No. 21-11271

In the 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
Case No. 4:21-cv-00595-O

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES SID MILLER, ET AL.

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that 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 in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The plaintiffs-appellees do not that believe oral argument is necessary because the issues on this appeal are straightforward and adequately presented in the parties' written submissions. If, however, the Court decides to hold oral argument, the plaintiffs-appellees respectfully ask to participate.

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The district court properly denied the Federation's motion to intervene. The Federation is not entitled to intervene as of right because it has failed to show that the Department of Justice will not adequately represent its interests. *See* Fed. R. Civ. P. 24(a)(2). And the Federation does not qualify for permissive intervention because it does not have a "claim or defense" in this litigation. *See* Fed. R. Civ. P. 24(b)(1).

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the district court's order to the extent it denies intervention as of right. *See Edwards v. City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) ("The denial of a motion to intervene of right is an appealable final order"). The Court lacks jurisdiction to review the denial of permissive intervention because the Federation has not shown a "clear abuse of discretion." *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1290 (5th Cir. 1987) ("In the absence of a clear abuse of discretion, this court lacks jurisdiction over an appeal from a denial of permissive intervention").

STATEMENT OF THE ISSUES

1. To intervene as of right under Rule 24(a), a movant must show that the existing parties do not "adequately represent" its interests in the litigation. Fed. R. Civ. P. 24(a). But when a proposed intervenor contends that a government agency fails to adequately represent its interests, "a much stronger showing of inadequacy is required." *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994). The district court denied intervention as of right and held that the Federation had failed to make a "strong showing"

of inadequate representation required because: (1) The Federation failed to demonstrate that Secretary Vilsack will not strongly defend the constitutionality of section 1005 of the American Rescue Plan Act of 2021; and (2) The Federation did not show it has a "separate defense" of section 1005 that Secretary Vilsack "has failed to assert." ROA.2549. The issue presented is:

> Did the district court err in holding that the Federation had failed to make a "strong showing" that Secretary Vilsack would inadequately represent its interests in this litigation?

2. Did the district court abuse its discretion by denying the Federation's motion for permissive intervention under Rule 24(b)?

STATEMENT OF THE CASE

Section 1005 of the American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021), provides aid to farmers and ranchers who have been harmed by the COVID-19 pandemic—including loan forgiveness up to 120 percent of the value of the loan—but only if they qualify as a "socially disadvantaged farmer or rancher." ROA.71-72. Federal law defines "socially disadvantaged farmer or rancher" as "a farmer or rancher who is a member of a socially disadvantaged group." 7 U.S.C. § 2279(a)(5). "Socially disadvantaged group," in turn, is defined as:

> 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.

7 U.S.C. § 2279(a)(6).

On May 21, 2021, the United States Department of Agriculture, through the Farm Service Agency (FSA), issued a press release announcing a Notice of Funds Availability (NOFA), in which it would start making loan payments for eligible borrowers with qualifying direct farm loans, pursuant to section 1005 of the American Rescue Plan Act. ROA.971-973. The Department of Agriculture published this notice in the Federal Register on May 26, 2021. *See* Notice of Funds Availability, 86 Fed. Reg. 28,329 (May 26, 2021) (ROA.974-977).

On April 26, 2021, plaintiff Sid Miller filed a class-action lawsuit against the Secretary of Agriculture, Tom Vilsack, and demanded that the court enjoin Secretary Vilsack and his successors from implementing any racial exclusions or discriminatory racial preferences in Department of Agriculture programs, including the loan-forgiveness program established in section 1005. ROA.52-62. On June 2, 2021, Mr. Miller amended his complaint and added four additional plaintiffs: Greg Macha, James Meek, Jeff Peters, and Lorinda O'Shaughnessy. ROA.384-397. Later that day, the plaintiffs moved for class certification and asked for a classwide preliminary injunction that would restrain Secretary Vilsack from discriminating on account of race in administering section 1005's loan-forgiveness program.[1] The Department of Justice vigorously opposed each of these motions.[2]

1. ROA.649-684 (motion for class certification); ROA.719-987 (motion for preliminary injunction).
2. ROA.1050-1120 (opposition to motion for preliminary injunction); ROA.1121-1146 (opposition to motion for class certification).

On July 1, 2021, the district court issued an order certifying two plaintiff classes. ROA.1497-1520. The first class consists of:

> All farmers and ranchers in the United States who are encountering, or who will encounter, racial discrimination from the United States Department of Agriculture on account of section 1005 of the American Rescue Plan Act.

ROA.1502. The second class consists of:

> All farmers and ranchers in the United States who are currently excluded from the definition of "socially disadvantaged farmer or rancher," as defined in 7 U.S.C. § 2279(a)(5)–(6) and as interpreted by the Department of Agriculture.

ROA.1502. Then the district court granted the motion for preliminary injunction and enjoined Secretary Vilsack from "discriminating on account of race or ethnicity in administering section 1005 of the American Rescue Plan Act for any applicant who is a member of the Certified Classes." ROA.1520.[3]

On October 12, 2021, The Federation of Southern Cooperatives/Land Assistance Fund moved to intervene under both Rule 24(a) and Rule 24(b). ROA.2285-2358. The Federation argued that it should intervene as of right because the Secretary could not "adequately represent" its interests in defending the constitutionality of section 1005. The Federation claims that the Secretary would be reluctant to expose or admit to the Department's "present-day and historical discrimination against minority farmers and inadequacies of previous reforms." ROA.2313. The Federation also stressed that

3. The district court later amended its preliminary injunction to protect any member of the certified class from racial discrimination, regardless of whether they qualified as "applicants." ROA.2405.

the Secretary would not emphasize the past and present discriminatory conduct of his Department "to the same extent that victims of that discrimination will, particularly when doing so could expose his agency to liability and constitute evidence in potential later suits claiming discrimination." *Id.* The Federation argued for permissive intervention on similar grounds. ROA.2314-2315.

On December 8, 2021, the district court denied the Federation's motion to intervene. ROA.2546-2551. The district court denied intervention as of right because the Federation had failed to show that the Secretary would not "adequately represent" their interests. ROA.2547-2550. The district court denied permissive intervention because "[t]he Federation's interests are significantly similar to the Secretary's" and "their arguments are virtually identical." ROA.2550. The district court also concluded that "permitting the Federation to proceed as amicus will enable it to fully voice its position in this case," and it granted the Federation leave to participate as amicus curiae. *Id.*

The Federation filed a timely notice of appeal. ROA.2561.

SUMMARY OF ARGUMENT

To intervene as of right under Rule 24(a), the Federation must show that Secretary Vilsack does not "adequately represent" its interests in the litigation. Fed. R. Civ. P. 24(a). But a presumption of adequate representation attaches when (1) the party to the lawsuit is a governmental body or officer; or (2) the would-be intervenor has the "same ultimate objective" as a party to the lawsuit. *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996).

Each of these presumptions applies here, as Secretary Vilsack is "a governmental body or officer," and he has the "same ultimate objective" as the Federation—to uphold the constitutionality of section 1005. *Id.* The Federation has not acknowledged either presumption, and it does not attempt to make the showings required to overcome these presumptions of adequate representation.

The Federation has also failed to show a "clear abuse of discretion" in the district court's denial of permissive intervention. *Kneeland*, 806 F.2d at 1290. The district court correctly observed that the Federation's interests "are significantly similar to the Secretary's" and that "[t]heir arguments are virtually identical." ROA.2550. And the Federation has made no effort to explain how it "has a claim or defense" in this litigation, as required by Rule 24(b)(1)(B).

STANDARD OF REVIEW

The district court's ruling denying intervention as of right is reviewed de novo. *See Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996). The ruling denying permissive intervention is reviewed for abuse of discretion. *See Kneeland*, 806 F.2d at 1290.

ARGUMENT

I. The Federation Has Failed To Make A Strong Showing That The Department Of Justice Will Not "Adequately Represent" Its Interests In This Litigation

Rule 24(a) sets forth the requirements for intervention as of right:

> On timely motion, the court must permit anyone to intervene who:
> (1) is given an unconditional right to intervene by a federal statute; or
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a) (emphasis added). The Federation does not have a statutory right to intervene, so it must satisfy each requirement of Rule 24(a)(2).

The Federation, however, has failed to demonstrate that the Department of Justice will not "adequately represent" its interests in this litigation. Fed. R. Civ. P. 24(a)(2). As Secretary Vilsack correctly noted below, the United States "is presumptively an adequate representative of the public in a case challenging the constitutionality of a federal statute,"[4] and the Federation has neither acknowledged nor rebutted that presumption—either in the district court or on appeal. Instead, the Federation wants to pretend as though its burden of demonstrating inadequate representation is "minimal." Appellant's Br. at 17 (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (internal quotation marks omitted)); *see also id.* ("Rule [24(a)] is satisfied if the applicant shows that the representation of his interest 'may be' inadequate." (quoting *Texas v. United States*, 805 F.3d 653, 661 (5th Cir. 2015) (some internal quotation marks omitted)). But the law of this circuit makes clear that the burden of showing inadequate representation is *much* more sub-

4. ROA.2497.

stantial when a would-be intervenor alleges that a government agency is an inadequate representative of its interests. *See Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) ("[W]here the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required."); *id.* at 605 ("In a suit involving a matter of sovereign interest, the State is presumed to represent the interests of all of its citizens."). As this Court explained in *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996):

> [O]ur jurisprudence has created two presumptions of adequate representation. First, when the putative representative is a governmental body or officer charged by law with representing the interests of the absentee, a presumption of adequate representation arises whether the would-be intervenor is a citizen or subdivision of the governmental entity. To overcome this presumption, the applicant must show "that its interest is in fact different from that of the [governmental entity] and that the interest will not be represented by [it]." *Hopwood,* 21 F.3d at 605 (quoting *Environmental Defense Fund, Inc. v. Higginson,* 631 F.2d 738, 740 (D.C. Cir. 1979)). This presumption, and the heightened showing required to overcome it, is restricted, however, to those suits involving matters of sovereign interest. *Id.* As the City appears in the present litigation in its capacity as an employer, and not in its capacity as a sovereign, this presumption of adequate representation is inapplicable.
>
> The second presumption of adequate representation arises when the would-be intervenor has the same ultimate objective as a party to the lawsuit. In such cases, the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption.

Id. at 1005 (some citations omitted). The Federation's brief does not even cite *Hopwood* or acknowledge its existence—which is astounding given that *Hopwood* served as the linchpin of the district court's ruling that denied intervention as of right. ROA.2549 ("In sum, '[t]he proposed intervenors have not demonstrated that the [Secretary] will not strongly defend' Section 1005. *Hopwood*, 21 F.3d at 606. 'Nor have the proposed intervenors shown that they have a separate defense' of Section 1005 that the Secretary 'has failed to assert.' *Id.*"). And although the Federation cites *Edwards* throughout its brief, it conveniently ignores the presumptions of adequate representation established in that case. The Federation also quotes *Edwards* out of context and suggests that the case held that a would-be intervenor's burden of showing inadequate representation is "minimal" in *all* situations. *See* Appellants' Br. at 24 ("A prospective intervenor's 'burden of showing inadequate representation is minimal.' *Edwards*, 78 F.3d at 1005."). But here is the full context of that statement from *Edwards*:

> Although the applicant's burden of showing inadequate representation is minimal, "it cannot be treated as so minimal as to write the requirement completely out of the rule." *Cajun Elec. Power Coop.,* 940 F.2d at 120 (quoting *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984)). Accordingly, our jurisprudence has created two presumptions of adequate representation.

Edwards, 78 F.3d at 1005.

Each of the presumptions of adequate representation from *Edwards* applies here, and the Federation has not attempted to rebut them. It is undisputed that Secretary Vilsack is a "governmental . . . officer charged by law

with representing the interests" of the Federation, so the Federation must "show that its interest is in fact different from" Secretary Vilsack and that "the interest will not be represented by" the Secretary. *Id.* (citation and internal quotation marks omitted). The Federation has not alleged or shown that Secretary Vilsack lacks its interest in vigorously defending the constitutionality of section 1005. Instead, the Federation suggests—based on nothing but rank speculation—that the Secretary and the Department of Justice will downplay or soft-pedal evidence of racial discrimination at the Department of Agriculture, even though this evidence is *essential* to demonstrate the constitutionality of statutory racial preferences under existing case law. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The government's brief opposing the motion for preliminary injunction was replete with documented evidence of racial discrimination at the Department of Agriculture,[5] and the Federation does not point to any deficiencies that it perceived in the government's previous briefing. The Federation claims that it might be able to offer *additional* anecdotes of discriminatory conduct beyond those presented by the government,[6] but nothing prevents the Federation from supplying this evidence to the government's lawyers or offering it in an amicus filing. This comes no-

5. ROA.1062 ("THE HISTORY OF DISCRIMINATION AGAINST SOCIALLY DISADVANTAGED FARMERS IN USDA PROGRAMS").

6. Appellants' Br. at 19–20.

where close to overcoming the presumption of adequate representation. *See Edwards*, 78 F.3d at 1005; *Hopwood*, 21 F.3d at 605.

The Federation is equally unable to overcome the second presumption of adequate representation, which "arises when the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Edwards*, 78 F.3d at 1005. The Federation and Secretary Vilsack have the "same ultimate objective"—ensuring that section 1005 is upheld by the courts—and the Federation appears to acknowledge as much. *See* Appellants' Br. at 21 ("[B]oth the Federation and the Secretary 'share the same objective' of vindicating the constitutionality of Section 1005"). That means the Federation "must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption." *Edwards*, 78 F.3d at 1005. The Federation does not even try to make this showing, and it does not acknowledge its obligation to do so. There is no conceivable "adversity" of interest when both the Secretary and the Federation are seeking to defend the constitutionality of section 1005. And the Federation has not even suggested "collusion" or "nonfeasance" on the part of the Secretary at any stage of this litigation.

Finally, the Federation tries to establish a "conflict of interest" by observing that the Secretary has been attempting to foreclose on its members' farms. *See* Appellants' Br. at 22–24. But that is because the Department of Agriculture has been enjoined (by numerous courts) from administering the loan-forgiveness program established in section 1005, so it is legally obligated to foreclose when a borrower fails to repay. The Secretary surely *wants* to

forgive those loans as provided in section 1005—and he is litigating vigorously to restore his authority to do so. His decision to obey the law in the meantime does not establish a conflict of interest between himself and the Federation's members.

II. The Court Lacks Jurisdiction To Review The Denial Of Permissive Intervention

This Court lacks jurisdiction to review a denial of permissive intervention absent a "clear abuse of discretion." *Kneeland*, 806 F.2d at 1290. The district court did not abuse its discretion in denying permissive intervention because it correctly observed that the Federation's interests "are significantly similar to the Secretary's" and that "[t]heir arguments are virtually identical." ROA.2550.

Permissive intervention should be denied for an additional reason: The Federation has made no effort to explain how it "has a claim or defense" in this litigation, as required by Rule 24(b)(1)(B). Rule 24(b)(1) sets forth the requirements for permissive intervention:

> On timely motion, the court may permit anyone to intervene who:
> (A) is given a conditional right to intervene by a federal statute; or
> (B) *has a claim or defense* that shares with the main action a common question of law or fact.

Fed. R. Civ. P. 24(b)(1) (emphasis added). The Federation does not have a statutory right to intervene, so it must satisfy the requirements of Rule 24(b)(1)(B).

Yet the Federation has never identified the "claim or defense" that it "has." The Federation obviously has no "claim" because it is not suing any of the litigants. And the Federation has no "defense" because it will not be required to do anything—nor will it be restrained from doing anything—by the relief that the plaintiffs are seeking against the federal government. *See* Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 274 (2020) ("[A] 'defense' is a particular type of legal argument that the targets of a claim assert to explain why the court should not grant relief against them."); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) ("'The 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." (citation and internal quotation marks omitted)). The Federation does not "have" a claim or defense against any of the litigants, so it has no grounds for permissive intervention.

* * *

The Federation's interests in this litigation can be fully accommodated by filing an amicus curiae brief; they do not warrant intervention as a party with the right to take discovery and participate in the trial proceedings. Allowing the Federation to intervene when there is no reason to doubt the zealous advocacy of the Department of Justice will serve no purpose other than to create opportunities for duplicative discovery and court filings that will delay the resolution of this case.

CONCLUSION

The order denying the Federation's motion to intervene should be affirmed.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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CERTIFICATE OF COMPLIANCE

with type-volume limitation, typeface requirements,
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1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 3,238 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on January 13, 2022, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of VirusTotal and is free of viruses.

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