UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SID MILLER, et al., *Plaintiffs,* *v.* TOM VILSACK, in his official capacity as Secretary of Agriculture, *Defendant.*	No. 4:21-cv-00595-O

THE FEDERATION'S MOTION FOR RECONSIDERATION

For the reasons given in the accompanying brief, the Federation of Southern Cooperatives/Land Assistance Fund (the "Federation") moves the Court to reconsider its denial of fact discovery and to extend the expert-designation deadline to eight weeks from the date on which the Secretary produces complete and usable loan data.

Dated: April 13, 2022

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

On April 13, 2022, counsel for the Federation conferred via phone with counsel for Defendant. Counsel for Defendant stated that Defendant opposes the Federation's motion for reconsideration. On April 11, 2022, counsel for the Federation left a voicemail for counsel for Plaintiffs requesting Plaintiffs' position on the motion. As of this filing, counsel for Plaintiffs has not responded with Plaintiffs' position.

/s/ Chase J. Cooper
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed via the court's CM/ECF system on April 13, 2022, which will serve all counsel of record.

/s/ Chase J. Cooper
Chase J. Cooper

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SID MILLER, et al., *Plaintiffs,* *v.* TOM VILSACK, in his official capacity as Secretary of Agriculture, *Defendant*.	No. 4:21-cv-00595-O

BRIEF IN SUPPORT OF THE FEDERATION'S MOTION FOR RECONSIDERATION

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I. Introduction

The Federation of Southern Cooperatives/Land Assistance Fund (the "Federation") respectfully moves for reconsideration of the Court's April 5, 2022 scheduling order (ECF No. 186).[1] In particular, the Federation asks that the Court allow the Federation to conduct targeted fact discovery and extend the expert-designation deadline to eight weeks from the date on which the Secretary produces complete and usable loan data.

Denying the Federation the fact discovery that it has requested is an unreasonable limit on the Federation's participation in this case as an intervenor of right. This Court "closed the possibility of fact discovery" (ECF No. 186 at 3) based on an agreement made before the Federation intervened by parties whose interests are directly adverse to the Federation's. Denying the Federation the opportunity to conduct fact discovery denies the Federation due process and is inconsistent with the letter and spirit of the Fifth Circuit's mandate directing this Court to allow the Federation to intervene as a matter of right. The Fifth Circuit explicitly found that evidence of current discrimination—the very evidence that the Federation intends to obtain through fact discovery—"may be highly relevant" to defending Section 1005 of the American Rescue Plan Act (ARPA), that, despite its conceded relevance, the Secretary has a motivation *not* to present such evidence to the Court, *and* that the Secretary's institutional interest in not presenting such relevant evidence makes him an inadequate representative of the Federation's interests. Thus, the Fifth Circuit expressly contemplated that, once allowed to intervene, the Federation would seek evidence of current discrimination against minority farmers, since no other party would put forth this potentially crucial evidence. Accordingly, the Federation respectfully requests that this Court reconsider its decision to bar fact discovery and permit the Federation to conduct the targeted fact

[1] Unless otherwise specified, all ECF references are to the proceedings in this case, *Miller v. Vilsack*, No. 4:21-CV-595-O.

discovery that it requested in the parties' Joint Status Report—discovery that is already severely limited in both time and scope compared to what would ordinarily be expected in litigation of this magnitude.

The Federation also requests a brief extension of time based on its expert's representations regarding the time reasonably needed to prepare his report.

II. Background

On October 12, 2021, a month before Plaintiffs filed the operative Third Amended Complaint, the Federation—an association of Black farmers—filed a motion seeking intervention as of right or, in the alternative, permissive intervention. (ECF No. 93).

On December 8, 2021, this Court denied the Federation's motion. (ECF No. 143). On December 17, 2021, the Federation filed its notice of appeal and, shortly thereafter, a motion to expedite consideration of its appeal. Motion to Expedite, at 1, *Miller v. Vilsack*, No. 21-11271 (5th Cir. Dec. 28, 2021), ECF No. 516144118. The Fifth Circuit granted the motion to expedite on December 28, 2021. Order, at 1, *Miller v. Vilsack*, No. 21-11271 (5th Cir. Dec. 28, 2021), ECF No. 516147083. On March 7, 2022, the Fifth Circuit heard oral argument, during which Judge Haynes observed that "get[ting] to do discovery" would be "the most critical thing" the Federation would get were it allowed to intervene. 5th Cir. Oral Argument Recording at 3:48–3:56.[2]

On March 11, 2022, four days after the Fifth Circuit heard oral argument on the Federation's appeal, Plaintiffs and the Secretary filed cross-motions for summary judgment. (ECF Nos. 167, 169).

On March 22, 2022, the Fifth Circuit held that this Court erred in denying the Federation's motion to intervene as a matter of right and remanded the case "with the directive to permit the

[2] https://www.ca5.uscourts.gov/OralArgRecordings/21/21-11271_3-7-2022.mp3.

Federation's intervention." Slip Opinion, at 8, *Miller v. Vilsack*, No. 21-11271 (5th Cir. Mar. 22, 2022), ECF No. 516249606 ("Slip Op."). Specifically, the Fifth Circuit held that the Secretary was an "inadequate representati[ve]" of the Federation's interests because he is unlikely to present evidence "that USDA is *continuing* to actively discriminate against its members"—evidence that the court held was "'germane to the case' because evidence of continued discrimination may be highly relevant to proving a 'compelling government interest'" in race-conscious debt relief. *Id.* at 7 (emphasis in original). The court of appeals recognized that "if given the opportunity to conduct discovery," *i.e.*, if allowed to intervene, "the Federation would seek evidence demonstrating current discrimination by the USDA against its members." *Id*. at 8 n.6.

On March 24, 2022, the Federation filed an emergency motion for immediate issuance of the mandate, which the Fifth Circuit granted that same day. (ECF No. 179).

On March 25, 2022, the Court ordered the parties, including the Federation, to confer and submit a joint status report to the Court. (ECF No. 178). The parties conferred and filed a joint motion to suspend the existing summary judgment briefing schedule until the parties proposed a new schedule that included the Federation. (ECF No. 182). The Court granted the motion to suspend the existing summary judgment briefing schedule and ordered the parties to propose an amended schedule in their status report. (ECF No. 183).

On April 1, 2022, the parties submitted a joint status report. (ECF No. 184). In the report, the Federation requested limited discovery, including documents regarding USDA's efforts to identify and remedy racial discrimination since resolution of the *Pigford* litigation and five depositions of USDA and/or FSA staff or county committee members regarding racial discrimination. *Id.* at 9–10. The Federation proposed that the parties would conclude all discovery and file their motions for summary judgment on September 2, 2022, approximately six weeks after

Plaintiff's and the Secretary's proposed filing date. *Id.* at 11–12. Plaintiffs and the Secretary opposed any fact discovery. *Id.* at 2, 5.

The Court "decline[d] to reopen fact discovery." (ECF No. 186). The Court ordered "Loan data disclosure" by April 15, 2022; expert designations by May 15, 2022; and summary judgment briefs filed by July 17, 2022. *Id.* at 4.

III. Legal Standard

When the Court is asked to reconsider an order other than a final judgment, that reconsideration is governed by Federal Rule of Civil Procedure 54(b), as opposed to Rule 59 or Rule 60. *See Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336 (5th Cir. 2017). "Rule 54(b) allows parties to seek reconsideration of interlocutory orders and authorizes the district court to 'revise[ ] at any time' 'any order or other decision . . . [that] does not end the action.'" *Id.* (quoting Fed. R. Civ. P. 54(b)). Recognizing the interlocutory nature of rulings entered before final judgment, Rule 54 allows a district court "to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Id.* (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.,* 37 F.3d 1069 (5th Cir. 1994) (en banc)).

IV. Argument

A. The Federation Requests Targeted Fact Discovery

The Federation respectfully requests that the Court reconsider its order prohibiting all fact discovery in this case. Denying the Federation the opportunity to conduct limited fact discovery is an unreasonable limitation on its participation in the case. The Federation did not waive its right to seek fact discovery, and it is not bound by any agreement between Plaintiffs and the Secretary regarding the scope and timing of discovery. Indeed, the Fifth Circuit found the Secretary to be an

inadequate representative of the Federation's interests precisely because "[i]t is highly unlikely that the Secretary would put forth . . . evidence" of "current discrimination by the USDA against its members." (Slip Op. at 8 n.6). The Fifth Circuit recognized that such evidence "is 'germane to the case' because evidence of continued discrimination may be highly relevant to proving a 'compelling government interest'" in race-conscious debt relief and that, "if given the opportunity to conduct discovery as a party, the Federation would seek evidence demonstrating current discrimination by the USDA." *Id.* at 7 & 8 n.6. Preventing the Federation from now conducting targeted discovery designed to uncover the very evidence that the Fifth Circuit identified as the basis for allowing the Federation to intervene would violate the letter and spirit of the Fifth Circuit's mandate.

1. The Federation Did Not Waive Its Right to Seek Fact Discovery

Contrary to what the Court suggested in its order denying fact discovery, the Federation never agreed that "fact discovery is unnecessary in this case." (ECF No. 186 at 1.) *Before* the Federation joined the case as a party, Plaintiffs and the Secretary agreed to limit discovery to expert testimony and jointly proposed a corresponding schedule to the Court. *Id.* The Federation was not a party to that agreement and is not bound by it.

When it sought to intervene, the Federation—recognizing the Court's prior rulings on class certification and Plaintiffs' request for a preliminary injunction—stated that it did "not seek to relitigate any prior rulings." (EFC No. 93-1 at 27). And that remains true: the Federation does not seek to relitigate any of the *rulings* issued before the Federation's motion to intervene.

However, the Federation's disavowal of any intent to relitigate prior *rulings* cannot reasonably be read as waiving the Federation's right to conduct fact discovery. The Court's September 22, 2021 scheduling order—which allows no time for fact discovery—did not resolve any factual or legal disputes. On the contrary, it was adopted "[i]n accordance with the parties'

Joint Scheduling Statement." (ECF No. 85 at 1) (emphasis added). The term "ruling" is "ordinarily used to signify the outcome of applying a legal test." Black's Law Dictionary (11th ed. 2019). Because the Court did not "apply[] a legal test" in any meaningful sense when adopting the discovery schedule jointly proposed by Plaintiffs and the Secretary, its scheduling order is not a "ruling" within the meaning of the Federation's statement.[3]

None of the authorities cited by the Court are to the contrary. Quoting *Petition of Geisser*, 554 F.2d 698, 705 n.6 (5th Cir. 1977), *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1977), and *Doe #1 v. Glickman*, 256 F.3d 371, 378 (5th Cir. 2001), this Court held that the Federation "has 'no right' to renewed discovery" because "'an intervenor must accept the proceedings as he finds them'" and thus has "'no[] . . . right to relitigate issues already decided.'" (ECF No. 186 at 3). The Court read the cited authority too broadly. *Geisser*, in which it was first articulated, makes clear that the underlying principle—that an intervenor has no right "to relitigate issues already decided"—encompasses only contested issues *actually decided* by a court. As relevant here, the question in *Geisser* was whether an intervenor could challenge an adverse "factual finding" that was made and affirmed on appeal prior to its intervention. 554 F.2d at 705 n.6.[4] Nothing in *Geisser* or its progeny suggests that an intervenor is bound by any stipulation between the initial parties—much less a stipulation foreswearing concededly relevant discovery (*cf.* 5th Cir. Oral Arg. Rec. 21:53–22:15) that was entered into by a party found as a matter of law to be an inadequate

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[3] To the contrary, when the Federation said that it would not challenge the Court's prior "rulings," it reasonably expected that—as has proven true (*cf.* ECF No. 186)—a new scheduling order would be entered were it permitted to intervene.

[4] Specifically, the issue was whether Switzerland, which intervened on the side of the United States in opposing a habeas petition, could challenge the district court's earlier determination that an integral part of a plea agreement required the U.S. government to use its best efforts to prevent extradition of the habeas petitioner to Switzerland. *See Geisser*, 554 F.2d at 699, 705 n.6.

representative of the intervenor's interest precisely because that party has an institutional interest in not presenting the very evidence that such discovery would uncover. (Slip Op. 7–8).

Notwithstanding this Court's conclusion to the contrary, the fact that the Federation "did not object" to the original parties' joint stipulation "that fact discovery is unnecessary" is immaterial. (ECF No. 186 at 2, 3). At the time of the stipulation, the Federation was not a party to the case and therefore could not object. The Federation is unaware of any procedural mechanism allowing a non-party to object to a proposed scheduling order, nor of any authority for the proposition that a non-party's failure to object to a stipulation between then-existing parties constitutes a waiver of its rights in the event it later becomes a party.

Finally, the Court erred by relying on statements made *by the Secretary* in its opposition to the Federation's motion to intervene. The Secretary's "understand[ing]" (ECF No. 186 at 3) of the Federation's position on fact discovery has no bearing on the Federation's rights, especially given the "adversity of interest" between the Secretary and the Federation on that very issue. (Slip. Op. at 8).[5]

2. The Fifth Circuit's Opinion Expressly Contemplates that the Federation Would Be Permitted to Seek Fact Discovery

Regardless of whether the Federation previously sought fact discovery, reconsideration also is necessary in light of the Fifth Circuit's opinion and mandate granting the Federation intervention as of right. The Fifth Circuit held that the Secretary was an inadequate representative of the Federation's interests because the Secretary's interests were adverse to those of the

[5] The Federation also disputes that failing to respond directly to the Secretary's statement regarding discovery constitutes acquiescence to that statement. (ECF No. 186 at 3). It is unreasonable to expect a litigant to respond to each and every statement made in an opposition brief, no matter how tangential, and equally unreasonable to construe silence as acceptance in this context.

Federation's in a way that directly implicates the Federation's entitlement to fact discovery. (Slip Op. at 8–9). This holding has a number of implications.

First, any prior agreement made by the Secretary with Plaintiffs to preclude fact discovery does not bind the Federation and, in fact, is contrary to the Federation's interests. As a matter of law, the Secretary's institutional interests are adverse to the Federation's case-specific interest in introducing evidence of current discrimination by the USDA. (Slip. Op. at 7–8). The Federation's intent to introduce evidence of current discrimination "not only *directly* conflicts with the Secretary's position, [it also] potentially exposes the agency to liability." *Id.* at 7 (emphasis in original). In other words, the Fifth Circuit decision mandating that the Federation be allowed to intervene rests on its recognition that the Secretary has much to gain by limiting the Federation's ability to obtain and present evidence of current discrimination against Black farmers. To now deny the Federation the opportunity to conduct the discovery necessary to secure robust evidence of current discrimination because the Secretary previously stipulated that no such discovery is necessary would be to ignore the basis for the Fifth Circuit's decision.

Second, the Fifth Circuit concluded that evidence of ongoing discrimination by USDA—the exact evidence the Federation seeks to obtain through discovery—is not only germane but "may be highly relevant to proving a 'compelling governmental interest'" in the race-conscious debt relief foreseen by Section 1005. (Slip Op. at 7) (citing *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1275, 1279 (M.D. Fla. 2021) (stating that evidence of continued discrimination is "crucial" to show that additional remedial action is warranted given the inadequacy of prior remedial efforts)). The Fifth Circuit rejected the Secretary's argument that "evidence of discrimination within the last decade" negated the relevance of evidence of *continued* discrimination. *Id.* This stands to reason: evidence of current discrimination is highly probative of whether past discrimination persists,

which in turn is highly relevant to proving a compelling governmental interest in affording race-conscious debt relief. *Id.* Counsel for the Secretary even conceded at oral argument that evidence of current discrimination "certainly would be relevant" to the constitutionality of Section 1005. 5th Cir. Oral Arg. Rec. 21:51–22:14. Preventing the Federation from discovering and presenting such concededly relevant evidence would render the Fifth Circuit's decision—and the Federation's right to intervene—close to meaningless.

Third, based on its recognition that evidence of current discrimination is "may be highly relevant"—and possibly "crucial"—to the defense of Section 1005, the Fifth Circuit explicitly contemplated that upon being allowed to intervene "the Federation would seek evidence demonstrating current discrimination by the USDA against [the Federation's] members." (Slip Op. at 7–8 & n.6); *see also* 5th Cir. Oral Arg. Rec. 3:48–3:56 ("You would get to do discovery if you were a party. Isn't that the most critical thing you get as a party you don't get as an amicus?") (Haynes, J.). Thus, this Court erred when it found that "[n]othing in the Fifth Circuit's opinion contemplates *fact* discovery." (ECF 186 at 5).

The Federation is the *only* party that will introduce evidence of ongoing discrimination in defense of Section 1005. As the Fifth Circuit recognized, the Secretary cannot "reasonably be expected" to introduce evidence that his agency is currently or recently engaged in racial discrimination. *Id.* at 7-8, *see also* n. 6 ("It is highly unlikely the Secretary would put forth such evidence in the absence of the Federation's intervention."). Allowing the Federation to conduct targeted fact discovery that it reasonably anticipates will produce evidence of current discrimination is the *only* way to give effect to the Fifth Circuit's mandate, which directed this Court to allow the Federation to intervene precisely *because* the Federation would "seek" and

ultimately present evidence of ongoing discrimination that the Secretary will neither disclose voluntarily nor present to the court.

"District courts do not have discretion to ignore mandates issued by [the Fifth Circuit]." *M.D. ex rel. Stukenberg v. Abbott*, 977 F.3d 479, 481 (5th Cir. 2020). To the contrary, they "must implement both the letter and the spirit of the appellate court's mandate." *Perez v. Stephens*, 784 F.3d 276, 280 (5th Cir. 2016) (citation omitted). Given the text and rationale of the Fifth Circuit's mandate in this case, preventing the Federation from conducting the targeted fact discovery that it requests is not a "reasonable condition" on the Federation's intervention as of right. *See generally Columbus-America Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 470 (4th Cir. 1992) (even if court may impose conditions on intervenor as of right, denying intervenor any discovery is "clearly unreasonable" and violates due process).[6]

3. The Federation Has Shown Good Cause for Limited Fact Discovery

There is good cause to permit limited fact discovery. The Federation seeks targeted, time-limited discovery to obtain evidence demonstrating current discrimination against its members. The Fifth Circuit has concluded that such evidence "may be highly relevant" to the constitutionality of Section 1005, that no other party will present it, and that the Secretary has an interest in excluding it. (Slip. Op. at 7–8). Denying the Federation the discovery it has requested

[6] It also is irrelevant that the Secretary did not oppose permissive intervention subject to the "reasonable condition" that the Federation not be allowed to conduct fact discovery. (ECF No. 186 at 4). As noted above, the Fifth Circuit has since held that the Federation is entitled to intervention *as of right*, and that the Secretary's interests are adverse to those of the Federation. Thus, any condition the Secretary unilaterally imposed upon his agreement to permissive intervention has no bearing here. Indeed, the Secretary's opposition to the Federation conducting fact discovery is best understood as an effort to shield the Secretary from having to disclose evidence of USDA's continuing discrimination, *i.e.*, as an attempt to advance the Secretary's institutional interests at the expense of the Federation's interest in vigorously defending Section 1005's constitutionality on all available bases.

substantially prejudices the Federation—and the general public, which has a strong interest in the constitutionality of Section 1005 being adjudicated on a complete factual record.

Allowing the Federation to conduct the discovery that it requests will not "severely delay briefing, trial on the merits, and final resolution," and certainly will not delay resolution of this case "indefinitely." (ECF No. 186 at 4.) The Federation is not seeking a blank check to conduct depositions and make document requests.[7] The Federation asks only for up to five depositions, and eight document requests substantially similar to the following:

- Documents related to actions taken by USDA to implement the recommendations made specifically to the Farm Service Agency (FSA) from the 2011 Jackson Lewis Report;
- Documents related to any FSA civil rights compliance reviews since 2010;
- Documents related to the USDA's tracking of participation rates, timeliness of loan applications, processing and timeliness of farm loan servicing actions,[8] and any actions taken by USDA to address racial disparities in these metrics since 2010;
- Documents related to annual target participation rates and reserve loan funds for socially disadvantaged farmers,[9] and whether target rates were met and reserved funds were accessed by socially disadvantaged farmers since 2010;
- Documents related to actions taken by USDA to appoint members of socially disadvantaged groups to county committees since 2010;

[7] The Federation does not intend to serve interrogatories or requests for admission.

[8] USDA's expert, William D. Cobb, states, "USDA . . . substantially updated its computer systems by transitioning to the Direct Loan System. USDA can now accurately track participation rates and timeliness of application processing as well as the timeliness of farm loan servicing actions," so this information should be readily available. (ECF No. 168-1 at ¶ 41).

[9] USDA's expert states that the USDA is required to set these target participation rates and reserve sufficient loan funds accordingly. (ECF No. 168-1 at ¶ 19).

- Documents related to complaints to USDA regarding racial discrimination in the FSA loan process or by FSA representatives (including staff or county committee members) since 2010;
- Documents related to any USDA investigations into the farm loan practices of private banks since 2010;
- Documents related to the formation of the USDA Equity Commission.

Even with that discovery, the Federation's proposed time frame for resolving the case on summary judgment is only six weeks longer than the schedule entered by the Court—time that, in any case, is necessary for the Federation's experts to perform their analysis, as discussed below.

The Federation agrees that the parties 'have a strong interest in the expeditious resolution of this case." (ECF No. 186 at 4.) Indeed, no party has a greater interest in the timely resolution of this case than the Federation, whose members remain without much-needed debt relief during the pendency of the litigation. But it is more important—to both the Federation and the general public—that the constitutionality of Section 1005 be decided on a complete factual record, especially when the evidence that the Federation seeks to obtain through discovery "may be highly relevant" to proper adjudication of the issue. (Slip Op. at 7).

Plaintiffs are not prejudiced by the Federation's proposed time frame because the preliminary injunction remains in place. And although introduction of the evidence that the Federation seeks "potentially exposes [the Secretary] to liability" in *other* cases (namely, those that might be brought by victims of USDA discrimination), allowing the Federation to obtain such evidence through discovery does not prejudice him in *this* case. On the contrary, evidence of ongoing discrimination by USDA may be "crucial" (Slip Op. at 7) to a successful defense of Section 1005, which is the Secretary's avowed objective in this litigation.

Rushing this case to a conclusion at the expense of crucial evidence based on agreements made before the Federation was a party to the case elevates speed over substance. Even if desirable in the abstract, "the idea of 'streamlining' the litigation" as advocated by the initial parties "should not be accomplished at the risk of marginalizing" intervenors "who have some of the strongest interests in the outcome." *United States v. City of L.A.*, 288 F.3d 391, 404 (9th Cir. 2002). "While the efficient administration of justice is always an important consideration, fundamental fairness to every litigant is an even greater concern." *Columbus-Am. Discovery Grp.*, 974 F.2d at 470.

B. The Federation Respectfully Requests an Extension on the Deadline for Expert Designations

The Federation also respectfully reiterates its request for eight weeks from the date on which the Secretary produces complete and usable loan data. (ECF No. 184 at 12). The Federation's retained expert, Mark P. Berkman of The Brattle Group, Inc., will work as expeditiously as possible, but reasonably will require at least eight weeks to complete a report compliant with Rule 26 of the Federal Rules of Civil Procedure. Declaration of Mark P. Berkman ("Berkman Decl.") at ¶¶ 7–8. Based on his review of the Secretary's expert report, Mr. Berkman's expert opinion is that the Secretary's expert had more than eight weeks to prepare her report. *Id.* at ¶ 6. It is an unreasonable limitation upon the Federation's participation to require an expert report within four weeks of receiving the loan data, particularly where the Secretary's expert was not operating under similar constraints. The Federation therefore requests eight weeks from the date on which the Secretary produces complete and usable loan data for the Federation's expert to complete his expert report.

V. Conclusion

For the foregoing reasons, the Federation respectfully requests that this Court reconsider its decision and permit the Federation to conduct the targeted, time-limited fact discovery

requested in its Joint Status Report. Further, the Federation respectfully requests that the Court extend the deadline for expert designations to eight weeks from the date on which the Secretary produces complete and usable loan data.

Dated: April 13, 2022

Respectfully submitted,

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Counsel for Intervenor of Right The Federation of Southern Cooperatives/Land Assistance Fund

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed via the court's CM/ECF system on April 13, 2022, which will serve all counsel of record.

/s/ Chase J. Cooper
Chase J. Cooper

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SID MILLER, et al., *Plaintiffs,* *v.* TOM VILSACK, in his official capacity as Secretary of Agriculture, *Defendant.*	No. 4:21-cv-00595-O

DECLARATION OF MARK P. BERKMAN

I, Mark P. Berkman, under 28 U.S.C. § 1746, declare as follows:

1. I am over eighteen years of age and have personal knowledge of the facts set forth in this Declaration.

2. I am a Principal at The Brattle Group, Inc., and I am an expert in applied microeconomics in the areas of the environment, energy, and natural resources; environmental health and safety; intellectual property; and discrimination.

3. I have conducted (a) studies of discrimination by mortgage lenders for federal regulators; (b) internal reviews to detect such practices on behalf of lending institutions; and (c) statistical analyses of discrimination in hiring, promotion, pay, and contracting.

4. I have been retained as an expert by counsel for the Federation of Southern Cooperatives/Land Assistance Fund to analyze loan data and other sources of evidence and to provide an expert opinion on (a) the existence of current and/or recent discrimination by the United States Department of Agriculture (USDA) against minority farmers in USDA lending programs;

and (b) the effect of any such current and/or recent discrimination on minority farmers in the present day.

5. I have reviewed the report of the USDA's expert, Dr. Alicia Robb.

6. Based on my experience conducting statistical analyses of discrimination and my review of Dr. Robb's expert report, and in my expert opinion, it would have taken Dr. Robb more than eight weeks to prepare her expert report.

7. Based on my experience conducting statistical analyses of discrimination and my review of Dr. Robb's expert report, and in my expert opinion, I cannot adequately and completely analyze the USDA loan data and prepare an expert report based thereon in just four weeks.

8. Based on my experience conducting statistical analyses of discrimination and my review of Dr. Robb's expert report, and in my expert opinion, I will need eight weeks after receipt of substantially complete and usable USDA loan data from the Government in order to analyze adequately and completely the USDA loan data and prepare an expert report based thereon.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 12th day of April, 2022 in San Francisco County, California.

Mark P. Berkman

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SID MILLER, et al., *Plaintiffs,* *v.* TOM VILSACK, in his official capacity as Secretary of Agriculture, *Defendant.*	No. 4:21-cv-00595-O

PROPOSED ORDER GRANTING THE FEDERATION'S MOTION FOR RECONSIDERATION

Having considered the briefing on the Federation of Southern Cooperatives/Land Assistance Fund's (the "Federation") Motion for Reconsideration, and for good cause shown, it is ORDERED that:

1. The Federation's Motion for Reconsideration is GRANTED.

2. The Court's April 5, 2022 Scheduling Order (ECF No. 186) is VACATED and the following schedule is ORDERED in its place:

   - Expert Designations: June 10, 2022 or 8 weeks following the Federation's receipt of substantially complete and usable loan data from the Secretary, whichever is later
   - Rebuttal Expert Reports: July 8, 2022
   - Close of Fact Discovery: July 29, 2022
   - Close of Expert Discovery: August 5, 2022

- Motions for Summary Judgment: September 2, 2022

3. The Federation shall be entitled to take up to five depositions and shall be entitled to serve document requests substantially similar to the following:

- Documents related to actions taken by USDA to implement the recommendations made specifically to the Farm Service Agency (FSA) from the 2011 Jackson Lewis Report;
- Documents related to any FSA civil rights compliance reviews since 2010;
- Documents related to the USDA's tracking of participation rates, timeliness of loan applications, processing and timeliness of farm loan servicing actions, and any actions taken by USDA to address racial disparities in these metrics since 2010;
- Documents related to annual target participation rates and reserve loan funds for socially disadvantaged farmers, and whether target rates were met and reserved funds were accessed by socially disadvantaged farmers since 2010;
- Documents related to actions taken by USDA to appoint members of socially disadvantaged groups to county committees since 2010;
- Documents related to complaints to USDA regarding racial discrimination in the FSA loan process or by FSA representatives (including staff or county committee members) since 2010;

- Documents related to any USDA investigations into the farm loan practices of private banks since 2010; and
- Documents related to the formation of the USDA Equity Commission.

IT IS SO ORDERED.

Dated: ____________________

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THE HONORABLE REED O'CONNOR
UNITED STATES DISTRICT JUDGE