IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: FED OF S COOP/LAND ASST, *Petitioner*.	No. 22-10600

OPPOSITION TO PETITIONER'S EMERGENCY MOTION TO STAY DISTRICT COURT PROCEEDINGS

The United States respectfully opposes the Federation's motion to stay district court proceedings pending the Court's disposition of the Federation's mandamus petition, which challenges the district court's rulings on various discovery matters.

I. The Federation Provides No Justification for the Emergency Relief it Seeks

Though not styled as such, the Federation's stay motion is an emergency motion because it "seek[s] relief before the expiration of 14 days after filing." Fifth Circuit Rule 27.3. As a result, the Federation was required, "subject to the penalties of Fed. R. App. P. 46(c)," to abide by the various requirements for emergency motions spelled out in the Court's local rules. *Id.* The Federation's motion runs afoul of those requirements at every step and should be denied on that basis alone. *See*

id. (requiring, *inter alia*, that emergency motions be "preceded by a telephone call to … the offices of opposing counsel," be labeled as an emergency motion, "state the nature of the emergency and the irreparable harm the movant will suffer" absent relief, and "[c]ertify that the facts supporting emergency consideration of the motion are true and complete").

In any event, emergency relief is not warranted. The Federation provides no explanation why relief is required "immediately." Mot. 1. The next discovery deadline in district court is the close of expert discovery on June 26. But cross motions for summary judgment are not due until July 17, which would allow the Court more than enough time to consider this stay motion on a non-expedited schedule. And even after those deadlines pass, if the Federation were to prevail on its mandamus petition—though it is not likely to do so, for reasons noted below—the district court could easily adjust the discovery or briefing schedule as necessary. For that reason, the Federation is wrong to claim that absent a stay it will be "irreparably harmed" in any way. Mot. 1.

The absence of any emergency is underscored by the Federation's delay in seeking this extraordinary relief. The district court issued the

discovery decisions that form the basis for this mandamus petition months ago. And although the Federation was aware of the upcoming discovery deadlines it now complains of, it waited until almost two weeks after the district court issued its decision denying the Federation's motion for interlocutory appeal before it sought mandamus and moved for a stay from this Court. Now, despite its own lengthy delay, the Federation asks the Court to act on its motion in just four business days. That request should be denied.

II. Moving For a Stay in District Court Prior To Seeking Relief From This Court, As Required by Fed. R. App. P. 8, Was Not "Impracticable"

The Federation's stay motion is procedurally defective for another reason: Federal Rule of Appellate Procedure 8 requires that a party must "ordinarily move first in the district court" before seeking a stay pending appeal from this Court. Fed. R. App. P. 8(a)(1). The only exception to that general rule is that moving first in the district court is not required where the movant can show that doing so "would be impracticable." Fed. R. App. P. 8(a)(2)(A).

The Federation's motion should be denied for failure to comply with Rule 8. The Federation did not move first in the district court, and

asserts in a short, conclusory paragraph that seeking relief first in the district court would have been "futile" because the district court had already ruled against it on the merits of these discovery disputes. Mot. 7-8. As this Court has held in rejecting similar arguments in the past, that "explanation[] for the purported impracticability of moving in the district do[es] not pass muster." *Whole Woman's Health v. Paxton*, 972 F.3d 649, 653-54 (5th Cir. 2020). The relevant question is whether "it clearly appears that further arguments *in support of the stay* would be pointless in the district court." *Ruiz v. Estelle*, 650 F.2d 555, 567 (5th Cir. 1981) (emphasis added). The Federation has made no such showing here. The mere fact that the district court disagreed with the movant on the merits does not demonstrate that it would be futile to seek a stay pending further review on appeal. *See Paxton*, 972 F.3d at 653-54. Nor does it matter that the district court declined to stay proceedings during the Federation's earlier appeal. *See Bayless v. Martine*, 430 F.2d 873, 879 (5th Cir. 1970) ("It does not follow from the refusal to grant a preliminary injunction pending a trial in the court below that the district court would refuse injunctive relief pending an appeal.").

The cases the Federation cites in support of its argument do not aid its case. Mot. 7. In *Whole Women's Health v. Jackson,* 13 F.4th 434, 441 n.8 (5th Cir. 2021), this Court considered emergency stay motions filed "after 1 a.m. on Sunday, August 29" seeking relief related to, inter alia, a hearing originally scheduled for "Monday, August 30." That 24-hour timeline—not any predictions about futility before a hostile district court—made it "'impracticable' first to seek a stay in the district court." *Jackson*, 13 F.4th at 441 & n.8. And in *Chem. Weapons Working Grp. (CWWG) v. Dep't of Army*, 101 F.3d 1360 (10th Cir. 1996), the court ultimately found that the movant had not shown impracticability. Citing this Court's decision in *Bayless v. Martine*, 430 F.2d 873, 879 n.4, the court held that "[i]t does not necessarily follow" from a district court's earlier adverse decisions "that the district court would also refuse injunctive relief pending appeal." *CWWG*, 101 F.3d at 1362. As already discussed, the same is true here.

III. The Federation Has Not Established That it is Entitled to A Stay

In any event, there is no basis for a stay pending mandamus. A stay is an "an extraordinary remedy." *Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019). To obtain that relief, a petitioner must show, among

other things, that it is likely to succeed on the merits of its claims and that it will suffer some irreparable harm absent a stay. *See id.* (*citing Nken v. Holder*, 556 U.S. 418, 434 (2009)); *see also Landis v. North American Company*, 299 U.S. 248 (1936) (describing similar factors). The Federation cannot satisfy those requirements here.

1. As explained in more detail in the government's opposition to the petition for mandamus, the Federation is not likely to succeed on the merits of its mandamus petition. A writ of mandamus is "a drastic and extraordinary remedy reserved for really extraordinary cases." *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 350 (5th Cir. 2017). This Court will grant a petition for a writ of mandamus only if the petitioner satisfies three conditions. *See Def. Distributed v. Bruck*, 30 F.4th 414, 426 (5th Cir. 2022). First, the petitioner must show that there are "no other adequate means to attain the relief he desires." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). Second, the court "must be satisfied that the writ is appropriate under the circumstances." *Id.* at 381. And third, the petitioner must show a "clear and indisputable right to the writ." *Id.* Because the Federation cannot, at a minimum, establish the first and

third of those conditions, it is unlikely to succeed on the merits of its petition.

First, the Federation cannot show that there are "no other adequate means to attain the relief [it] desires." *Cheney*, 542 U.S. at 380. The Federation asks this court to reverse certain discretionary discovery decisions entered by the district court. But as this Court has recognized, a court of appeals can "effectively review the district court's interlocutory discovery order on appeal from a final judgment." *Periodical Publishers Serv. Bureau, Inc. v. Keys*, 981 F.2d 215, 218 (5th Cir. 1993); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009) ("Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence."). Because the Federation was allowed to intervene as a party, it can appeal the final judgment of the district court (assuming it is dissatisfied with the result) and seek review of these discovery orders on that appeal if it still believes those discovery rulings constituted reversable error. The

availability of effective appellate review in the ordinary course is fatal to the Federation's mandamus petition.

Second, the Federation cannot show that it has a "clear and indisputable right to the writ." *Cheney*, 542 U.S. at 380. The Federation seeks mandamus review of discretionary district court decisions about the scope of discovery—decisions that turned on the Federation's own representations about the discovery it wanted to take were it allowed to intervene. "[T]he scope and conduct of discovery are within the sound discretion of the trial court, and discovery orders are reviewed for abuse of discretion." *Williams v. Lockheed Martin Corp.*, 990 F.3d 852, 863 (5th Cir. 2021). This Court will therefore reverse a discovery decision "*only* if it is 'arbitrary or clearly unreasonable,' *and* the complaining party demonstrates that it was prejudiced by the ruling." *HC Gun & Knife Shows, Inc. v. City of Houston*, 201 F.3d 544, 549 (5th Cir. 2000). The Federation falls far short of establishing that kind of arbitrariness here, let alone to a degree that would demonstrate that it has a "clear and indisputable right" to the relief it seeks.

2. The Federation's stay motion independently fails because the Federation has not established that it will face any cognizable harm if it

is not granted immediate access to the broad fact discovery that it seeks. As this Court directed in its earlier mandate, the Federation was granted the right to intervene in the district court as a party. As such, if it is dissatisfied with the outcome of summary judgment proceedings—including if it thinks it was unreasonably prevented from developing indispensable evidence—it can make those arguments to this Court in the course of a normal appeal. *See Periodical Publishers*, 981 F.2d at 218. This is not a case, for example, in which the Federation needs a stay to prevent the disclosure of privileged information, or to avoid some other legal injury that could not be redressed through ordinary appellate review. The mere inconvenience of having to expend resources litigating the case to final judgment in the meantime does not constitute irreparable harm. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough [to constitute an irreparable injury.]"); *Queipo v. Prudential Bache Sec., Inc.*, 867 F.2d 721, 722 (1st Cir. 1989) ("If on appeal from a final judgment that order is overturned, denial of immediate review will have required

appellant to have incurred the expense of court proceedings, but this potential inconvenience does not constitute irreparable harm.").

CONCLUSION

The Federation's emergency motion for a stay pending consideration of its mandamus petition should be denied.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

CHAD E. MEACHAM
Acting United States Attorney

MARLEIGH D. DOVER
JACK STARCHER
Attorneys, Appellate Staff
Civil Division, Room 7515
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-8877
john.e.starcher@usdoj.gov

Counsel for Respondent Tom Vilsack, in his official capacity as Secretary of Agriculture

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2022, I electronically filed the foregoing response with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Jack Starcher
Counsel for Respondent
Tom Vilsack, in his official capacity as Secretary of Agriculture

CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 27 because it contains 1847 words. It complies with applicable typeface and type-style requirements because it was prepared using Microsoft Word in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Jack Starcher
Counsel for Respondent
Tom Vilsack, in his official capacity as Secretary of Agriculture