No. 22-10600

In the United States Court of Appeals for the Fifth Circuit

IN RE THE FEDERATION OF SOUTHERN COOPERATIVES/LAND ASSISTANCE FUND,

Petitioner.

On Petition for a Writ of Mandamus to the U.S. District Court for the Northern District of Texas, Fort Worth Division
No. 4:21-cv-0595-O (Hon. Reed O'Connor)

PETITIONER'S OPPOSED MOTION TO STAY DISTRICT COURT PROCEEDINGS

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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.

Plaintiffs–Respondents

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

Counsel for Plaintiffs–Respondents

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–Respondent

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

Counsel for Defendant–Respondent

11. Emily Sue Newton, U.S. Department of Justice
12. Kyla Marie Snow, U.S. Department of Justice
13. Michael Fraser Knapp, U.S. Department of Justice
14. Alexander V. Sverdlov, U.S. Department of Justice
15. Jeffrey Eric Sandberg, U.S. Department of Justice
16. Marleigh D. Dover, U.S. Department of Justice
17. Jack Starcher, U.S. Department of Justice

Petitioner

18. The Federation of Southern Cooperatives/Land Assistance Fund

Counsel for Petitioner

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22. Julie A. Bauer, Winston & Strawn LLP
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24. Janelle Alyssa Li-A-Ping, Winston & Strawn LLP
25. Jordan B. Redmon, Winston & Strawn LLP
26. Ashley Jones Wright, Winston & Strawn LLP

27. Dorian Lawrence Spence, Lawyers' Committee for Civil Rights Under Law

28. Jon Marshall Greenbaum, Lawyers' Committee for Civil Rights Under Law

29. Anneke Dunbar-Gronke, Lawyers' Committee for Civil Rights Under Law

30. Phylicia Helena Hill, Lawyers' Committee for Civil Rights Under Law

31. Mark Dale Rosenbaum, Public Counsel

32. Nisha Kashyap, Public Counsel

Permissive Intervenors

33. National Black Farmers Association

34. Association of American Indian Farmers

Counsel for Permissive Intervenors

35. Scott Martin Hendler, Hendler Flores Law, PLLC

36. Rebecca R. Webber, Hendler Flores Law, PLLC

37. David S. Muraskin, Public Justice

38. Jessica L. Culpepper, Public Justice

39. Randolph T. Chen, Public Justice

Dated: June 17, 2022

Respectfully submitted,

/s/ Andrew E. Tauber

Andrew E. Tauber
Counsel of Record for Petitioner

The Federation of Southern Cooperatives/Land Assistance Fund moves the Court to stay all district court proceedings pending resolution of the Federation's petition for a writ of mandamus under Federal Rule of Appellate Procedure 8(a)(2). Specifically, the Federation asks the Court to (1) immediately stay the district court proceedings (2) at least until the Court has considered this motion to stay in due course.[1]

If the proceedings below are not immediately stayed, one of two things will happen. Either the Federation will be irreparably harmed because it will lose the opportunity to meaningfully participate in the proceedings below or judicial and party resources will be wasted if the Federation prevails on its mandamus petition and matters must be relitigated.

INTRODUCTION

The Federation has petitioned for a writ of mandamus to enforce this Court's mandate in *Miller v. Vilsack*. *See* No. 21-11271, 2022 WL 851782, at *3–4 (5th Cir. Mar. 22, 2022) (per curiam). As the Federation explained in its petition, the district court has violated *Miller*'s mandate by barring the Federation from taking any fact discovery.

Given the district court's clear violation of this Court's mandate, the Federation fully anticipates that this Court will issue the writ and compel the district court to allow the Federation to take the limited fact discovery that it has requested. Given the imminent deadlines below, including the June 26 expert-discovery deadline and the July 17 summary-judgment deadline, an

[1] Both respondents—Plaintiffs and the Secretary—oppose this motion.

immediate stay of proceedings is necessary to ensure that this Court's decision in *Miller*, which established the Federation's right to fully participate as a party to the litigation, is not rendered meaningless.

BACKGROUND

A. Plaintiffs challenge Section 1005.

Both Section 1005 and the underlying litigation are aptly described in this Court's *Miller* opinion, 2022 WL 851782, at *1-4, and in the Federation's mandamus petition. So only a brief summary is needed to understand why a stay should be entered here.

Section 1005 directs USDA to deliver loan assistance to "socially disadvantaged farmers and ranchers." American Rescue Plan Act of 2021 ("ARPA") § 1005(a)(2), Pub. L. No. 117-2, 135 Stat. at 12–13. A "socially disadvantaged farmer or rancher" is one who belongs to a socially disadvantaged group "whose members have been subjected to racial or ethnic prejudice … without regard to their individual qualities." 7 U.S.C. § 2279(a)(6). Per USDA's interpretation, the term 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; ARPA Section 1005 Loan Payment, 86 Fed. Reg. 28,329, 28,330 (May 26, 2021).

In April 2021, White farmers filed a class-action lawsuit challenging Section 1005 on constitutional and statutory grounds. ECF No. 1. They claim that, in administering Section 1005, the Secretary 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." *Id.* at ¶ 18.

In July 2021, the district court certified a class of White farmers and ranchers excluded from participating in Section 1005's loan-forgiveness program and preliminarily enjoined the Secretary from administering Section 1005. ECF No. 60. The Secretary chose not to appeal either class certification or the preliminary injunction.

B. The district court erroneously denies intervention.

The Federation then moved to intervene as a matter of right so that it could defend Section 1005 by, among other things, introducing evidence of ongoing discrimination by USDA. ECF Nos. 93 & 93-1. The Federation contended that the Secretary's institutional interest in avoiding liability for continuing discrimination was adverse to the Federation's case-specific interest in defending Section 1005 to the fullest extent possible, including on the basis of continued discrimination by the USDA against the Federation's members. ECF No. 93-1 at 25.

Disagreeing, the district court denied the Federation's motion to intervene. ECF No. 143. The Federation timely appealed. *Miller*, 2022 WL 851782, at *3.

C. This Court reverses, directing the district court to allow the Federation to intervene as a matter of right.

This Court reversed the district court's denial of intervention of right and directed the district court to permit the Federation to intervene. *Id.* at *4. This Court held that the Federation had "met its 'minimal' burden

demonstrating inadequate representation." *Id.* at *3–4.

This Court's conclusion that the Federation and the Secretary had adverse interests rested in large part on the Federation's intent to present evidence of ongoing discrimination by USDA. *See id.* Recognizing that one court considering Section 1005 has said that "'evidence of continued discrimination' may be 'crucial'" to its successful defense, this Court reasoned that the Federation's interest in seeking and presenting such evidence was "germane to the case because evidence of continued discrimination *may be highly relevant* to proving a compelling governmental interest" and thus establishing Section 1005's constitutionality. *Id.* (quoting *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021)) (emphasis added).

The Court understood that the Federation "would seek evidence demonstrating current discrimination by the USDA" were it allowed to intervene and thus "given the opportunity to conduct discovery as a party." *Miller*, 2022 WL 851782, *8 n.6. That the Court anticipated the Federation being granted fact discovery upon intervention is underscored by Judge Haynes' statement at oral argument that "get[ting] to do discovery" would be "the most critical thing" the Federation would obtain if allowed to intervene. *Miller*, No. 21-11271, Oral Argument Recording at 3:48–3:56.

D. The district court denies all fact discovery.

On remand, the district court directed Plaintiffs, the Secretary, and the Federation to confer and thereafter file a "joint status report" addressing four issues, including "what limitations, if any, the [district] [c]ourt should place

on the Federation's participation in this case." ECF No. 178.

The parties submitted a joint status report on April 1, 2022. ECF No. 184. In its portion of the report, the Federation requested targeted, time-limited fact discovery regarding USDA's efforts to identify and remedy racial disparities from 2010 to present. *Id.* at 7–10. The Federation focused its discovery requests on this time period because the Secretary has not acknowledged any discrimination during it. Thus, the Federation specifically requested USDA loan data from 2010 to present, including both the loan data reviewed by the Secretary's expert and three other categories of loan data. *Id.* at 9. The Federation did not request the full scope of discovery to which it was entitled; it voluntarily accepted self-imposed limitations that were more than reasonable, namely, that it would take only five depositions and propound only a few requests for production. *Id.* at 9–10.

On April 5, 2022, the district court entered a six-page order directing the Secretary to produce "loan data" but otherwise rejecting the Federation's request for discovery. ECF No. 186.

E. The district court refuses to reconsider its ban on fact discovery.

On April 13, 2022, the Federation moved the district court to reconsider its ban on fact discovery. ECF No. 187 & 187-1. The Federation explained that barring it from taking fact discovery violated the letter and spirit of this Court's mandate and amounted to an "unreasonable" limitation on the Federation's intervention of right. ECF No. 187-1 at 5. The district court denied reconsideration. ECF No. 196.

F. The district court denies the Federation's experts the data needed to prepare a reliable report.

On May 13, 2022, the Federation asked the district court (1) to compel the Secretary to disclose the loan data the Federation's experts needed to prepare their report; and (2) to extend case deadlines to remedy the Secretary's delay in disclosing that data. ECF Nos. 199 & 199-1. The district court denied both requests. ECF No. 202.

G. The district court refuses to certify its orders barring fact discovery for interlocutory appeal.

On May 27, 2022, the Federation moved the district court to certify its orders (ECF Nos. 186, 196, 202) barring fact discovery for interlocutory appeal under 28 U.S.C. § 1292(b). ECF Nos. 203 & 203-1. On June 6, the district court denied certification. ECF No. 207. Without citing this Court's opinion, the district court held that its compliance with the mandate and its power to deny the Federation fact discovery were not controlling questions; that there was not substantial ground to differ with its conclusions; and that an immediate appeal would not materially advance the ultimate termination of the litigation. *Id.*

H. The Federation petitions this Court for a writ of mandamus.

On June 17, 2022, the Federation petitioned this Court for a writ of mandamus to compel the district court to comply with the letter and spirit of *Miller*'s mandate. In its petition, the Federation explained why the three prerequisites for mandamus are satisfied. *First*, the district court's ban on fact discovery violates the mandate rule and therefore constitutes clear and

indisputable error. *Second*, the writ is appropriate under the circumstances because the district court's violation of the mandate means that the constitutionality of a federal statute will be decided on an incomplete record—specifically, one missing evidence that this Court recognized "may be highly relevant to" the statute's constitutionality. *Third*, the Federation has no adequate means other than mandamus to obtain relief from the district court's blanket ban on fact discovery given that court's refusal to reconsider the ban and its refusal to certify its orders for interlocutory appellate review.

IMPRACTICABILITY OF FIRST SEEKING A STAY BELOW

A party may make an initial stay motion in this Court if it shows "that moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2). "When the district court's order demonstrates commitment to a particular resolution, application for a stay from that same district court may be futile and hence impracticable." *Chem. Weapons Working Grp. (CWWG) v. Dep't of Army*, 101 F.3d 1360, 1362 (10th Cir. 1996); *cf. Whole Women's Health v. Jackson*, 13 F.4th 434, 441 n.8 (5th Cir. 2021) (granting stay first sought in this Court where first seeking stay in the district court would have been impracticable).

Moving first in the district court would be "impracticable" here. The district court's orders following remand demonstrate that it is determined to proceed to summary judgment without allowing the Federation any fact discovery. Despite this Court's mandate, the district court denied the Federation's request for limited fact discovery and a corresponding

extension of the summary-judgment deadlines. The court then denied both the Federation's motion for reconsideration and its subsequent motion for certification of an interlocutory appeal. At each step the court has shown that it will forge ahead without pause and without due regard for this Court's mandate or the Federation's rights. And the district court's previous refusal to enter a stay pending the Federation's successful appeal in *Miller* shows that it is not prepared to stay the proceedings pending resolution of a plainly meritorious appeal. In light of all this, first seeking a stay in the district court would be futile.

ARGUMENT

District court proceedings should be stayed pending this Court's resolution of the Federation's petition for a writ of mandamus. If the proceedings are not stayed, the Federation will be denied the opportunity to meaningfully participate in vital proceedings, including fact and expert discovery and summary judgment motions—even if its petition is successful. Thus, a stay is necessary to ensure meaningful mandamus review.

For this reason, other courts of appeal have stayed district court proceedings while considering petitions for a writ of mandamus. *See, e.g.*, *In re Citizens Bank, N.A.*, 15 F.4th 607, 622 (3d Cir. 2021) (granting stay of district court proceedings pending disposition of mandamus petition); S.*E.C. v. Citigroup Global Markets, Inc.*, 673 F.3d 158, 169 (2d Cir. 2012) (per curiam) (granting stay pending disposition of consolidated appeals and a mandamus petition).

The "purpose of … a stay is to preserve the status quo pending appeal

so that the appellant may reap the benefit of a potentially meritorious appeal." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 356 F.3d 1256, 1267 (10th Cir. 2004) (quotation marks omitted). Here, there is no doubt that the Federation's mandamus petition is, at the very least, "potentially meritorious." Indeed, the Federation has presented this Court with compelling reasons why the district court's ban on fact discovery violates the mandate and thus constitutes clear and indisputable error correctable by mandamus.

If the proceedings below are not stayed, the Federation might not "reap the benefit" of its mandamus petition even if it ultimately prevails. *Dominion*, 356 F.3d at 1267. Expert discovery closes on June 26, and the deadline for filing motions for summary judgment is July 17. If any of those deadlines expire before the Federation is allowed the opportunity to conduct the limited fact discovery it has requested, the Federation would be denied its right as an intervening party to fully participate in the district court proceedings even if its petition is successful.

These adverse outcomes can easily be avoided by an immediate stay pending resolution of the Federation's mandamus petition.

CONCLUSION

This Court should immediately stay the proceedings below—at least until the Court has considered this motion in due course—so that both (1) important case deadlines do not elapse without the Federation's meaningful participation in the litigation consistent with this Court's *Miller* opinion; and (2) the constitutionality of a federal statute will not be decided on an

incomplete record missing evidence that this Court recognized "may be highly relevant to" the statute's constitutionality.

Dated: June 17, 2022

Respectfully submitted,

/s/ Andrew E. Tauber

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that this motion was served by email on all counsel of record on June 17, 2022.

Dated: June 17, 2022

/s/ Andrew E. Tauber

Andrew E. Tauber
Counsel of Record for Petitioner

CERTIFICATE OF CONFERENCE

I certify that on June 15, 2022, my partner and co-counsel Chase Cooper contacted, via email, counsel for all parties and advised them of the Federation's intent to file this motion. Both Plaintiffs and the Secretary oppose this motion and intend to file a response. The National Black Farmers Association and the Association of American Indian Farmers, both intervenor-defendants, do not intend to file a response.

Dated: June 17, 2022

/s/ Andrew E. Tauber
Andrew E. Tauber
Counsel of Record for Petitioner

CERTIFICATE OF COMPLIANCE

This motion complies with (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,247 words, excluding the parts exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Georgia Pro) using Microsoft Word (the same program used to calculate the word count).

Dated: June 17, 2022

/s/ Andrew E. Tauber
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