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,

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 (Hon. Reed O'Connor)

RESPONSE BRIEF FOR DEFENDANT-APPELLEE
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CERTIFICATE OF INTERESTED PERSONS

Miller v. Vilsack, No. 21-11271 (5th Cir.)

Per Circuit Rule 28.2.1, a certificate of interested persons is not required because defendant-appellee is a government official sued in his official capacity.

/s/ Jeffrey E. Sandberg
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Counsel for Defendant-Appellee
Tom Vilsack, in his official capacity
as Secretary of Agriculture

STATEMENT REGARDING ORAL ARGUMENT

The Government does not believe that oral argument is necessary, and notes that the Federation has conditionally waived argument if needed to obtain expedited consideration. *See* Br. of Movant-Appellant Federation of Southern Cooperatives (Br.) at v. The Government stands ready to present argument if it would assist the Court in its deliberations.

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STATEMENT OF JURISDICTION

This is an interlocutory appeal by movant Federation of Southern Cooperatives / Land Assistance Fund (the Federation), which seeks to intervene in this pending district court action brought under 28 U.S.C. §§ 1331 and 1343. *See* ROA.2478-2485 (plaintiffs' third amended complaint). The Federation filed its motion to intervene on October 12, 2021, which the district court denied on December 8, 2021. ROA.2546-2551. The Federation filed a timely notice of appeal from that denial on December 17, 2021. ROA.2561-2563.

This Court has appellate jurisdiction under 28 U.S.C. § 1291 as to the denial of intervention as of right. *St. Bernard Parish v. Lafarge N. Am., Inc.*, 914 F.3d 969, 973 (5th Cir. 2019). This Court has "'provisional jurisdiction'" as to the denial of permissive intervention; if the district court's denial "does not constitute an abuse of discretion," this Court "must dismiss the appeal for lack of jurisdiction." *Id.* (brackets and quotation marks omitted); *see also Edwards v. City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc).

STATEMENT OF THE ISSUE

Whether the district court erred in denying the Federation's motion to intervene as of right or clearly abused its discretion in denying the motion for permissive intervention.

STATEMENT OF THE CASE

A. Statutory And Factual Background

On March 11, 2021, the President signed into law the American Rescue Plan Act of 2021 (ARPA), providing $1.9 trillion in economic assistance. *See* Pub. L. No. 117-2, 135 Stat. 4. Among other initiatives, Congress appropriated the funds necessary to pay off "up to 120 percent of the outstanding indebtedness" of certain "socially disadvantaged farmer[s] or rancher[s]" with certain farm loans either issued directly by or guaranteed by the United States Department of Agriculture (USDA). *Id.* § 1005, 135 Stat. at 12-13. By statute, "socially disadvantaged farmer[s] or rancher[s]" are those belonging to any "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)(5)-(6); *see* ARPA §§ 1005(b)(3), 1006(c)(2)-(3), 135 Stat. at 13-14 (incorporating this definition). USDA has interpreted that definition to include American

Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos. *See* 86 Fed. Reg. 28,329, 28,330 (May 26, 2021).

This is one of twelve lawsuits brought nationwide challenging the constitutionality of Section 1005.[1] In this class action, plaintiffs Sid Miller *et al.* claim that Section 1005 violates the equal protection component of the Due Process Clause of the Fifth Amendment.[2] *See* ROA.2478-2485 (third amended complaint). In June 2021, plaintiffs moved for class certification and a preliminary injunction against the operation of Section 1005.

The Government vigorously opposed both motions. On the merits, the Government argued that Section 1005 is "necessary to further its interests in remedying well-documented long-standing racial discrimination in USDA loan programs and to ensure that its pandemic relief efforts did not perpetuate the effects of that discrimination." ROA.1060. In doing so, the Government provided evidence of the unfortunate history of agency

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[1] In two other lawsuits, courts also entered preliminary injunctions. *See Wynn v. Vilsack*, No. 3:21-cv-514, 2021 WL 2580678 (M.D. Fla. June 23, 2021); *Holman v. Vilsack*, No. 21-cv-1085, 2021 WL 2877915 (W.D. Tenn. July 8, 2021). Many, though not all, of the pending lawsuits have been stayed pending disposition of the current *Miller* action.

[2] Plaintiff also previously asserted additional claims which, following multiple amendments of the complaint, are no longer at issue here.

discrimination against minority farmers, as well as the lingering effects of that discrimination experienced by minority farmers today. *See* ROA.1062-1069, 1076-1087.

On July 1, 2021, the district court certified a class action and granted plaintiffs' motion for a preliminary injunction. ROA.1497-1520. The injunction prevents USDA from making payments under Section 1005 using current eligibility criteria during the pendency of this litigation. ROA.1520. The Government then informed the district court of its understanding that the injunction, while preventing payment, did not forbid USDA from taking preparatory steps, including sending notification letters to eligible borrowers, to enable prompt payments in the event the injunction is lifted. *See* ROA.1521-1523. The district court subsequently confirmed that understanding, ROA.2405-2406, and USDA has since continued to lay the groundwork for eventual debt relief payments under Section 1005 when authorized.

The district court also adopted the parties' jointly proposed schedule for further litigation in this case. As extended, under that schedule, initial expert reports were exchanged on January 7, 2022; rebuttal expert reports are to be exchanged by February 4, 2022; expert depositions will be

completed by February 25, 2022; and the parties' cross-motions for summary judgment are due by March 11, 2022. ROA.1909-1910, 2560.

B. The Federation's Motion To Intervene

In October 2021, three months after the district court entered its preliminary injunction, the Federation moved to intervene as a defendant in this action. The Federation is a nonprofit association of Black farmers, landowners, and cooperatives, some of whose members are presumed eligible for assistance under Section 1005. ROA.2326, 2330. The Federation sought intervention as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure or, in the alternative, permissive intervention under Rule 24(b). *See* ROA.2285, 2295.

The Government opposed the motion to intervene as a matter of right, explaining that the Federation could not show that the Government would fail to adequately vindicate its claimed litigation interest in defending the constitutionality of Section 1005. ROA.2497-2503. But the Government did not oppose permissive intervention, which it noted was "largely a matter of

[the district court's] discretion," so long as certain limitations were put in place. ROA.2503; *see* ROA.2505 (proposed limitations).[3]

The district court denied the Federation's motion. ROA.2546-2551. With respect to intervention as of right, the court ruled that the Federation failed to establish that the Government will not adequately represent its litigation interests. The district court noted that the Federation and the Government indisputably "share the same objective" and "'seek[] the same relief'" in this lawsuit—namely, to vindicate the constitutionality of the statute so that debt relief can be provided to eligible farmers. ROA.2548 (quoting ROA.2306 n.3).

The district court rejected the Federation's argument that it is entitled to intervene because the Government has a range of other assertedly relevant concerns, such as "maintaining the integrity of the overall federal COVID-19 response and economic recovery, and preserving the federal

[3] The Government's proposed conditions were that the Federation "may not (1) assert any new claims or cross-claims in this matter, (2) seek to conduct fact discovery or written expert discovery, or (3) otherwise disrupt the schedule this Court entered without agreement of the parties or the Court's approval." ROA.2505 (footnote omitted); *cf. Beauregard, Inc. v. Sword Servs. LLC*, 107 F.3d 351, 353 (5th Cir. 1997) ("[R]easonable conditions may be imposed even upon one who intervenes as of right."). Plaintiffs opposed both intervention as of right and permissive intervention. ROA.2507-2510.

agencies' relationships with current participants in this and other programs." ROA.2549 (quoting ROA.2313). As the district court explained, "[t]hat the federal government writ large has other concerns is true in every lawsuit." ROA.2549. "[T]hat truism does not demonstrate that the Secretary in this lawsuit has interests different from the Federation," particularly where, as here, the Government has "repeatedly committed to defending Section 1005" and "has demonstrated that commitment throughout this litigation." ROA.2549.

The district court also denied the Federation's motion for permissive intervention. ROA.2550. In an exercise of discretion, the court declined to permit intervention "at this time" because the Federation's interests are "significantly similar to the Secretary's" and its "arguments are virtually identical," and "permitting the Federation to proceed as amicus will enable it to fully voice its position in this case." ROA.2550. The court noted that such participation would also obviate any need to "impose limitations on the Federation's involvement to prevent delay," such as had been proposed by the Government if intervention were permitted. ROA.2550.

This Court has since granted the Federation's motion to expedite this appeal, and has denied the Federation's emergency motion to stay the district court proceedings pending appeal.

SUMMARY OF ARGUMENT

I. The district court properly denied the Federation's motion to intervene as of right. Intervention as of right is available only when a putative intervenor demonstrates, *inter alia*, that "existing parties" do not "adequately represent" its claimed interest in the litigation. Fed. R. Civ. P. 24(a). The Federation has failed to make that showing because, as the district court correctly determined, the Government shares the Federation's interest in defending the constitutionality of Section 1005 and ensuring payments to eligible farmers. That shared interest gives rise to two presumptions of adequate representation, neither of which the Federation has rebutted and one of which it entirely fails to address. The few arguments that the Federation does make do not accurately reflect the scope of this litigation and the nature of USDA's recent actions.

II. The Government has not opposed the Federation's request for permissive intervention. But permissive intervention is "'wholly discretionary' and may be denied even when the requirements of Rule 24(b)

are satisfied." *Turner v. Cincinnati Ins. Co.*, 9 F.4th 300, 317 (5th Cir. 2021). Exercising its discretion, the district court chose to deny intervention while authorizing the Federation to participate as amicus curiae, noting that this would obviate any need to impose further limitations were the Federation given party status. That exercise of discretion does not reflect the kind of "extraordinary circumstances" or "clear abuse of discretion" necessary to obtain reversal under this Court's precedent. *St. Bernard Parish v. Lafarge N. Am., Inc.*, 914 F.3d 969, 973 (5th Cir. 2019).

STANDARD OF REVIEW

In this Circuit, the denial of intervention as of right is reviewed *de novo*. *See Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc).[4] The denial of permissive intervention is reviewed only for "clear abuse of discretion." *See id.*

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[4] In *Berger v. North Carolina State Conference of the NAACP*, No. 21-248 (U.S.), the Supreme Court recently granted certiorari to address, *inter alia*, whether the proper standard of review is *de novo* or abuse of discretion. The case is now being briefed and has not yet been scheduled for argument.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED INTERVENTION AS OF RIGHT.

A. The Government Can Adequately Defend The Constitutionality Of Section 1005.

1. Federal Rule of Civil Procedure 24(a) establishes the requirements for intervention as of right. In addition to filing a "timely" motion, (1) the movant must "have an interest relating to the property or transaction which is the subject of the action;" (2) it must "be so situated that the disposition of the action may, as a practical matter, impair or impede [its] ability to protect that interest"; and (3) its "interest must be inadequately represented by the existing parties to the suit." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.* (*NOPSI*), 732 F.2d 452, 463 (5th Cir. 1984) (en banc)). The movant bears the burden of establishing each of those requirements, and "[f]ailure to satisfy any one requirement precludes intervention of right." *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (en banc).

With respect to the final requirement—that "existing parties [do not] adequately represent [the movant's] interest," Fed. R. Civ. P. 24(a)(2)—this Court recognizes two relevant presumptions. First, a presumption of

adequate representation arises where, as here, the "would-be intervenor has the same ultimate objective as a party to the lawsuit." *Edwards*, 78 F.3d at 1005. "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.*

Second, a distinct—and stronger—presumption of adequate representation arises when the existing party "is a governmental body or officer charged by law with representing the interests of the absentee." *Edwards*, 78 F.3d at 1005. That is because, "[i]n a suit involving a matter of sovereign interest, the State is presumed to represent the interests of all of its citizens." *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (per curiam). To overcome this "heightened" presumption, a movant cannot cite the mere possibility of a divergence in interest. *Edwards*, 78 F.3d at 1005. Rather, the movant "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.'" *Id.* (brackets omitted) (emphasis added) (quoting *Hopwood*, 21 F.3d at 605).

2. Those presumptions control here, and the Federation "has failed to demonstrate that the [Government] will not adequately represent its interests in this suit." ROA.2548. With respect to the first presumption, the

Federation and the Government indisputably "share the same objective" in this litigation: to vindicate the constitutionality of Section 1005 so that debt relief can promptly be made available to eligible farmers. ROA.2548. Indeed, the Federation frankly acknowledged that it "seeks the same relief as the Secretary." ROA.2548 (quoting ROA.2306 n.3). The presumption therefore applies.

The Federation has not rebutted the presumption. It has not shown that its litigation interests are likely adverse to those of the government or that there are any issues of collusion or nonfeasance. On the contrary, the Government, represented by the Department of Justice and with expert advice and assistance from USDA, has made clear through its conduct that it shares the Federation's interest in upholding Section 1005. The Government has zealously defended Section 1005 in this case and in eleven others. *See supra* p. 3 & n.1. Even after entry of the preliminary injunctions, USDA has affirmed that "[it] will continue to forcefully defend our ability to carry out this act of Congress and deliver debt relief to socially disadvantaged borrowers." Helena Bottemiller Evich, *USDA Will 'Forcefully Defend' Debt Relief for Farmers of Color After Judge's Order*, POLITICO (June 14, 2021), https://perma.cc/7K8A-TPBU. Indeed, as noted (*supra* p. 4), USDA has

continued to take the steps needed to ensure that it is ready to act promptly to afford debt relief in the event that the current injunctions are lifted.

In any event, the "heightened" governmental presumption—which the Federation does not address—is even more clearly dispositive. *See Edwards*, 78 F.3d at 1005. This case indisputably involves a "matter of sovereign interest": the constitutionality of an Act of Congress. *Hopwood*, 21 F.3d at 605. The defense of duly enacted federal statutes is the statutory responsibility of the Attorney General and his designees in the Department of Justice. *See* 28 U.S.C. §§ 516, 518, 519, 530D; *cf. id.* § 2403(a) (right to intervene when "the constitutionality of any Act of Congress affecting the public interest is drawn in question"). As the district court recognized, because of this governmental presumption, a "much stronger showing of inadequacy" is necessary for the Federation to succeed in demonstrating an entitlement to intervention. ROA.2548 (quoting *Hopwood*, 21 F.3d at 605).

The Federation cannot make that showing. Its litigation interests are not "*in fact* different" from the Government's interest. *Hopwood*, 21 F.3d at 605 (emphasis added) (quotation marks omitted). They are, in every meaningful respect, the same. The Federation, like the Government, seeks to uphold the constitutionality of Section 1005. And it also specifically seeks

to uphold USDA's manner of interpreting and implementing that statute. *Cf.* Br. 4 (arguing that USDA's regulatory definition is "appropriate").

3. This Court's reasoning in prior cases underscores these conclusions. This case is directly analogous to *Hopwood*, which likewise involved attempted intervention by beneficiaries of a race-conscious policy in support of the constitutionality of that policy. 21 F.3d at 604-05. There, two associations representing Black law school applicants sought to intervene in a constitutional challenge brought by two white law school applicants who claimed that they were unlawfully denied admission due to a university affirmative-action program. *Id.* The associations argued that they had a right to intervene because "the State must balance competing goals while [the associations] [we]re sharply focused on preserving the admissions policy" and that, "because of its competing goals, the State [wa]s not in as good a position to bring in evidence of present effects of past discrimination and current discrimination." *Id.* at 605.

This Court disagreed. The Court explained that in order to justify the race-conscious policy, "the State must show that there are 'present effects of past discrimination.'" *Hopwood*, 21 F.3d at 605. Finding that the State was well-positioned to carry that burden, the Court reasoned that the movants

"ha[d] not demonstrated that the State w[ould] not strongly defend [the] program"; had not shown that they "ha[d] a separate defense . . . that the State ha[d] failed to assert"; and could "act as amicus" or coordinate with the State to present any additional argument or evidence they believed to be relevant. *Id.* at 606.

The district court also correctly explained why the Federation's reliance on *Brumfield v. Dodd*, 749 F.3d 339 (5th Cir. 2014), did not advance its argument. *Brumfield* "involved a suit between Louisiana and the federal government regarding Louisiana's school voucher program." ROA.2548. There, the parents of schoolchildren were entitled to intervene because they had different litigation interests than the State: "Louisiana had conceded the continuing jurisdiction of the district court, but the parents had not," and Louisiana had incentives to "maintain[] its relationship with the federal government" by agreeing to terms that may not be acceptable to the parents. ROA.2548-2549. Here, by contrast, there is no divergence between the Federation's and the Government's litigation interests: both seek to uphold Section 1005, defeat plaintiffs' suit, and implement the congressionally mandated debt-relief program. *Cf. Texas*, 805 F.3d at 663 (intervention warranted because the Government took the express litigation position that

"the States may refuse to issue driver's licenses to deferred action recipients," which was "directly adverse to the Jane Does, who are eligible for deferred action").

B. The Federation's Contrary Arguments Are Without Merit.

The Federation's arguments on appeal misapprehend the requirements for intervention, the legal framework governing the merits of this suit, and the nature and purpose of USDA's recent actions.

1. The Federation's opening brief does not acknowledge the governing precedent on which the district court here relied. As noted above, this Court recognizes a distinct presumption that applies when a "governmental body or officer" participates as a party to vindicate "a matter of sovereign interest." *Hopwood*, 21 F.3d at 605.[5] The district court invoked this standard in issuing its decision. *See* ROA.2548. By failing to address the district court's basis for decision and the "relevant legal authority" on which it relies, the

[5] Other circuits apply the same robust presumption. *See, e.g.*, *Victim Rights Law Ctr. v. Rosenfelt*, 988 F.3d 556, 561-62 (1st Cir. 2021); *North Carolina State Conf. of NAACP v. Berger*, 999 F.3d 915, 930-31 (4th Cir.), *cert. granted*, 142 S. Ct. 577 (2021); *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620-21 (9th Cir. 2020); *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019).

Federation has forfeited any argument that it does not apply. *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 414 (5th Cir. 2021).[6]

Similarly, the Federation is mistaken in asserting that its burden of showing inadequate representation is "minimal." Br. 14, 17, 24; *see also* Br. 17 ("*de minimis*"). This Court squarely held that "where the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required." *Hopwood*, 21 F.3d at 605. Instead of merely positing that there may be some divergence of interest, the putative intervenor "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.'" *Edwards*, 78 F.3d at 1005 (emphasis added) (brackets omitted) (quoting

[6] In *Entergy Gulf States La., LLC v. U.S. EPA*, 817 F.3d 198 (5th Cir. 2016), a divided panel held that a Freedom of Information Act requester could intervene in a reverse-FOIA action, remarking that the "government-representative" presumption was not implicated because "EPA is a governmental agency and not a sovereign interest." *Id.* at 203 n.2. Even assuming that statement can be reconciled with Circuit precedent, it does not apply here. Though the Secretary is the named defendant, plaintiffs challenge the constitutionality of an Act of Congress, so the United States "as a sovereign body politic" is "the real party in interest" in this case. *Baker v. Wade*, 743 F.2d 236, 241-42 (5th Cir. 1984).

Hopwood, 21 F.3d at 605). The Federation acknowledged this standard in district court, *see* ROA.2312, but has overlooked it on appeal.

The Federation's arguments also reflect a basic misunderstanding about the "interests" that matter in intervention analysis. In determining whether a movant is permitted to intervene as of right, the question is not whether its goals and interests are identical to those of the existing party in some general, overarching sense. Rather, the question is whether their interests are aligned in the lawsuit. The movant must "demonstrate that its interests diverge from the putative representative's interests *in a manner germane to the case*." *Texas*, 805 F.3d at 662 (emphasis added).

Here, the question to be litigated is whether Section 1005 is constitutional. The fact that the Government has "'many interests'" as a sovereign (Br. 21), such as its broader interests in administering public-benefit programs, does not demonstrate that the Government will not adequately represent the Federation's particular interests in this case. As the district court observed, "that the federal government writ large has other concerns" is always true. ROA.2549. The analysis must turn on the matters to be litigated in the case at hand. *See, e.g.*, *North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 922 (8th Cir. 2015) (government

adequately represented movant's interest in establishing public title to certain land, notwithstanding their other disagreements; "[t]his lawsuit concerns [only] a claim to quiet title" and "does not concern administrative decisions about how the [lands] should be managed or used").

Brumfield only confirms this point. This Court ultimately permitted intervention there not simply because the State of Louisiana necessarily had a broader range of concerns that the schoolchildren's parents. Rather, "[t]he [S]tate ha[d] many interests *in this case*," including a litigation interest in accepting the court's jurisdiction that the parents did not share. 749 F.3d at 346 (emphasis added). No similar divergence in interests is present here.

2. The Federation advances two further theories of inadequacy in its opening brief, but neither one shows that the Government cannot be relied upon to vindicate its interest in the constitutionality of Section 1005.

First, the Federation asserts that the Government, because of its presumed "contrary institutional interest[]" in avoiding future liability in other actions, has failed to "present evidence" of "current and recent USDA discrimination." Br. 14; *see* Br. 17-22. But the Government did submit evidence of discrimination within the last decade (*see* ROA.1083-1085),

despite the court's contrary finding highlighted by the Federation.[7] And to the extent that the Government has not emphasized evidence of current discrimination, that is merely a reflection of Congress's intent in enacting Section 1005. The Federation has not disputed that heightened equal-protection scrutiny applies to plaintiffs' claims. And under that framework, a reviewing court's focus is Congress's "actual purpose" for employing a race-conscious classification. *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982)).

Here, as the Government explained at length in opposing the preliminary injunction (ROA.1062-1069, 1076-1087), Congress enacted Section 1005 because it "acknowledged that its previous efforts to remedy the lingering effects of discrimination against minority farmers in USDA programs 'ha[d] fallen short.'" ROA.1066 (brackets in original). Congress found that minority farmers "'have for many decades suffered discrimination by [USDA]'" and "had not benefited from prior pandemic relief efforts." ROA.1069 (brackets in original). And Congress discussed at length its

[7] More importantly for purposes of Section 1005, the Government discussed recent reports in the congressional record highlighting how past discrimination continues to disadvantage minority farmers today. ROA.1067-1069. As explained below, it is those current disadvantages—the lingering effects of past discrimination—that Section 1005 is designed to remedy.

conclusion that minority farmers' present-day disadvantages—such as higher rates of foreclosure and greater difficulty accessing credit—were caused by longstanding discrimination by USDA and exacerbated by the failure of prior USDA funds to reach them. The debt relief authorized by Section 1005 was intended to "address the historical discrimination against [SDFRs] and … issues relating to … COVID-19" by targeting those and other lingering effects. ROA.1069-1070 (brackets and ellipses in original) (quoting S. 278, 117th Cong. § 4(a)(1)-(2) (2021)). Since that is why Congress enacted the law, that is the rationale on which the Government has defended it. *Cf. United States v. Virginia*, 518 U.S. 515, 535-36 (1996) ("[A] tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.").[8]

The Federation's apparent disagreement with the Government's focus on the lingering effects of past discrimination, consistent with the

[8] The Federation incorrectly suggests (Br. 19) that USDA has staked out a litigation position categorically denying current discrimination. Though the district court remarked that "the Government admit[ted]" that USDA "is not currently discriminating against any socially disadvantaged farmers or ranchers," ROA.1512, that is not an accurate characterization of counsel's statements. What counsel stated was that, in defending Section 1005, the Government is "relying on intentional discrimination at the USDA in the past and then the negative ramifications of that," ROA.2629—in other words, the same considerations relied upon by Congress.

congressional record, does not demonstrate any adversity of interest. "[T]actical differences do not make inadequate the representation of those whose interests are identical … ." *Bush v. Viterna*, 740 F.2d 350, 358 (5th Cir. 1984); *accord, e.g.*, *Victim Rights Law Ctr. v. Rosenfelt*, 988 F.3d 556, 562 (1st Cir. 2021) ("[A] movant-intervenor['s] interest in making an additional constitutional argument in defense of government action does not render the government's representation inadequate."); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("[D]ifferences in litigation strategy do not normally justify intervention."). Were it otherwise, "federal courts would be required under Rule 24(a)(2) to arbitrate, de novo, the inevitable differences over strategy that arise even among parties who share an ultimate goal, deciding which trial tactics do and do not amount to 'adequate' representation." *North Carolina State Conf. of NAACP v. Berger*, 999 F.3d 915, 931 (4th Cir.), *cert. granted*, 142 S. Ct. 577 (2021).

The Federation's claim that it has better access to evidence of past discrimination does not entitle it to intervention, either. As the district court explained, even assuming the Federation were correct that it could "make the Secretary's case 'more comprehensively and compellingly,'" this consideration "does not demonstrate the inadequacy of representation

necessary for intervention." ROA.2549. This Court recognized as much in *Hopwood*: the movants there likewise asserted that they "ha[d] ready access to more evidence than the State," but this Court noted that the movants had been "authorized to act as amicus" and there was "no reason they cannot provide this evidence to the State." 21 F.3d at 605-06. So too here.

Second, the Federation mistakenly claims that the Government has a "conflict of interest" because USDA is "threatening Federation members with foreclosure." Br. 17, 18; *see* Br. 22-24. As an initial matter, this argument was not raised in timely fashion below, so it has not been preserved.[9] *See, e.g.*, *Del Prado v. B.N. Dev. Co.*, 602 F.3d 660, 664 (5th Cir. 2010) (plaintiff waived argument on issue "by failing to raise it to the district court until the reply" in support of its motion); *cf. Vais Arms, Inc. v. Vais*, 383 F.3d 287, 292 (5th Cir. 2004) (district court may only rely upon

[9] The Federation states that this point first came to its attention "[d]uring briefing on the Federation's motion to intervene." Br. 12. The letter on which their argument apparently rests is dated September 28, 2021. ROA.2540-2543. Yet the Federation did not address the letter in its October 12, 2021 motion, but instead waited until the reply brief. The Government accordingly had no opportunity to respond.

arguments "presented for the first time in a reply brief" if it has first "give[n] the nonmovant an adequate opportunity to respond").

In any event, the Federation's argument fails both factually and legally. As a factual matter, the Federation mischaracterizes USDA's actions. Contrary to the Federation's assertions, USDA did *not* declare that it is "tak[ing] legal action" against Federation members "notwithstanding their eligibility for debt relief under Section 1005." Br. 12; *see* Br. 22-23 (likewise mistakenly asserting that USDA is "seeking to foreclose" "even though [members] may be eligible for debt relief"). On the contrary, USDA's letter—which notes that agency records reflect that the relevant borrower is "a member of a socially disadvantaged group" under "section 1005 of the ARP Act"—states that the agency is "*suspending further servicing on your account* until after the ARP Act payment process is implemented." ROA.2540 (emphasis added). In fact, because of the COVID-19 pandemic (and subject only to certain extremely rare exceptions), USDA has indefinitely "suspended all foreclosure, debt collection and other adverse actions" for eligible Direct or Storage Facility Loans across the board, without regard to a farmer's potential eligibility under Section 1005. *See* USDA, *American Rescue Plan Act Section 1005 Litigation FAQs*,

https://go.usa.gov/xt4j7 (last visited Jan. 13, 2022). For that reason, there is no imminent risk of USDA foreclosing on any of the Federation's members. And there is certainly no reason for treating USDA's ministerial mailing of certain loan forms—mailings that USDA is required to make upon occurrence of particular events, 7 U.S.C. § 1981d; 7 C.F.R. §§ 766.101(a), 766.103(b)—as a basis for doubting USDA's commitment to delivering "timely debt relief for minority farmers" (Br. 15) under Section 1005.

In any event, as a legal matter, USDA's loan-administration practices are not at issue in this litigation. Rather, the sole question is whether Section 1005 is constitutional. And on that score, the Federation has provided no reason to doubt that the Government will continue to defend the statute against constitutional challenge. The mere fact that a government agency administering a statutory program may at some point take regulatory action adverse to a program beneficiary does not suggest that the Government cannot be relied upon to defend the constitutionality of the statute.[10]

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[10] The Federation's invocation of the ABA Model Rules of Professional Conduct (Br. 23-24) highlights the lack of relevant authority for their position. USDA obviously is not—and would not serve as—the Federation's lawyer. But this Court has never suggested that a party can only be found adequate to represent an outsider's litigation interest under Rule 24(a) if it could hypothetically enter into an attorney-client relationship with that

II. PERMISSIVE INTERVENTION LIES WITHIN THE DISTRICT COURT'S SOUND DISCRETION.

A district court "may" permit intervention by one who "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). While intervention as of right is mandatory when all requirements are met, permissive intervention is "'wholly discretionary' and may be denied even when the requirements of Rule 24(b) are satisfied." *Turner v. Cincinnati Ins. Co.*, 9 F.4th 300, 317 (5th Cir. 2021). In exercising that discretion, the district court weighs the benefits of intervention against the possibility that intervention would unduly delay the resolution of the case or unduly prejudice the interests of the parties and the public. *See* Fed. R. Civ. P. 24(b)(3). And in considering the likely benefits of intervention, a court may consider "whether the intervenors' interests are adequately represented by other parties' and whether they 'will significantly contribute to full development of the underlying factual issues.'" *NOPSI*, 732 F.2d at 472.

The Government has not opposed the Federation's request for permissive intervention. The Government noted in district court that it did

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outsider without violating professional rules of conduct. On the contrary, this Court has made clear that the adequacy analysis looks solely to those interests that are "germane to the case," *Texas*, 805 F.3d at 662, not to all of the broader considerations that may be relevant in ethical contexts.

not believe that participation as a party was necessary in this case, because the Government is forcefully defending the constitutionality of Section 1005 and adequately represents the interests of the Federation and its members. The Government recognized, however, that the Federation has an interest in this case and that its participation as a party could be accommodated, subject to certain conditions (*see supra* p. 6 n.3).

Here, the district court recognized that the threshold requirements of Rule 24(b) were satisfied and thus that it was called upon to "exercis[e] its discretion." ROA.2550. In so doing, the court considered that the "Federation's interests are significantly similar to the Secretary's" and that "[t]heir arguments are virtually identical." ROA.2550. The court also reasoned that it could obtain the benefit of the Federation's assistance by "permitting the Federation to proceed as amicus," which would "enable it to fully voice its position in this case." ROA.2550. The Government had requested that the court "impose limitations on the Federation's involvement to prevent delay" in the event intervention were permitted. ROA.2550. "Rather than proceed with that route," the court "f[ound] it more efficient to

deny intervention and grant the Federation leave to file as amicus." ROA.2550.

The district court's decision is reviewed only for "clear abuse of discretion." *St. Bernard Parish*, 914 F.3d at 973 (quoting *Edwards*, 78 F.3d at 995). "Under this standard, the Court will reverse a district court decision only under extraordinary circumstances." *Id.* (quoting *Edwards*, 78 F.3d at 995). Indeed, "reversing a district court's decision denying permissive intervention is 'so unusual as to be almost unique.'" *Rotstain v. Mendez*, 986 F.3d 931, 942 (5th Cir. 2021) (quoting *NOPSI*, 732 F.2d at 471).

The Federation has not identified an abuse of discretion here. The district court acknowledged the Federation's interest in this lawsuit, but correctly noted that its litigation interest parallels that of the Government. The court also emphasized that denying intervention need not prevent the Federation from having an opportunity to be heard. On the contrary, "permitting the Federation to proceed as amicus will enable it to fully voice its position in this case." ROA.2550.[11]

[11] The Government agrees that the Federation should be able to participate fully as amicus curiae, not only by offering argument in defense of the statute but also by presenting "additional first-hand accounts from Black and other minority farmers." ROA.2502. The Government does not understand the district court's order to foreclose that opportunity.

CONCLUSION

For the foregoing reasons, the district court's denial of intervention as of right should be affirmed, and the Federation's appeal of denial of permissive intervention should be dismissed for lack of jurisdiction.

Respectfully submitted,

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JANUARY 2022

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2022, I electronically filed the foregoing brief 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.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,803 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in CenturyExpd BT 14-point font, a proportionally spaced typeface.

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