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 TO CERTIFY ORDERS FOR INTERLOCUTORY APPEAL AND REQUEST FOR EXPEDITED BRIEFING AND DECISION

For the reasons given in the accompanying brief, the Federation of Southern Cooperatives/Land Assistance Fund moves the Court under 28 U.S.C. § 1292(b) for entry of an order certifying for immediate appeal the orders (ECF No. 186, 196, 202) barring the Federation from taking even limited fact discovery. Given fast-approaching deadlines, the Federation requests that the Court set an expedited briefing schedule and order the filing of any responses by June 2, 2022. In the interest of expediency, the Federation waives its right to file a reply.

Dated: May 27, 2022

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CERTIFICATE OF CONFERENCE

Counsel for the Federation conferred via email on May 25, 2022 with counsel for Plaintiffs, counsel for the Secretary, and counsel for the other Intervenors. Plaintiffs and the Secretary oppose the relief requested in this motion.

/s/ Chase J. Cooper
Chase J. Cooper

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed via the court's CM/ECF system on May 27, 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

BRIEF IN SUPPORT OF THE FEDERATION'S MOTION TO CERTIFY ORDERS FOR INTERLOCUTORY APPEAL AND REQUEST FOR EXPEDITED BRIEFING AND DECISION

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I. INTRODUCTION

The Federation of Southern Cooperatives/Land Assistance Fund moves the Court on an expedited basis under 28 U.S.C. § 1292(b) for entry of an order certifying for immediate appeal the orders (ECF Nos. 186, 196, 202) prohibiting the Federation from taking even limited fact discovery. The orders easily satisfy the statutory criteria for certification under Section 1292(b).

First, whether the orders (1) violate the letter and spirit of the Fifth Circuit's mandate in *Miller v. Vilsack*[1] and (2) impose unreasonable conditions on the Federation's intervention of right are both "controlling question[s] of law" because resolution of both questions will dictate the future course of this litigation.

Second, there is "substantial ground for difference of opinion" on both of the controlling questions. On the first question, there is "substantial ground" to differ with the Court's conclusion that the Fifth Circuit's mandate permits the Court to bar the Federation from taking even limited fact discovery, given the panel's opinion and settled law on the nondiscretionary duty of a district court to comply with the letter and spirit of the mandate. Similarly, on the second question, there is "substantial ground" to differ with the Court's conclusion that barring the Federation from taking even limited fact discovery is a "reasonable" condition on the Federation's intervention of right.

Third, an immediate appeal "may materially advance the ultimate termination of the litigation." Reversal after final judgment and an appeal in the ordinary course would require—for a second time—a re-do of summary-judgment proceedings. The parties and the Court stand to benefit from a definitive answer, delivered before final judgment, on the scope of discovery to which the Federation is entitled.

[1] No. 21-11271, 2022 WL 851782, at *3–4 (5th Cir. Mar. 22, 2022).

Because all of the statutory criteria for certification under Section 1292(b) are met, the Court should certify its orders for interlocutory appeal. Given fast-approaching deadlines, including the May 31, 2022 expert-designation deadline, the Federation requests that the Court expedite briefing and decision of this motion.

II. LEGAL STANDARD

A district judge may certify an order for interlocutory appeal "where (1) a controlling question of law is involved, (2) there is substantial ground for difference of opinion about the question of law, and (3) immediate appeal will materially advance the ultimate termination of the litigation." *Rico v. Flores*, 481 F.3d 234, 238 (5th Cir. 2007) (citing 28 U.S.C. § 1292(b)). The district court must find all three criteria met before certifying an appeal. *See Aparicio v. Swan Lake*, 643 F.2d 1109, 1110 n.2 (5th Cir. 1981). Section 1292(b) "give[s] to the appellate machinery ... a considerable flexibility operating under the immediate, sole and broad control of Judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might *both* be avoided." *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 703 (5th Cir. 1961) (emphasis added).

III. ARGUMENT

A. The Orders Barring Fact Discovery Involve Controlling Questions of Law.

The orders barring even limited fact discovery involve controlling questions of law. A question need not result in the termination of the action to be "controlling" under Section 1292(b). *La. State Conf. of NAACP v. Louisiana*, 495 F. Supp. 3d 400, 413 (M.D. La. 2020). "It is sufficient to satisfy the controlling question of law standard if resolution [of the question] on appeal determines the 'future course of the litigation.'" *Id.* (quoting *Tesco Corp. v. Weatherford Int'l, Inc.*, 722 F. Supp. 2d 755, 766 (S.D. Tex. 2010)). Here, the orders barring the Federation from taking limited fact discovery involve two controlling questions of law that will determine the future course of this litigation.

The first controlling question is whether this Court's ban on fact discovery violates the Fifth Circuit's mandate. *See Miller*, 2022 WL 851782, at *3–4. A "corollary of the law-of-the-case doctrine," the mandate rule requires a district court on remand to "implement both the letter and the spirit of the appellate court's mandate." *Perez v. Stephens*, 784 F.3d 276, 280 (5th Cir. 2015) (per curiam) (quotation omitted); *cf. M.D. ex rel. Stukenberg v. Abbott*, 977 F.3d 479, 483 (5th Cir. 2020) (reversing district court for violating the mandate). "In implementing the mandate, the district court must take into account the appellate court's opinion and the circumstances it embraces." *Gen. Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007). "The district court is without power to do anything [that] is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case." *Tollett v. City of Kemah*, 285 F.3d 357, 364 (5th Cir. 2002) (quotation omitted). "[T]he district court should consult the reviewing court's opinion to ascertain what was intended by [the] mandate." *Id.* (quotation omitted). Whether this Court violated the mandate rule by barring the Federation from taking even limited fact discovery will determine the future course of the litigation because it will settle the discovery to which the Federation is entitled and the basis on which Section 1005 of the American Rescue Plan Act of 2021 is defended. It is therefore a controlling question.

The second controlling question is whether this Court's refusal to allow the Federation to take even limited fact discovery constitutes an unreasonable condition on the Federation's intervention of right. The Fifth Circuit has stated that "*reasonable* conditions may be imposed even upon one who intervenes as of right." *Beauregard, Inc. v. Sword Servs. L.L.C.*, 107 F.3d 351, 353 (5th Cir. 1997) (emphasis added). Still, under Fifth Circuit precedent, "an intervenor of right 'is treated as if he were an original party and has equal standing with the original parties.'" *Brown v. Demco*, 792 F.2d 478, 480–81 (5th Cir. 1986) (quoting *Donovan v. Oil, Chem., & Atomic Workers*

Int'l Union, 718 F.2d 1341, 1350 (5th Cir. 1983)). To that end, an intervenor of right "is entitled to litigate fully on the merits once intervention has been granted." 7C WRIGHT & MILLER, FED. PRAC. & PROC. § 1920 (3d ed.). Here, even assuming the Court may impose "reasonable" conditions on the Federation's intervention of right, it is a controlling question whether prohibiting the Federation from taking *any* fact discovery is "reasonable." *Cf. Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 470 (4th Cir. 1992) (even if conditions on intervenors of right "are ever proper," the denial of discovery was a "clearly unreasonable" condition that violated due process). This second controlling question will determine the future course of the litigation in the same way as the first: it will dictate both the discovery to which the Federation is entitled and the basis on which Section 1005 is defended.

B. There is Substantial Ground for Difference of Opinion on the Court's Power to Bar the Federation From Taking Even Limited Fact Discovery.

There is substantial ground for difference of opinion on the question whether the Court may bar the Federation from taking limited fact discovery in light of (1) the letter and spirit of the Fifth Circuit's mandate and (2) Fifth Circuit law on the rights afforded intervenors of right.

This Court has certified orders for interlocutory appeal in the appropriate case, even when convinced of the order's correctness. *See, e.g.*, *Odle v. Wal-Mart Stores Inc.*, No. 3:11-CV-2954-O, 2013 WL 66035, at *3 (N.D. Tex. Jan. 7, 2013) (O'Connor, J.) (finding substantial ground for difference of opinion and certifying order for interlocutory appeal, despite belief that "its previous decision ... was correct"). "The level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case." 16 WRIGHT & MILLER, FED. PRAC. & PROC. § 3930 (3d ed.). Because the discovery to which the Federation is entitled is a threshold question that could dictate the course

of this litigation through final judgment, appeal, and (potentially) certiorari, "certification may be justified at a relatively low threshold of doubt." *Id.*

As for the first controlling question, there is "substantial ground" to differ with the Court's conclusion that the letter and spirit of the Fifth Circuit's mandate allow this Court to bar the Federation from taking any fact discovery. Allowing the Federation to take the discovery necessary to obtain and present evidence of current discrimination by USDA—something neither Plaintiffs nor the Secretary will do[2]—was *the* rationale for the Fifth Circuit's directive that this Court permit intervention of right. *Miller*, 2022 WL 851782, at *3–4. "Tak[ing] into account" the Fifth Circuit's opinion and "the circumstances it embraces," *Gen. Universal Sys.*, 500 F.3d at 453, the Court should have allowed the Federation to take the limited fact discovery it requested. *See Miller*, 2022 WL 851782, at *3.

The second controlling question also raises "substantial ground" for disagreement. As relevant here, the Court concluded that prohibiting the Federation from taking fact discovery was a "reasonable" limitation on the Federation's intervention of right under *Beauregard*. *See* 107 F.3d at 353. But the Court neither cited nor analyzed Fifth Circuit precedents that take a broader view of the rights given intervenors of right. *See, e.g.*, *Brown*, 792 F.2d at 480–81 ("[A]n intervenor of right is treated as if he were an original party and has equal standing with the original parties.") (quotation omitted). Nor did the Court engage with federal appellate authority holding that prohibiting an intervenor of right from taking discovery is "clearly unreasonable" and a violation of due process. *Columbus-Am. Discovery Grp.*, 974 F.2d at 470.

[2] The Fifth Circuit's opinion recognized that the Federation is the only party that will introduce evidence of ongoing discrimination in defense of Section 1005. *See* 2022 WL 851782, at *3 ("[A] U.S. Secretary would likely heartily deny that their agency is *currently* discriminating against people based upon race.") (emphasis original); *id.* at *3 n.6 ("It is highly unlikely the Secretary would put forth such evidence in the absence of the Federation's intervention.").

C. An Immediate Appeal From the Orders Barring Fact Discovery Will Materially Advance the Ultimate Termination of the Litigation.

Allowing the Federation to immediately appeal from the Court's orders banning fact discovery will materially advance the ultimate termination of this litigation.

This standard is not a difficult one to meet. Section 1292(b) "does not require the appeal to certainly advance the termination of the litigation." *La. State Conf.*, 495 F. Supp. 3d at 416. It is enough if the "appeal *may* advance the ultimate termination of the litigation if permitted." *Id.* (italics original). "An immediate appeal would materially advance the disposition of the litigation if it would conserve judicial resources and spare the parties from possibly needless expense if the Court's ruling was reversed." *Air. Transp. Ass'n of Am., Inc. v. U.S. Dep't of Agric.*, 317 F. Supp. 3d 385, 394 (D.D.C. 2018) (quotation omitted).

Here, the material-advancement standard is easily met. If the Court declines to certify its orders barring fact discovery and is reversed after final judgment on that ground, the parties and the Court will have needlessly expended considerable resources. This Court's opinion on summary judgment, the parties' summary-judgment briefing, and expert discovery would all need be re-done—either completely or to varying degrees. Certification for immediate appeal would materially advance the ultimate termination of this litigation by reducing the risk that the Court's and the parties' resources are unnecessarily expended and by settling, fully and finally, the discovery to which the Federation is entitled.

IV. REQUEST FOR EXPEDITED BRIEFING AND DECISION

Given fast-approaching deadlines, including the May 31, 2022 expert-designation deadline, the Federation requests that the Court set an expedited briefing schedule and order the filing of any responses by no later than June 2, 2022. In the interest of expediency, the Federation waives its right to file a reply.

V. CONCLUSION

The Federation has met all three prerequisites for certification. The Court's orders barring the Federation from taking even limited fact discovery involve controlling questions of law; there is substantial ground for difference of opinion about whether the Court may properly bar the Federation from taking any fact discovery; and an immediate appeal will materially advance the ultimate termination of this litigation by saving judicial and party resources in the event the Court is again reversed. For these reasons, the Court should enter an order under Section 1292(b) certifying for interlocutory appeal its orders (ECF Nos. 186, 196, 202) prohibiting the Federation from taking even limited fact discovery.

Dated: May 27, 2022

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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 May 27, 2022, which will serve all counsel of record.

/s/ Chase J. Cooper
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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 TO CERTIFY ORDERS FOR INTERLOCUTORY APPEAL AND REQUEST FOR EXPEDITED BRIEFING AND DECISION

Having considered the briefing on the Federation of Southern Cooperatives/Land Assistance Fund's Motion to Certify Orders for Interlocutory Appeal and Request for Expedited Briefing and Decision (the "Motion"), and for good cause shown, it is **ORDERED** that:

The Motion is **GRANTED**. The orders (ECF Nos. 186, 196, 202) barring the Federation from taking even limited fact discovery involve controlling questions of law as to which there is substantial ground for difference of opinion, and an appeal from the orders may materially advance the ultimate termination of the litigation. The Court therefore **CERTIFIES** the orders for immediate appeal under 28 U.S.C. § 1292(b).

SO ORDERED on this __ day of _____, 2022.

THE HONORABLE REED O'CONNOR
UNITED STATES DISTRICT JUDGE

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 REQUEST FOR EXPEDITED BRIEFING AND DECISION ON ITS MOTION TO CERTIFY ORDERS FOR INTERLOCUTORY APPEAL

Before the Court is the Federation of Southern Cooperatives/Land Assistance Fund's Motion to Certify Orders for Interlocutory Appeal and Request for Expedited Briefing and Decision. To expedite resolution of the motion, the Court **GRANTS** the request for expedited briefing and decision and **ORDERS** the Government and the Plaintiffs to respond to the motion by June 2, 2022. The Federation has waived its right to file a reply.

SO ORDERED on this __ day of ____, 2022.

THE HONORABLE REED O'CONNOR
UNITED STATES DISTRICT JUDGE