difficulty of "muster[ing] enough votes" to rehear an unpublished opinion). The second criterion is satisfied for many of the same reasons: The Supreme Court is unlikely to review a unanimous, fact-specific, unpublished opinion allowing intervention. Accordingly, because there is no reasonable likelihood that this Court or the Supreme Court would revisit the Court's opinion, the mandate should issue forthwith.

A stay of proceedings below is equally justified.[2] In deciding whether

[2] The Federation was not required to file an initial stay motion in the district court because "moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i). The Federation's notice of interlocutory appeal from the district court's order denying intervention divested the district court "of its control over those aspects of the case involved in the appeal," *i.e.*, the intervention issue. *Wooten v. Roach*, 964 F.3d 395, 403 (5th Cir. 2020) (quotation omitted). Because the district court

to grant a stay pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Earl v. Boeing Co.*, 21 4 F.4th 895, 898 (5th Cir. 2021) (citing *Nken v. Holder*, 556 U.S. 418, 426 (2009)). Each factor is easily met here.

First, the Federation has "made a strong showing that [it] is likely to succeed on the merits" because the Federation has *already* succeeded on the merits. *Earl*, 21 4 F.4th at 898. The Court has already issued an opinion reversing the district court and directing it "to permit the Federation's intervention." Slip Op. at 8.

Second, the Federation will be irreparably injured absent a stay pending issuance of the mandate because it will be deprived of the opportunity to meaningfully participate in the ongoing litigation. *See Compact Van Equip. Co. v. Leggett & Platt, Inc.*, 566 F.2d 952, 954–55 (5th Cir. 1978) (recognizing loss of the right to litigate as an irreparable injury). Cross-motions for summary judgment are already pending, and the district

---

would lack jurisdiction over the initial stay motion, and because the Federation faces an imminent risk of substantial harm if proceedings below continue without its participation, moving first in the district court would be "impracticable." Fed. R. App. P. 8(a)(2)(A)(i).

court could rule on them as soon as April 15, 2022. Absent a stay, the Federation could be shut out of the case entirely.

Third, entering a stay will not substantially injure the Plaintiffs or the Government. And even if there were any injury, it "is outweighed by [the Federation's] strong likelihood of success on the merits." *Freedom from Religion Found., Inc. v. Mack*, 4 F.4th 306, 316 (5th Cir. 2021).

Fourth, the public interest favors a stay because it is in the public interest that the constitutionality of Section 1005 be determined on a full evidentiary record and briefing that addresses all relevant issues—something that will not happen if the Federation is prevented from participating in the case until after the cross-motions for summary judgment have been decided.

Because all four factors favor a stay, the Court should promptly stay all district-court proceedings pending issuance of the mandate.

CONCLUSION

The Court should issue the mandate immediately or stay proceedings below pending issuance of the mandate.

Dated: March 24, 2022

Respectfully submitted,

/s/ Andrew Tauber

Andrew E. Tauber
Counsel of Record
WINSTON & STRAWN LLP
1901 L St. NW
Washington, DC 20036
(202) 282-5288
atauber@winston.com

Mark D. Rosenbaum
Nisha Kashyap
PUBLIC COUNSEL
610 S. Ardmore Ave.
Los Angeles, CA 90005

Jon Greenbaum
Dorian L. Spence
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
1500 K St. NW, Suite 900
Washington, DC 20005

George C. Lombardi
Julie A. Bauer
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601

Kobi K. Brinson
WINSTON & STRAWN LLP
300 South Tryon Street, 16th Floor
Charlotte, NC 28202

Chase J. Cooper
WINSTON & STRAWN LLP
2121 N. Pearl Street, Suite 900
Dallas, TX 75201

Janelle Li-A-Ping
WINSTON & STRAWN LLP
333 South Grand Avenue
Los Angeles, CA 90071

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

CERTIFICATE OF SERVICE

I certify that this brief was served on all participating counsel on March 24, 2022, via the CM/ECF system.

Dated: March 24, 2022 By: */s/ Andrew Tauber*
Andrew E. Tauber

CERTIFICATE OF CONFERENCE

I certify that on March 24, 2022, my partner and co-counsel Chase Cooper contacted, via telephone, the clerk's office, as well as the offices of counsel for Plaintiffs and counsel for the Government, and advised them of the Federation's intent to file this emergency motion to immediately issue the mandate or stay district court proceedings. As of this filing, counsel for Plaintiffs has not responded to Mr. Cooper's voicemail. Counsel for the Government indicated that the Government take no position on the motion.

Dated: March 24, 2022 By: */s/ Andrew Tauber*
Andrew E. Tauber

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 1,782 words, excluding the parts of the document exempted by Fed R. App. P. 32(f).

Dated: March 24, 2022 By: */s/ Andrew Tauber*
Andrew E. Tauber

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 22, 2022
Lyle W. Cayce
Clerk

No. 21-11271

SID MILLER, *on behalf of himself and others similarly situated*; GREG MACHA; JAMES MEEK; LORINDA O'SHAUGHNESSY; JEFF PETERS,

Plaintiffs—Appellees,

versus

TOM VILSACK, *in his official capacity as* SECRETARY OF AGRICULTURE,

Defendant—Appellee,

versus

FEDERATION OF SOUTHERN COOPERATIVES/LAND ASSISTANCE FUND,

Movant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CV-595

Before SOUTHWICK, HAYNES, and HIGGINSON, *Circuit Judges*.

PER CURIAM:*

Appellant Federation of Southern Cooperatives (the "Federation") moved to intervene in a class action challenging the constitutionality of § 1005 of the American Rescue Plan Act of 2021 ("ARPA"), Pub. L. No. 117-2, 135 Stat. 4. The district court denied the motion. For the following reasons, we REVERSE and REMAND.

I. Background

The Secretary of the United States Department of Agriculture ("USDA") is authorized under § 1005 to "provide a payment in an amount up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer or rancher" to pay off the disadvantaged farmer or rancher's loans "made" or "guaranteed by the Secretary." ARPA § 1005(a)(2), 135 Stat. at 12–13. The term "socially disadvantaged farmer or rancher" ("SDFR") is defined as "a farmer or rancher who is a member of a socially disadvantaged group," 7 U.S.C. § 2279(a)(5), which, in turn, means that the members of the group "have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities," *id.* § 2279(a)(6). Per USDA interpretation, SDFR includes (but is 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).

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Sid Miller, a white farmer excluded from the SDFR designation (who describes his ancestry as "overwhelmingly white"),[1] filed a class action lawsuit against the Secretary, claiming that USDA violated Title VI of the Civil Rights Act of 1964 and the U.S. Constitution "by excluding individuals and entities from the benefit of federal programs on the grounds of race, color, and national origin." The district court certified the class and granted a preliminary injunction to enjoin the Secretary from administering § 1005.

The Federation, "a nonprofit cooperative association of Black farmers, landowners, and cooperatives,"[2] filed a motion to intervene as a defendant in this action. The organization argued it was entitled to intervention as a matter of right under Federal Rule of Civil Procedure 24(a) or, alternatively, permissive intervention under Rule 24(b). Both the Secretary and Plaintiffs opposed the motion to intervene as a matter of right, arguing that the Federation failed to show that the Government inadequately represented the Federation's interest. Only Plaintiffs opposed permissive intervention.

The district court denied the Federation's motion to intervene on both grounds. *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 6129207, at

[1] Miller is the Agriculture Commissioner for the State of Texas but stated in the class action complaint that he is "suing in his capacity as a private citizen[] and not on behalf of the State of Texas or the Texas Department of Agriculture."

[2] According to the Executive Director of the Federation, the organization "serves its members through advocacy, technical assistance, and support services." It is also a "unique" organization "because it has a cooperative membership as well as a land assistance fund." Here, the Federation's minority farmer members, who are § 1005 beneficiaries or applicants, seek to present evidence of ongoing and current discrimination against them by USDA—the agency administering the loan assistance program at issue.

*3 (N.D. Tex. Dec. 8, 2021).[3] The Federation timely appealed, and we granted the motion to expedite.

II. Jurisdiction and Standard of Review

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3). As to the denial of the motion to intervene as a matter of right, we have jurisdiction over this appeal under 28 U.S.C. § 1291 and review this denial de novo, *Edwards v. City of Houston*, 78 F.3d 983, 992, 995 (5th Cir. 1996) (en banc). As to the denial of the permissive intervention motion, we only have "provisional jurisdiction" and review for a clear abuse of discretion. *Id.* at 992, 995. Under this deferential standard, we will reverse the district court's decision only if "extraordinary circumstances" are present. *St. Bernard Parish v. Lafarge N. Am., Inc.*, 914 F.3d 969, 973 (5th Cir. 2019) (quotation omitted).

III. Discussion

On appeal, the Federation argues that the district court erred in denying its motion to intervene based on intervention as a matter of right or (alternatively) permissive intervention. We agree that the court erred in denying intervention as a matter of right, mooting the permissive intervention issue.

To prevail on a motion to intervene as a matter of right, an applicant must meet four requirements:

> (1) The application must be timely; (2) the applicant must have an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that

[3] Instead, the district court granted the Federation leave to file a brief as amicus curiae. *Miller*, 2021 WL 6129207, at *3.

> the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Brumfield v. Dodd, 749 F.3d 339, 341 (5th Cir. 2014) (quotation omitted); Fed. R. Civ. P. 24(a)(2). Nevertheless, a Rule 24(a) inquiry "is a flexible one, which focuses on the particular facts and circumstances surrounding each application . . . measured by a practical rather than technical yardstick." *Entergy Gulf States La., L.L.C. v. EPA*, 817 F.3d 198, 203 (5th Cir. 2016) (quotation omitted). In line with this flexibility, we have held that "[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be attained." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) (quotation omitted). Therefore, even though "the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed," *id.* at 656 (quotation omitted), "with doubts resolved in favor of the proposed intervenor," *Entergy*, 817 F.3d at 203 (internal quotation marks and citation omitted).

Because the parties do not dispute that the Federation can meet the first three prongs of the Rule 24(a) inquiry, we limit our analysis to the fourth prong—whether the Federation's interest is adequately represented by the Secretary. We have held that "[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). However, "it cannot be treated as so minimal as to write the requirement completely out of the rule." *Texas*, 805 F.3d at 661 (quotation omitted). Therefore, we have "created two presumptions of adequate representation that intervenors must overcome in appropriate cases." *Id.* (internal quotation marks and citation omitted). The first presumption applies "when the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Id.* (internal quotation

marks and citation omitted). The second presumption applies in cases where a party "is presumed to represent the interests of all of its citizens," *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (per curiam), such as "when the putative representative is a governmental body or officer charged by law with representing the interests of the [intervenor]," *Texas*, 805 F.3d at 661 (quotation omitted). This presumption is limited, however, to "suits involving matters of sovereign interest." *Edwards*, 78 F.3d at 1005.

The district court did not explicitly mention these two presumptions, but it noted that "where the party whose representation is said to be inadequate is a governmental agency," the necessary showing of inadequacy needed to be "much stronger." *Miller*, 2021 WL 6129207, at *2 (quotation omitted). We disagree with this conclusion because the second presumption is not in play in this case, so we need not apply it.[4]

Turning to the first presumption, in order to overcome it, "the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party." *Texas*, 805 F.3d at 661–62 (quotation omitted). Specifically, "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." *Id.* at 662.

---

[4] Although *Hopwood* mentioned "governmental agency" in passing, it involved a case against the State of Texas, not a governmental agency, thus the question of whether a governmental agency can assert a "matter of sovereign interest" was not the issue. *See* 21 F.3d at 605. Such a question was in play in *Entergy*, which concluded that because the EPA was "a governmental agency and not a sovereign interest," the second presumption was inapplicable. *See* 817 F.3d at 203 n.2. This case is more like *Entergy*; it involves assistance with loans by a governmental agency, not a sovereign interest.

Given the lack of "sovereign interest" here, we need not address the exact circumstances of when a "sovereign interest" might apply in all instances. Nor do we address when (or if) a governmental agency might be implicated as a sovereign interest. Instead, we simply conclude that *Entergy*'s holding applies to the analogous agency at issue here.

Undoubtedly, the Secretary and the Federation share the "same ultimate objective"—upholding the constitutionality of § 1005. Therefore, the relevant inquiry is whether the Federation can "show adversity of interest" by demonstrating that its interests diverge from the Secretary's "in a manner germane to the case." *Id.* We conclude that the Federation has made such a showing.

Relevant here, the Secretary maintains that he has provided "evidence of discrimination within the last decade" and discussed reports "highlighting how *past* discrimination continues to disadvantage minority farmers today." However, the Federation is making a meaningfully different argument. Instead of focusing on how *past* discrimination continues to have "lingering effects,"[5] the Federation argues that USDA is *continuing* to actively discriminate against its members. Therefore, the Federation has an interest in taking a position that not only *directly* conflicts with the Secretary's position, but also potentially exposes the agency to liability. That interest is "germane to the case" because evidence of continued discrimination may be highly relevant to proving a "compelling governmental interest." *See Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1275, 1279 (M.D. Fla. 2021) (describing, in a § 1005 case, how "evidence of continued discrimination" may be "crucial"). Yet, this argument is not one the Secretary can reasonably be

[5] Indeed, the record demonstrates that the Secretary's position is "*not* that the USDA is continuing to discriminate against minorities"; rather *past* discrimination "has led to . . . lingering effects" that work against minorities. Because the Secretary maintains that the USDA is no longer discriminating against minorities, which is something the Federation disputes, that is strong evidence that the two entities are "staking out a position significantly different" from each other. *See Brumfield*, 749 F.3d at 346 (observing that the government entity conceded an issue that the parent intervenors disagreed with).

expected to adopt or support: a U.S. Secretary would likely heartily deny that their agency is *currently* discriminating against people based upon race.[6]

In light of this adversity of interest, we conclude that the Federation has successfully rebutted the first presumption. Given our "broad policy favoring intervention," we hold that the Federation has met its "minimal" burden demonstrating inadequate representation (though we limit this holding to the facts of this case). *See Sierra Club*, 18 F.3d at 1207 (quotation omitted).[7] We therefore REVERSE the district court's denial of intervention as a matter of right and REMAND with the directive to permit the Federation's intervention.

[6] It also stands to reason that, if given the opportunity to conduct discovery as a party, the Federation would seek evidence demonstrating current discrimination by the USDA against its members. It is highly unlikely the Secretary would put forth such evidence in the absence of the Federation's intervention.

[7] The Federation also argues that USDA letters sent to its members disclosing the agency's intent to accelerate the members' loans demonstrate a divergence of interest. Whether or not this evidence is germane to the case, as to the first presumption, it provides additional support to overcome the Federation's "minimal" burden. *Sierra Club*, 18 F.3d at 1207 (quotation omitted).