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)

REPLY BRIEF 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.

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Dated: January 20, 2022

Respectfully submitted,

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INTRODUCTION

The briefs of both the Secretary of Agriculture and the Plaintiffs are remarkable for what they do not dispute. They do not dispute the Secretary has an institutional interest in avoiding the potential liability and reputational harm that would flow from the presentation of evidence of current USDA discrimination against Black farmers. They do not dispute that evidence of current discrimination by the Department of Agriculture against the Federation's members is relevant to the constitutionality of Section 1005. And they do not dispute that the Secretary has no intention of presenting evidence of current discrimination despite its relevance. These undisputed facts alone require reversal.

And then there is the conflict created by USDA's threat to foreclose on Federation members' farms. Plaintiffs say that threat is irrelevant and the Secretary denies having made the threat. But neither is true. USDA has threatened to initiate foreclosure proceedings and that threat prevents it from adequately representing the Federation's interests.

Rather than refute the Federation's demonstration that its interests and the Secretary's interests diverge in material ways, the Secretary and Plaintiffs invoke presumptions of adequate representation and treat them as conclusive. But the presumptions that they invoke are inapplicable. They are, moreover, merely presumptions that the Federation has in any event rebutted.

The Federation should have been allowed to intervene. The district court erred in concluding otherwise. The order below should be reversed.

ARGUMENT

I. The Federation is entitled to intervene as a matter of right because the Secretary inadequately represents the Federation's interests.

The Federation is entitled to intervene as a matter of right because the Secretary is an inadequate representative of the Federation's interests in this litigation. His interests diverge from those of the Federation and its members in at least two material—and now unrefuted—ways.

First, the Federation has an interest in presenting evidence of—and argument based on—current racial discrimination by USDA. *See* Opening Br. 19. The Secretary has a contrary interest, and his response confirms that he does not intend to present such evidence or argument.

Second, USDA has threatened Federation members with foreclosure. Opening Br. 22–24; ROA.2541. The Secretary denies this and argues that the Federation has waived the point in any case, but the point has not been waived and in this posture the Court must credit the Federation's facts, which are supported by the record in any event. *See Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015).

The district court ignored both conflicts and neither the Secretary nor Plaintiffs explain why the Secretary is an adequate representative of the Federation's interests given these conflicts.

A. No presumption of adequate representation applies.

To defend the denial of as-of-right intervention, the Secretary and the Plaintiffs rely heavily on presumptions that the Secretary adequately represents the interests of the Federation in this litigation. *See* Sec. Br. 11–13; Plfs.' Br. 7–12. That reliance is misplaced.

The first presumption invoked by the Secretary and Plaintiffs—the "ultimate objective" presumption—does not apply here. True, this Court has recognized a presumption of adequate representation "when the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014) (quotation omitted). But that presumption "does not apply" when the interests of the would-be intervenor and the existing parties "may not align precisely." *Id.* Just so here.

As noted above (*supra* at 2) and as shown in the Federation's opening brief (at 20–24), the Federation's interests and those of the Secretary diverge in at least two material respects. Because the interests of the Federation and the Secretary "may not"—and, in fact, do not—"align precisely," the ultimate-objective presumption "does not apply." *Brumfield*, 749 F.3d at 345. But even if it did, the Federation has overcome it by showing an "adversity of interest" between itself and the Secretary. *Id.*

The Secretary and Plaintiffs' reliance on the governmental-body presumption fares no better. This Court has applied that presumption "when the putative representative is a governmental body or officer *charged by law*

with representing the interests of the absentee." *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996) (en banc) (emphasis added). As the leading treatise explains, "[t]his principle … applies when there is formal representation by a fiduciary, such as an executor, administrator, or trustee, and it extends also to cases in which a corporation, a labor union, or some other group speaks for its members." 7C Charles Alan Wright, et al., Fed. Prac. & Proc. Civ. § 1909 (3d ed.). The governmental-body presumption "does not apply" here because the Secretary is "no[t] … a representative of [the Federation]" and does not speak for its members. *Entergy Gulf States La., L.L.C. v. U.S. EPA*, 817 F.3d 198, 203 (5th Cir. 2016).[1]

The governmental-body presumption also is inapplicable because its application "is restricted … to those suits involving matters of sovereign interest." *Edwards*, 78 F.3d 983, 1005 (5th Cir. 1996). Because "[USDA] is a governmental agency and not a sovereign interest," the governmental-body presumption does not apply and "a stronger showing of inadequacy is not required." *Entergy*, 817 F.3d at 203 n.2 (distinguishing *Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994), on the ground that "in *Hopwood*, the party was the state of Texas—not a governmental agency").[2]

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[1] Thus, contrary to what Plaintiffs say, there is a dispute over whether the Secretary "is a 'governmental … officer charged by law with representing the interests' of the Federation." Plfs.' Br. 9–10.

[2] Seeking to avoid *Entergy*'s unambiguous holding regarding

Because neither presumption of adequate representation applies, the Federation bears the "minimal" burden of showing that the Secretary's "representation of [its] interests 'may be' inadequate." *Texas*, 805 F.3d at 661 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see* Opening Br. 16–17. The Federation has easily met that "*de minimis* standard." *Edwards*, 78 F.3d at 1005. It should have been allowed to intervene as of right.[3]

governmental agencies, the Secretary quotes *Baker v. Wade*, 743 F.2d 236 (5th Cir. 1984), for the proposition that "the United States 'as a sovereign body politic' is 'the real party in interest' in this case" because Plaintiffs challenge the constitutionality of a federal statute. Sec. Br. 17 n.6. The Secretary's reliance on *Baker* is misplaced. True, the panel decision cited by the Secretary dismissed an appeal brought by a would-be intervenor on the ground that the State of Texas adequately represented the intervenor's interest in defending the constitutionality of a state statute. But that decision was subsequently vacated when this Court granted rehearing en banc. *Cf.* Fifth Circuit Rule 41.3 ("Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion[.]"). And on rehearing, this Court "conclude[d] as a matter of law that [the prospective intervenor's] interests were inadequately represented" by the Texas attorney general and that the prospective intervenor was entitled to intervene as a matter of right, notwithstanding the plaintiff's constitutional challenge to a state statute. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *overruled on other grounds by Lawrence v. Texas*, 539 U.S. 558 (2003).

[3] Neither the Secretary nor the Plaintiffs appear to contest that, if no presumption of adequate representation applies, the Federation has satisfied Rule 24(a)'s inadequate-representation prong.

B. Even if presumptions of adequate representation applied, the Federation has overcome them.

Neither of the presumptions invoked by the Secretary and Plaintiffs applies here. But even if *both* presumptions applied, the Federation has thoroughly rebutted each of them. The Federation has shown that "its interest is in fact different from that of" the Secretary (*Edwards*, 78 F.3d at 1005), both because the Federation, unlike the Secretary, has an interest in presenting evidence of—and argument based on—current discrimination by USDA, and because USDA's threatened foreclosure on Federation members' farms is contrary to not only the Federation's immediate interests but also its broader interest in successfully defending the constitutionality of Section 1005. *See* Opening Br. 18–24.

1. The Federation's interest in presenting evidence of current discrimination is different from the Secretary's interest in relying exclusively on evidence of past discrimination.

Resisting the district court's characterization (*cf.* ROA.1512), the Secretary says that he has not taken "a litigation position categorically denying current discrimination" by his agency against Black farmers. Sec. Br. 21 n.8. But the fact remains that the Secretary, consistent with his institutional interests, has neither admitted current discrimination nor presented evidence of current discrimination. And he has no intention of doing so. As the Secretary concedes, his defense of Section 1005 "'rel[ies] on

intentional discrimination at USDA *in the past* and then the negative ramifications of *that*.'" *Id.* (quoting ROA.2629) (emphasis added).

The Secretary says that his failure to "emphasize[] evidence of current discrimination … is merely a reflection of Congress's intent in enacting Section 1005," which, he says, is "a reviewing court's focus." Sec. Br. 20. There are two problems with that.

First, it is not merely a question of emphasis. According to the Secretary, he "submit[ted] evidence of discrimination within the past decade," notwithstanding the district court's finding to the contrary. Sec. Br. 19–20. But evidence of discrimination "within the past decade" is not evidence of current discrimination and the Secretary does not argue that he has presented or will present evidence of current discrimination.

Second, even if Section 1005 is designed to remedy "the lingering effects of past discrimination" (Sec. Br. 20 n.7), evidence of current discrimination is nonetheless highly relevant to its constitutionality. Evidence of ongoing discrimination helps establish both the necessary predicate of past discrimination and the inadequacy of prior remedial efforts. Indeed, as the Federation noted (Opening Br. 21) and the Secretary ignores, one court has stated that "evidence of continued discrimination" is "*crucial*" to finding Section 1005 constitutional. *Wynn v. Vilsack*, ____ F. Supp. 3d ____, 2021 WL 2580678, at *5 (M.D. Fla. 2021) (emphasis added); *see also, e.g.*, *W.H. Scott Const. Co. v. City of Jackson*, 199 F.3d 206, 217 (5th Cir.

1999) (recognizing remedying "present discrimination" as a potential justification for "a race-conscious program"); *see also H.B. Rowe Co. v. Tippet*, 615 F.3d 233, 243–46 (4th Cir. 2010) (considering statistical evidence of current discrimination in analyzing justification for race-conscious remedial measure).

Thus, contrary to what the Secretary suggests, the evidence of current discrimination that the Federation would present is not merely "'more evidence than the [Secretary]'" would offer (Sec. Br. 23 (quoting *Hopwood*, 21 F.3d at 605)) but qualitatively different evidence that would have "concrete effects on the litigation." *Texas*, 805 F.3d at 663. Inasmuch as the Federation would rely on current discrimination to defend Section 1005 and the Secretary will not, the Federation—unlike the prospective intervenors in *Hopwood*—would advance "a separate defense" of the statute at issue. *Hopwood*, 21 F.3d at 606.

In short, the Secretary's unwillingness to present evidence of—and argument based on—current discrimination shows that his interests are "in fact different" from the Federation's interests (*Edwards*, 78 F.3d at 1005) "in a manner germane to the case." *Texas*, 805 F.3d at 661. That "adversity of interest" is sufficient to rebut any presumption that the Secretary adequately represents the Federation's interests. *Edwards*, 78 F.3d at 1005;

accord Texas, 805 F.3d at 662.[4]

2. USDA's threat to foreclose on Federation members' farms shows that the Federation's interests and the Secretary's interests are not aligned.

The conflict over presenting evidence of current discrimination shows that the Secretary does not adequately represent the Federation's interest in defending Section 1005. That alone requires reversal. But there is more.

As the Federation explained (Opening Br. 22–24), the letters that USDA sent Federation members threatening to foreclose on their farms undermines the Federation's interest in successfully defending the constitutionality of Section 1005. Nothing that the Secretary says refutes the Federation's analysis.

First, the Secretary says that the Federation's argument regarding the foreclosure letters "has not been preserved" because it "was not raised in timely fashion below." Sec. Br. 23. Not so.

The Federation did not forfeit the argument by first raising it on reply.

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[4] It is no answer to say that the Federation "ha[s] been 'authorized to act as amicus' and there [i]s 'no reason [it] cannot provide … evidence'" of current discrimination "'to the [Secretary].'" Sec. Br. 23 (quoting *Hopwood*, 21 F.3d at 605–06). Presenting evidence of current discrimination to the Secretary is meaningless if the Secretary will not present it to the court. And if the Federation were merely an amicus, it would have neither the right to challenge an adverse ruling nor the right to defend a favorable ruling on appeal. Thus, authorization to act as an amicus is no substitute for being allowed to participate as a party.

In its motion to intervene, the Federation argued that it was entitled to intervene as a matter of right under Rule 24(a). The only contested issue was whether the Secretary adequately represents the Federation's interests. *See* ROA.2548. In its opening memorandum, the Federation argued that "[t]he Secretary does not adequately represent the Federation's interests" given his "'divergent interests.'" ROA.2312 (quoting *Texas*, 805 F.3d at 661). In its reply memorandum, the Federation argued that

> any presumption of the adequacy of the government's representation of the Federation's interests is defeated by adversity of interests between the Federation and the government, including both the government's incentive to avoid presenting evidence that could expose USDA to liability for discriminatory practices and the fact that USDA has issued letters to farmers otherwise eligible for Section 1005 relief, threatening foreclosure of their farms.

ROA.2526. Thus, the Federation cited the foreclosure letters on reply only as further evidence that—as it had argued in its opening memorandum—the Secretary does not adequately represent its interests. Accordingly, the Federation has not forfeited its right to rely on the letters. *Cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (distinguishing between a new claim and a new argument in support of an existing claim).

Neither of the cases cited by the Secretary (Sec. Br. 23) is to the contrary. *Del Prado v. B.N. Development Co.*, 602 F.3d 660 (5th Cir. 2010), is distinguishable on the facts. It held that a litigant had forfeited an argument that it "fail[ed] to raise to the district court until the reply brief to

a *Motion for Reconsideration*." *Id.* at 664 (emphasis added). But the general rule that "a party may not raise an argument for the first time in a petition for rehearing" (*id.* (quotation marks omitted)) is irrelevant here, where the Federation cited the foreclosure letters during initial briefing on its motion to intervene, not on a motion for reconsideration. Nor is the Secretary helped by *Vais Arms, Inc. v. Vais*, 383 F.3d 287 (5th Cir. 2004). It holds that "a district court *may* rely on arguments and evidence presented for the first time in a reply brief as long as the court gives the nonmovant an adequate opportunity to respond." *Id.* at 292 (emphasis added). Here, the Secretary had no need to respond: the district court denied the Federation's motion to intervene without even mentioning the foreclosure letters.[5]

Purported forfeiture aside, the Secretary argues that "[c]ontrary to the Federation's assertions, USDA did *not* declare it is 'tak[ing] legal action' against Federation members." Sec. Br. 24. But that is precisely what USDA

[5] Noting that the foreclosure letter cited by the Federation was dated September 28 but not raised in the Federation's opening memorandum submitted October 12, the Secretary insinuates that the Federation deliberately "waited until the reply brief" to raise the letter so that the Secretary would have "no opportunity to respond." Sec. Br. 23 n.9. That is not the case. The September 28 letter was sent to a Federation member, not the Federation. ROA.2540. Federation staff did not receive the letter until October 4. Not recognizing the letter's relevance to its motion to intervene, the Federation did not inform its outside counsel of the letter until several weeks later, after its motion to intervene had been filed. In short, contrary to the Secretary's insinuation, there was no sandbagging.

declared. The notice of "intent to accelerate" attached to the letter states that the Farm Service Agency, an arm of USDA, "*will take legal action* to collect all the money you owe to the Agency." ROA.2541 (emphasis added). It further states that,

> [a]fter acceleration of your loan accounts, *the Agency will start foreclosure proceedings*. The Agency will repossess or take legal action to sell your real estate, personal property, crops, equipment, and any other assets in which the Agency has a security interest. … The Agency will also obtain and file judgments against you and your property and/or refer your account to the Department of Treasury for collection.

ROA.2541 (emphasis added).[6]

The Secretary next argues that "USDA's ministerial mailing" is in any event irrelevant because, in light of "the COVID-19 pandemic …, USDA has indefinitely 'suspended all foreclosure, debt collection and other adverse actions' … across the board without regard to a farmer's potential eligibility" for relief "under Section 1005." Sec. Br. 24.[7] But that "across the board"

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[6] The Secretary would have this Court think that the notice means something other than its says because the accompanying letter states that the agency is "*suspending further servicing on your account* until after the ARP Act payment process is implemented." Sec. Br. 24 (quoting ROA.2540). But suspension of servicing is merely the first step in the foreclosure process, *i.e.*, the first step in the "legal action" that the Agency says it "will take." ROA.2541.

[7] In fact, the temporary moratorium is not as complete as the Secretary portrays. Although it protects from imminent foreclosure those who have loans directly from USDA, it does not protect those who hold bank loans guaranteed by USDA.

action without regard to eligibility under Section 1005 does not cure the problem created by the foreclosure letters. If anything, it exacerbates the problem. As the Federation explained, USDA's threat to foreclose on its members' farms undermines the Secretary's argument that "'timely debt relief *for minority farmers* [is] necessary to remedy the lingering effects' of USDA discrimination." Opening Br. 23 (quoting ROA.1091–1092) (emphasis added). Providing "across the board" relief to *all* farmers, even those ineligible for relief under Section 1005, diminishes the Secretary's ability to convincingly argue that minority farmers are uniquely in need of debt relief given racial discrimination in USDA loan programs.

Finally, the Secretary dismisses the significance of the foreclosure letters, arguing that USDA's "loan-administration practices are not at issue in this litigation." Sec. Br. 25. But USDA's lending practices are at the very heart of this litigation, which challenges the constitutionality of the debt relief afforded by Section 1005. Yes, "the sole question" to be decided "is whether Section 1005 is constitutional" (*id.*), but USDA's lending practices—including its foreclosure practices—are plainly relevant to that question. And, for the reasons the Federation has identified (Opening Br. 20–22), the foreclosure letters sent by USDA undermine the Secretary's ability to zealously defend Section 1005's constitutionality. For this reason, too, the Secretary is an inadequate representative of the Federation's interests.

***

Because the Federation has demonstrated that the Secretary is an inadequate representative of the Federation's interests, it is entitled to intervene as a matter of right and the district court erred in concluding otherwise.

II. Denying permissive intervention was a clear abuse of discretion.

The district court clearly abused its discretion when it denied the Federation's request for permissive intervention—a request that even the Secretary did not oppose below (subject to certain conditions).

For his part, the Secretary argues on appeal that the Federation "has not identified an abuse of discretion." Sec. Br. 28. That is wrong. The Federation specifically identified three ways in which the district court abused its discretion. It showed that the district court relied on clearly erroneous factual findings; relied on erroneous conclusions of law; and misapplied the law to the facts. Opening Br. 25–27.

For their part, Plaintiffs argue that this Court lacks jurisdiction to review the district court's denial of permissive intervention and that the Federation is not entitled to permissive intervention in any event. *See* Plfs.' Br. 12–13. Neither assertion is correct.

"[I]f the district court abused its discretion in denying the Rule 24(b) motion," as the it did here, this Court "retain[s] jurisdiction and must

reverse." *Edwards*, 78 F.3d at 992.

On the merits, Plaintiffs contend that as a matter of law the Federation cannot permissively intervene because, according to Plaintiffs, it has no "'claim or defense.'" Plfs.' Br. 13 (quoting Fed. R. Civ. P. 24(b)(1)(B)). But of course the Federation has a "defense" within the meaning of Rule 24(b). According to the only case Plaintiffs cite, "[t]he words 'claims or defenses' … in the context of Rule 24(b)(2) governing permissive intervention … manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997)). Here, were it allowed to intervene, the Federation would defend the constitutionality of Section 1005 on the ground that it is narrowly tailored to achieve the compelling governmental interest in remediating the present-day effects of past and current USDA discrimination against minority farmers.

Indeed, the very reason the Federation has sought to intervene is to defend the constitutionality of Section 1005. The Federation has shown (and no party disputes) that its members have an interest in the debt relief Section 1005 would provide, and that the Federation seeks to protect that interest by defending the legality of Section 1005 through the presentation of evidence of current discrimination by the Department of Agriculture. Courts in this circuit have found the "defense" component of Rule 24(b)(1)(B) satisfied in similar circumstances. For example, in *Franciscan Alliance, Inc. v. Azar*,

414 F. Supp.3d 928 (N.D. Tex. 2019), the court held that Rule 24(b)(1)(B)'s "defense" prong was satisfied by would-be intervenors who sought to defend the legality of a federal regulation. The court so held even though there, as here, the would-be intervenors would neither "be required to do anything … nor … restrained from doing anything" by an adverse ruling. Plfs.' Br. 13. In short, the Federation has a "defense" within the meaning of Rule 24(b)(1)(B).

Thus, the district court clearly abused its discretion in denying the Federation permissive intervention.

CONCLUSION

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

Dated: January 20, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this brief was served on all participating counsel on January 20, 2022, via the CM/ECF system.

Dated: January 20, 2022 By: */s/ Andrew Tauber*
Andrew E. Tauber

CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the typeface requirement of Fed. R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limit of Fed R. App. P. 32(a)(7)(B)(ii). 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 3,756 words, excluding the parts of the document exempted by Fed R. App. P. 32(f).

Dated: January 20, 2022 By: */s/ Andrew Tauber*
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