No. 21-11271

United States Court of Appeals for the Fifth Circuit

SID MILLER, ET AL.,

Plaintiffs-Appellees,

v.

THE 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)

MOTION TO EXPEDITE OF MOVANT-APPELLANT THE FEDERATION OF SOUTHERN COOPERATIVES

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Movant-Appellant.

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-Appellees

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Movant-Appellant

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

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

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

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

Movants-Conditional Interveners

29. National Black Farmers Association (NBFA)

30. Association of American Indian Farmers (AAIF)

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

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

Dated: December 23, 2021

Respectfully submitted,

/s/ Andrew E. Tauber
Andrew E. Tauber

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

Pursuant to Rule 2 of the Federal Rules of Appellate Procedure and Fifth Circuit Rules 27.5 and 34.5, Appellant Federation of Southern Cooperatives/Land Assistance Fund (the "Federation") moves to expedite this appeal.

INTRODUCTION

The underlying question in this litigation is whether Section 1005 of American Rescue Plan Act of 2021—which extends debt relief to Black and other socially disadvantaged farmers and ranchers—is constitutional.

This appeal presents two related issues under Rule 24 of the Federal Rules of Civil Procedure: Whether the district court erred when it held that the Federation is not entitled to intervene as a matter of a right, and whether the district court abused its discretion when it denied the Federation permissive intervention.

Time is of the essence. Discovery is scheduled to close February 25, 2022, and motions for summary judgment are due less than three weeks later. ECF 85, *Miller v. Vilsack*, 4:21-cv-00595-O (N.D. Tex.).[1] Unless this appeal is resolved on an expedited basis, the relief that the Federation ultimately seeks—the ability to participate in the case as a party—will be rendered largely meaningless.

[1] All ECF references are to *Miller v. Vilsack*, 4:21-cv-00595-O (N.D. Tex.).

Section 1005 is a remedial statute designed to mitigate the harms of racial discrimination by the United States Department of Agriculture (the "Department" or "USDA") in the administration of federal loan programs. Plaintiffs are a class of White farmers and ranchers who have sued the Secretary of Agriculture claiming that Section 1005 violates the Constitution. ECF 135.

The Federation is a non-profit cooperative association of Black farmers. ECF 93. Its members have suffered as a direct result of the Department of Agriculture's racially discriminatory loan practices. *Id*. The district court denied the Federation's motion to intervene, finding that the Department of Justice, which is defending the constitutionality of Section 1005 on behalf of the government, adequately represents the Federation's interests. ECF 143.

That finding—the sole basis for the district court's ruling—does not withstand scrutiny. The government's defense of Section 1005 rests entirely on evidence of historical discrimination that occurred more than 10 years ago. Apparently fearing reputational harm or potential liability to the Federation's members, the government has presented no evidence of—and no argument based on—recent or current discrimination by the Department of Agriculture. The government recognizes the importance of demonstrating racial discrimination against Black farmers in USDA lending programs—at

least in past decades—but stops short of presenting narratives or other evidence of recent or current discrimination. In fact, the government affirmatively denies any current discrimination. ECF 60 at 16. The government's denial of current discrimination may be explicable both politically and as a way of limiting its exposure to liability. But, as shown by evidence proffered by the Federation in support of its motion to intervene, it is simply not the case that discrimination in USDA lending practices is merely a relic of the distant past. *See* ECF 93-2.

Were it allowed to intervene, the Federation would present evidence of recent and current racial discrimination by the Department and the proximate effects of that discrimination on its members' present-day debt burden, and argue that Section 1005 passes constitutional muster given the that discrimination and its profound detrimental effects on the Federation's members and others who stand to benefit from the debt-relief legislation. Such evidence could be outcome-determinative.

Citing, among other things, the government's denial of current discrimination, the district court has already preliminarily enjoined implementation of Section 1005, concluding that the plaintiffs are likely to prevail on the merits of their constitutional challenge—a decision that the government could have appealed (*see* 28 U.S.C. § 1292(a)(1)) but did not, for reasons unknown. ECF 60 at 19. Absent the Federation's intervention

and the evidentiary record it intends to make, the district court will likely issue a final judgment holding Section 1005 unconstitutional—a holding that would irreparably harm the Federation's members.

For its intervention to be meaningful, and for the district court to have a complete factual record when evaluating the constitutionality of Section 1005, the Federation must be allowed to participate in discovery and summary judgment briefing. Given the current schedule below, that is possible only if this Court expedites its consideration of the Federation's appeal and quickly reverses the district court.[2]

To facilitate expeditious resolution of its appeal, the Federation intends to file its opening brief on December 30, 2021. It asks that the plaintiffs and the government be required to file their responsive briefs on January 13, 2022, and that the Federation have until January 20, 2022, to file its reply brief. This schedule would allow the Court to consider the Federation's appeal during its February sitting.[3]

Precisely because intervention is often time-sensitive, this Court and

[2] At approximately the same time that it filed this motion to expedite consideration of its appeal, the Federation filed a motion in the district court to stay proceedings pending this Court's resolution of its appeal. The district court has yet to rule on that motion, but it did order the parties to file any responses thereto on an expedited basis, i.e., seven days after the motion was filed. D.E. 150.

[3] The plaintiffs have consented to the proposed schedule. The government has not; it would like until January 20 to file its responsive brief.

the other courts of appeals routinely expedite appeals that challenge orders denying intervention. *See e.g., United States v. Aldawsari*, 683 F.3d 660 (5th Cir. 2012); *Cotter v. Massachusetts Ass'n of Minority L. Enf't Officers*, 219 F.3d 31 (1st Cir. 2000); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983).

There is good cause to expedite consideration of the Federation's appeal given its basis, significance, and urgency. Indeed, because good cause exists, 28 U.S.C. § 1657(a) requires that consideration of the appeal be expedited.

BACKGROUND

Last year, Congress enacted the American Rescue Plan Act of 2021. ECF 143. Section 1005 of the Act directs the Secretary of Agriculture to provide debt relief to "socially disadvantaged" farmers and ranchers ("SDFRs"), defined as a farmer or rancher who is a member of a group "whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." *Id.*

Plaintiffs, White farmers, filed this lawsuit on behalf of themselves "and others similarly situated" on April 26, 2021. ECF 1. In their original complaint, Plaintiffs alleged that Section 1005 violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the United States Constitution,

on grounds that it provides benefits to SDFRs. *Id.*

On June 2, 2021, the same day that they filed an amended complaint, Plaintiffs moved for class certification and a preliminary injunction to prevent the Department of Agriculture "from discriminating on account of race or ethnicity in administering section 1005 of the American Rescue Plan Act." ECF 12, 17. On June 29, 2021, the Secretary answered Plaintiffs' Amended Complaint and moved to dismiss it in part. ECF 49, 51. On June 30, 2021, the district court held a hearing on Plaintiffs' motions for class certification and a preliminary injunction. ECF 59. It granted both on July 1, 2021. ECF 60. The district court enjoined the government from providing loan forgiveness to Black farmers and other SDFRs pursuant to Section 1005. *Id.*

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. ECF 85. Plaintiffs filed their Second Amended Complaint that same day. ECF 87. On October 6, 2021, the Secretary moved to dismiss Plaintiffs' Second Amended Complaint in part. ECF 89.

On October 12, 2021, the Federation filed a motion seeking intervention as of right or, in the alternative, permissive intervention. ECF 93.

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. ECF 134. Plaintiffs filed their Third Amended Complaint, which dropped their Title VI claim, the same day. ECF 135. Also on November 12, Plaintiffs and the Secretary filed their responses to the Federation's motion to intervene; Plaintiffs opposed both intervention as of right and permissive intervention, and the Secretary opposed intervention as of right only. ECF 136, 137.

On December 8, 2021, the district court denied the Federation's motion to intervene, holding that the Federation had failed to show that the government "do[es] not 'adequately represent [the Federation's] interest" in the matter. ECF 143 at 3.

Under the current scheduling order, discovery closes on February 25, 2022, and motions for summary judgment are due March 11, 2022. ECF 85.

On December 17, 2021, the Federation filed its notice of appeal (ECF 147) and, shortly thereafter, filed this motion to expedite.

ARGUMENT

By statute, this Court *must* expedite an appeal if "good cause" for expedition "is shown." 28 U.S.C. § 1657(a); *see also* Fed. R. App. P. 2; 5th Cir. R. 27.5 and 34.5 (permitting appellate court to expedite appeals). As shown below, there is good cause to expedite consideration of the

Federation's appeal.

Good cause exists when "failure to expedite would result in mootness or deprive the relief requested of much of its value." H.R. REP. 98-985, 6, 1984 U.S.C.C.A.N. 5779, 5784. That is precisely what would happen if the Federation's appeal is not resolved until after discovery closes and the deadline to file summary judgment motions has passed. Intervention would have little or no value if the Federation is unable to present evidence of recent and current discrimination in the Department's loan practices and prevented from defending the constitutionality of Section 1005 on the basis of such discrimination and its proximate affects.

Given the unique evidence and argument that the Federation intends to present, there are (at the very least) substantial grounds on which to challenge the district court's conclusion that the government adequately represents the Federation's interest and its corresponding denial of the Federation's motion to intervene.

There is, moreover, a strong public interest in ensuring that judicial decisions—especially those resolving constitutional questions—are based on a complete record and thorough briefing. That public interest cannot be vindicated in this case unless the Federation is allowed to intervene in a timely manner.

Thus, expedition of the Federation's appeal is warranted.

I. The Federation has shown good cause for expedition under 12 U.S.C. section 1657.

This Court must expedite this appeal because the Federation has shown good cause under 12 U.S.C. § 1657(a).

Absent expedition, the district court is likely to issue a decision enjoining implementation of Section 1005 without hearing evidence of the contemporary discrimination that is sufficient to save the provision from Plaintiffs' constitutional challenge. When issuing the preliminary injunction sought by Plaintiffs, the district court concluded that the government had failed to carry its burden of demonstrating that Section 1005 is narrowly tailored to achieve a compelling interest. ECF 60 at 16-19. The district court reached that conclusion, at least in part, because the government relied exclusively on "evidence of past" discrimination and, in the court's words, "admi[tted] that the USDA is not currently discriminating against any socially disadvantaged farmers or ranchers." *Id*. at 16. The evidentiary record on summary judgment will be very different—and will clearly show on-going discrimination by the Department of Agriculture and the effect of that discrimination on contemporary Black farmers—if the Federation is allowed to intervene in a timely manner.

Given the current scheduling order—pursuant to which discovery closes on February 25 and motions for summary judgment are due March

11—the only way that the Federation will be able to intervene in a timely manner is if this Court expedites consideration of the Federation's appeal. If the Federation is not allowed to intervene before the close of discovery and the deadline for summary judgment motions, intervention will have little or no value. The Federation will have neither the opportunity to build an evidentiary record of recent and current discrimination nor the ability to defend Section 1005 on that basis. Because a "failure to expedite would … deprive the relief requested of much of its value," good cause for expedition exists. H.R. Rep. No. 98-985, at 6 (1984), 1984 U.S.C.C.A.N. 5779, 5784.

The Federation has singular evidence that present-day Black farmers have suffered, and continue to suffer, discrimination by the USDA that has resulted in their current debt burdens. As recognized by another district court, this evidence of continued discrimination is "crucial" to the constitutionality of the Section 1005 debt relief program, and may establish that race- and ethnicity-based debt relief is warranted. *Wynn v. Vilsack*, 2021 WL 2580678, at *5 & *6 n.9 (M.D. Fla. June 23, 2021). Yet, as both the district court below and the *Wynn* court noted, the government has not presented *any* evidence of continued discrimination by the USDA or how this discrimination resulted in the debt addressed by Section 1005. *Id.* at *16 ("The Government has not connected SDFRs disproportionate delinquency status to actual discrimination by USDA outside of conclusory remarks made

in support of the legislation."); *see also* ECF 60 at 17 ("[T]he Government puts forward no evidence of intentional discrimination by the USDA in at least the past decade.").

The Government has demonstrated that it is an inadequate representative of the Federation's interests, because its own institutional interests motivate it to sweep under the rug the damning evidence of recent and ongoing discrimination against present-day SDFRs—the very evil that Congress sought to remediate by enacting Section 1005. Given the strong public interest in a case of this magnitude being litigated on a complete evidentiary record, the rationale for expedition is especially compelling.

Unless consideration of the Federation's appeal is expedited, the district court may permanently enjoin debt relief payments under Section 1005 based on a limited record. Given the current scheduling order, expedition is necessary to ensure the Federation's appeal from the denial of intervention has value and that, if successful, the Federation has a meaningful opportunity to present firsthand evidence of discrimination against its members and others similarly situated and defend Section 1005 on that basis.

In short, good cause for expedition exists and this Court must therefore expedite this appeal under 28 U.S.C. § 1657(a).

II. The district court's order is subject to substantial challenge.

In the opening brief that it will file on December 30, the Federation will demonstrate that the district court erred in several critical aspects when it denied intervention.

In denying the Federation's motion to intervene as a matter of right, the district court found that the government adequately represents the interests of the Federation and its members. But the district court overlooked evidence that the Federation's interests are in fact materially different from those of the government.

First, despite acknowledging that the Federation may be able to make the case for discrimination "more comprehensively and compellingly" than the government, the district court nevertheless held that the Federation and the government shared the same interests. ECF 143 at 4. In fact, a divergence of interests is why the Federation could present stronger evidence of discrimination than the government. The government has self-interested reasons for denying its present-day discrimination against minority farmers and the inadequacies of its previous reform efforts, particularly when such discrimination could expose it to liability. The Federation, by contrast, has a vital interest in exposing recent and current discrimination suffered by its members. The district court erroneously ignored that fundamental divergence of interests.

Second, the district court failed to even acknowledge, let alone address, evidence that the government is currently threatening the Federation's members with acceleration of their loans and foreclosure of their farms during the pendency of this lawsuit. *See* ECF 142. This too demonstrates that the interests of the Federation and the government are strikingly different. It is inconceivable that Black farmers could be adequately represented by the very entity that is threatening to seize their farms and destroy their families' livelihoods for its own gain.

Finally, the district court clearly exceeded its discretion by denying permissive intervention to the Federation, which represents those *most affected* by the constitutional challenge to the debt relief program. The district court identified no harm that the Federation's intervention would cause but denied permissive intervention based on its belief that "the Federation's interests are significantly similar to" the government's interests. ECF 143 at 5. In preventing those with the greatest stake in Section 1005 from intervening, the district court plainly contravened this Court's instruction that "[f]ederal courts should allow intervention where no one would be hurt and the greater justice *could be* obtained." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) (emphasis added).

III. An expedited appeal is in the public interest.

Expedited consideration of this appeal is in the public interest. It is

axiomatic that there is a strong public interest in remedying racial discrimination and its lingering effects. Section 1005 is designed to do just that. Unless the Federation has a meaningful opportunity to present evidence of the racial discrimination that its members have endured and the continuing effect of that discrimination on their debt burden, the constitutionality of Section 1005 will be decided on an incomplete record, which is manifestly contrary to the public interest. Expediting this appeal so that the Federation has a timely opportunity to present the evidence of discrimination that the government refuses to present is the only way to vindicate the public interest in thorough litigation of constitutional issues.

IV. Proposed Briefing Schedule

The Federation respectfully requests that the Court issue the following proposed briefing schedule. Plaintiffs do not oppose this briefing schedule. The government does not oppose expedition as such but asks that its responsive brief be due January 20, 2022.

The Federation's Opening Brief	December 30, 2021
Plaintiffs' and the Secretary's Answering Briefs	January 13, 2022
The Federation's Reply Brief	January 20, 2022

CONCLUSION

The Court should expedite its consideration of the Federation's appeal,

adopt the Federation's proposed briefing schedule, and set the case for argument in February (if it does not decide the appeal on the papers).

Dated: December 23, 2021

Respectfully submitted,

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Certificate of Service

I certify that this motion was served on all participating counsel on December 23, 2021, via the CM/ECF system.

Dated: December 23, 2021

/s/ Andrew E. 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 3,013 words, excluding the parts of the document exempted by Fed R. App. P. 32(f).

Dated: December 23, 2021

/s/ Andrew E. Tauber
Andrew E. Tauber

United States Court of Appeals

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December 27, 2021

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No. 21-11271 Miller v. Federation of Southern Coop
USDC No. 4:21-CV-595

Dear Mr. Tauber,

Your motion does not contain a certificate of conference, pursuant to **5TH CIR. R.** 27.4. You must submit a sufficient motion as soon as possible in light of the request to expedite.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Mary Frances Yeager, Deputy Clerk
504-310-7686

cc: Mr. Chase Johnson Cooper
Mr. Jonathan F. Mitchell