No. 22-_____

In the United States Court of Appeals for the Fifth Circuit

IN RE THE FEDERATION OF SOUTHERN COOPERATIVES/LAND ASSISTANCE FUND,

Petitioner.

On Petition for a Writ of Mandamus to the U.S. District Court for the Northern District of Texas, Fort Worth Division
No. 4:21-cv-0595-O (Hon. Reed O'Connor)

PETITION FOR A WRIT OF MANDAMUS

Jon M. Greenbaum
Dorian L. Spence
LAWYERS' COMMITTEE
1500 K St. NW, Suite 900
Washington, DC 20005

Chase J. Cooper
Jordan B. Redmon
Ashley Jones Wright
WINSTON & STRAWN LLP
2121 N. Pearl Street, Suite 900
Dallas, TX 75201

Kobi K. Brinson
WINSTON & STRAWN LLP
300 South Tyron St., 16th Floor
Charlotte, NC 28202

Janelle A. Li-A-Ping
WINSTON & STRAWN LLP
333 S. Grand Ave.
Los Angeles, CA 90071

George C. Lombardi
Julie A. Bauer
WINSTON & STRAWN LLP
35 West Wacker Dr.
Chicago, IL 60601

Andrew E. Tauber
Counsel of Record
WINSTON & STRAWN LLP
1901 L St. NW
Washington, DC 20036
(202) 282-5288
atauber@winston.com

Mark D. Rosenbaum
Nisha Kashyap
PUBLIC COUNSEL
610 S. Ardmore Ave.
Los Angeles, CA 90005

Counsel for Petitioner

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CERTIFICATE OF INTERESTED PERSONS

The following persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that members of the Court may evaluate possible recusal.

Plaintiffs–Respondents

1. Sid Miller
2. Greg Macha
3. James Meek
4. Lorinda O'Shaughnessy
5. Jeff Peters

Counsel for Plaintiffs–Respondents

6. Gene Patrick Hamilton, America First Legal Foundation
7. Jonathan F. Mitchell, Mitchell Law, PLLC

8. Charles W. Fillmore, The Fillmore Law Firm LLP
9. H. Dustin Fillmore III, The Fillmore Law Firm LLP

Defendant–Respondent

10. Tom Vilsack, in his capacity as Secretary of Agriculture

Counsel for Defendant–Respondent

11. Emily Sue Newton, U.S. Department of Justice
12. Kyla Marie Snow, U.S. Department of Justice
13. Michael Fraser Knapp, U.S. Department of Justice
14. Alexander V. Sverdlov, U.S. Department of Justice
15. Jeffrey Eric Sandberg, U.S. Department of Justice
16. Marleigh D. Dover, U.S. Department of Justice
17. Jack Starcher, U.S. Department of Justice

Petitioner

18. The Federation of Southern Cooperatives/Land Assistance Fund

Counsel for Petitioner

19. Andrew E. Tauber, Winston & Strawn LLP
20. Chase J. Cooper, Winston & Strawn LLP
21. George Lombardi, Winston & Strawn LLP
22. Julie A. Bauer, Winston & Strawn LLP
23. Kobi K. Brinson, Winston & Strawn LLP
24. Janelle Alyssa Li-A-Ping, Winston & Strawn LLP
25. Jordan B. Redmon, Winston & Strawn LLP
26. Ashley Jones Wright, Winston & Strawn LLP

27. Dorian Lawrence Spence, Lawyers' Committee for Civil Rights Under Law

28. Jon Marshall Greenbaum, Lawyers' Committee for Civil Rights Under Law

29. Anneke Dunbar-Gronke, Lawyers' Committee for Civil Rights Under Law

30. Phylicia Helena Hill, Lawyers' Committee for Civil Rights Under Law

31. Mark Dale Rosenbaum, Public Counsel

32. Nisha Kashyap, Public Counsel

Permissive Intervenors

33. National Black Farmers Association

34. Association of American Indian Farmers

Counsel for Permissive Intervenors

35. Scott Martin Hendler, Hendler Flores Law, PLLC

36. Rebecca R. Webber, Hendler Flores Law, PLLC

37. David S. Muraskin, Public Justice

38. Jessica L. Culpepper, Public Justice

39. Randolph T. Chen, Public Justice

Dated: June 17, 2022

Respectfully submitted,

/s/ Andrew E. Tauber

Andrew E. Tauber
Counsel of Record for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulations

Other Authorities

INTRODUCTION

Petitioner Federation of Southern Cooperatives/Land Assistance Fund seeks a writ of mandamus to enforce this Court's mandate, which the district court has violated.

Unanimously reversing the district court, this Court held that the Federation is entitled to intervene in the underlying litigation as a matter of right because the Secretary of Agriculture does not adequately represent the Federation's interest in defending Section 1005 of the American Rescue Plan Act of 2021. In particular, the Court found that the Secretary "would likely deny that [USDA] is *currently* discriminating against people based on race," and was thus "highly unlikely to put forth … evidence" of such discrimination, which the Court recognized "may be highly relevant to" defending Section 1005's constitutionality. The Court understood that the Federation, by contrast, "would seek evidence demonstrating current discrimination by the USDA" were it "given the opportunity to conduct discovery as a party." That the Court anticipated the Federation being granted fact discovery upon intervention is underscored by Judge Haynes' statement at oral argument that "get[ting] to do discovery" would be "the most critical thing" the Federation would obtain if allowed to intervene.

Despite this, the district court has prevented the Federation from taking *any* fact discovery. It has, moreover, done so based on an agreement struck by the Secretary and the plaintiffs challenging Section 1005. In other words, the district court has justified denying the Federation the discovery envisioned by this Court based on an agreement between two parties adverse

to the Federation's interests—an agreement that those parties reached long before the Federation had an opportunity to object. Denying the Federation reasonable fact discovery violates this Court's mandate and constitutes clear and indisputable error.

The underlying litigation is a class-action lawsuit challenging the constitutionality of Section 1005, which grants loan-forgiveness assistance to "socially disadvantaged farmers and ranchers." The Plaintiffs, self-described White farmers, have sued the Secretary, who is responsible for USDA loan programs and the implementation of Section 1005.

The Federation is a nonprofit cooperative association of Black farmers, landowners, and cooperatives whose members stand to benefit from Section 1005. Given its interest in preserving Section 1005 for the benefit of its members, the Federation moved to intervene in defense of the law. The district court denied intervention and the Federation appealed. This Court reversed, directing the district court to permit the Federation's intervention as a matter of right. *See Miller v. Vilsack*, No. 21-11271, 2022 WL 851782, at *3–4 (5th Cir. Mar. 22, 2022) (per curiam).

The Court's unanimous reversal rested on the Federation's showing that the Secretary inadequately represents the Federation's interest in the litigation. This Court explained that the Federation's interest in presenting evidence of current discrimination by USDA was adverse to the Secretary's institutional interest in avoiding liability for current discrimination against Black farmers. The linchpin of this Court's opinion, then, was the

Federation's right to seek (and ultimately present) evidence of USDA's ongoing discrimination against Black farmers.

On remand, however, the district court ignored all of this. It barred the Federation from taking any fact discovery, going so far as to deny the Federation's expert the USDA loan data that he needed to prepare his expert report. In denying it the opportunity to conduct even limited fact discovery, the district court has ensured that the Federation will never uncover the very evidence that animated this Court's unanimous opinion. The district court allowed two parties with interests adverse to those of the Federation to not only control this constitutional litigation but to also conceal the evidence that this Court recognized could be "highly relevant to proving a compelling governmental interest" and thereby establishing Section 1005's constitutionality. The district court did all of this without analyzing—or even citing—this Court's opinion.

For their part, the Secretary and the Plaintiffs have endorsed the district court's refusal to allow the Federation to take fact discovery. That comes as no surprise. Although nominally adverse, the Secretary and the Plaintiffs have taken the same side at every opportunity when it comes to the Federation's participation in the litigation. Both have sought to minimize its role to the greatest extent possible—even though the Federation's members are the individuals who will be most directly affected by the implementation or demise of Section 1005. And, aware that the Federation intended to seek and present evidence of current discrimination by USDA, both have consistently opposed any discovery by the Federation. The collusion makes

some practical sense from their point of view: both Plaintiffs and the Secretary have an obvious interest in burying evidence that USDA currently discriminates against Black farmers. For the Secretary, discovery of that evidence might well lead to civil liability for his agency; for Plaintiffs, evidence of ongoing discrimination weakens the argument that Section 1005 violates equal-protection principles.

The limited evidence that the Federation seeks through discovery—USDA loan data, certain documents regarding USDA's efforts to identify and remedy racial discrimination, and the testimony of a few USDA officials—is in the exclusive control of the Secretary. The Secretary has not denied that this targeted discovery would reveal direct evidence of current discrimination by USDA. And the Secretary cannot deny that, as one court has held, such evidence could be "crucial" to upholding the constitutionality of Section 1005. Nonetheless, the Secretary refuses to produce that evidence. Although his refusal to do so confirms that his interests are adverse to those of the Federation, the district court has sanctioned the Secretary's stonewalling on the ground that he and Plaintiffs, who are seeking to overturn Section 1005, had previously agreed to forgo fact discovery.

The district court's ban on fact discovery violates the letter and spirit of this Court's mandate and constitutes a clear and indisputable error. This Court directed the Federation's intervention precisely because the Federation would seek and present evidence of ongoing discrimination by the USDA, when no other party to the case would do so; the district court's

ban on fact discovery ensures that evidence of such discrimination will never be uncovered.

There is no reasonable justification for barring the Federation from conducting the limited discovery that it has requested. Any delay would be minimal; the Federation sought only a six-week extension of the current summary-judgment deadlines. Plaintiffs will suffer no prejudice because they are protected by a nationwide preliminary injunction blocking implementation of Section 1005. And although the Secretary may be forced to produce evidence of ongoing discrimination by his department, such evidence would greatly enhance the likelihood that Section 1005 will be found constitutional, which is the Secretary's stated goal in this litigation.

There is moreover a strong public interest in compelling production of the evidence held by the Secretary. The constitutionality of federal statutes such as Section 1005 should always be judged on a full record. That is especially true where, as here, Congress intended the statute at issue to redress discrimination by the government itself. Due respect for the legislative branch demands that the judicial branch have before it as complete a record as possible before passing judgment on the statute's constitutionality.

In denying the Federation the limited discovery that it seeks, the district court violated this Court's mandate. That by itself warrants mandamus. Compelling compliance with the mandate is, after all, one of the principal purposes of the writ. The writ should issue here to ensure that the district court follows rather than flouts this Court's mandate.

STATEMENT OF RELIEF SOUGHT

The Federation requests a writ of mandamus compelling the district court to follow the letter and spirit of this Court's mandate. *See Miller*, 2022 WL 851782, at *3–4. Specifically, the Court should direct the district court (1) to vacate its orders (ECF Nos. 186, 196, 202) prohibiting the Federation from taking fact discovery and denying the Federation's expert the data necessary to prepare a reliable report and (2) to enter a revised scheduling order allowing the Federation to conduct the targeted, time-limited fact discovery identified in its portion of the joint status report submitted following this Court's decision directing that the Federation be allowed to intervene as a matter of right (ECF No. 184 at 9–10).

ISSUE PRESENTED

Whether the district court clearly and indisputably erred when it violated the letter and spirit of this Court's mandate by barring the Federation from taking any fact discovery after this Court held that the Federation was entitled to intervene as a matter of right precisely because it would seek and present potentially critical evidence of ongoing discrimination by USDA that neither the Secretary nor Plaintiffs will present.

STATEMENT OF FACTS

A. Plaintiffs challenge Section 1005.

Both Section 1005 and the underlying litigation are aptly described in this Court's *Miller* opinion, 2022 WL 851782, at *1-4, and only a brief summary is needed to understand why the writ should issue here.

Section 1005 directs USDA to deliver loan assistance to "socially disadvantaged farmers and ranchers." American Rescue Plan Act of 2021 ("ARPA") § 1005(a)(2), Pub. L. No. 117-2, 135 Stat. at 12–13. A "socially disadvantaged farmer or rancher" is one who belongs to a socially disadvantaged group "whose members have been subjected to racial or ethnic prejudice … without regard to their individual qualities." 7 U.S.C. § 2279(a)(6). Per USDA's interpretation, the term includes (but is not limited to): "American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos." Notice of Funds Availability; ARPA Section 1005 Loan Payment, 86 Fed. Reg. 28,329, 28,330 (May 26, 2021).

In April 2021, White farmers filed a class-action lawsuit challenging Section 1005 on constitutional and statutory grounds. ECF No. 1. They claim that, in administering Section 1005, the Secretary violated Title VI of the Civil Rights Act of 1964 and the U.S. Constitution "by excluding individuals and entities from the benefit of federal programs on the grounds of race, color, and national origin." *Id.* at ¶ 18.

In July 2021, the district court certified a class of White farmers and ranchers excluded from participating in Section 1005's loan-forgiveness

program and preliminarily enjoined the Secretary from administering Section 1005. ECF No. 60. The Secretary chose not to appeal either class certification or the preliminary injunction.

B. Plaintiffs and the Secretary agree not to take fact discovery.

Two weeks after the district court certified the class and preliminarily enjoined implementation of Section 1005, the Secretary and the Plaintiffs submitted a joint status report in which they said they "do not believe factual discovery is necessary." ECF No. 70 at 2. The Federation was not involved in that agreement and—as a non-party—had no opportunity to object to it.

C. The district court erroneously denies intervention.

The Federation then moved to intervene as a matter of right so that it could defend Section 1005 by, among other things, introducing evidence of ongoing discrimination by USDA. ECF Nos. 93 & 93-1. Neither Plaintiffs nor the Secretary disputed that the Federation satisfied the first three requirements of intervention of right; they disputed only the fourth, namely, whether the Secretary inadequately represented the Federation's interests. ECF Nos. 136 & 137. The Federation contended that the Secretary's institutional interest in avoiding liability for continuing discrimination was adverse to the Federation's case-specific interest in defending Section 1005 to the fullest extent possible, including on the basis of continued discrimination by the USDA against the Federation's members. ECF No. 93-1 at 25.

Disagreeing, the district court denied the Federation's motion to intervene. ECF No. 143. The Federation timely appealed. *Miller*, 2022 WL 851782, at *3.

D. This Court reverses, directing the district court to allow the Federation to intervene as a matter of right.

This Court reversed the district court's denial of intervention of right and directed the district court to permit the Federation to intervene. *Id.* at *4. This Court held that the Federation had "met its 'minimal' burden demonstrating inadequate representation." Recognizing that there are "two presumptions of adequate representation," the ultimate-objective presumption and the governmental-body presumption, it held that the Federation had "rebutted the first presumption" by showing "adversity of interest" between itself and the Secretary and that "the second presumption" does "not apply" in this case. *Id.* at *3–4.

This Court's conclusion that the Federation and the Secretary had adverse interests rested in large part on the Federation's intent to present evidence of ongoing discrimination by USDA. *See id.* Specifically, the Court reasoned 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." *Id.* The Court went on to describe evidence of "continuing discrimination" as "'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 *3.

The Court's opinion and its statements at oral argument specifically contemplated the Federation's right to take fact discovery on remand. At oral argument, Judge Haynes observed that "get[ting] to do discovery" would be "the most critical thing" the Federation would get were it permitted to intervene. Oral Argument Recording at 3:48–3:56. And in its opinion, this Court 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.

Two days after this Court issued its opinion, the Federation moved on an emergency basis for immediate issuance of the mandate. No. 21-11271, Doc. No. 00516252799. The Court granted the motion later that day. *Id.* at Doc. No. 00516253355.

E. The district court denies all fact discovery.

On remand, the district court directed Plaintiffs, the Secretary, and the Federation to confer and thereafter file a "joint status report" addressing four issues, including "what limitations, if any, the [district] [c]ourt should place on the Federation's participation in this case." ECF No. 178.

The parties submitted a joint status report on April 1, 2022. ECF No. 184. As they have for much of this litigation, Plaintiffs and the Secretary agreed: the Federation should not receive any fact discovery. ECF No. 184 at 1–2 (Plaintiffs); *id.* at 2–7 (Secretary).

In its portion of the report, the Federation requested targeted, time-limited fact discovery regarding USDA's efforts to identify and remedy racial disparities from 2010 to present. *Id.* at 7–10. The Federation focused its

discovery requests on this time period because the Secretary has not acknowledged any discrimination during it. Thus, the Federation specifically requested USDA loan data from 2010 to present, including both the loan data reviewed by the Secretary's expert and three other categories of loan data. *Id.* at 9. The Federation did not request the full scope of discovery to which it was entitled; it voluntarily accepted self-imposed limitations that were more than reasonable, namely, that it would take only five depositions and propound only a few requests for production. *Id.* at 9–10. The Federation proposed that the parties conclude all discovery and file their motions for summary judgment on September 2, 2022—just six weeks after Plaintiffs' and the Secretary's proposed filing dates. *Id.* at 11–12. To support its request, the Federation directed the district court to the rationale of this Court's opinion, explaining that "[t]he lynchpin of the Fifth Circuit's analysis was the Federation's interest in presenting evidence of current discrimination by USDA[.]" *Id.* at 8.

On April 5, 2022, the district court entered a six-page order directing the Secretary to produce "loan data" but otherwise rejecting the Federation's request for discovery. ECF No. 186. Although no fact discovery had occurred, the district court said it would not "reopen" fact discovery to accommodate the Federation's intervention of right. ECF No. 186 at 1. It based its ban on fact discovery on (1) an agreement by Plaintiffs and the Secretary—made before the Federation intervened—that fact discovery would be unnecessary; (2) the Federation's failure to "object" to that agreement, even though it was not a party to the case and had no mechanism by which to do so; (3) the

Federation's statement, in its motion to intervene, that it did "not seek to relitigate any prior rulings" by the district court; and (4) a district court's power to impose "reasonable" conditions on intervenors of right. *Id.* at 2–5.

In short, the district court "closed the possibility of fact discovery" (ECF No. 186 at 3) based in significant part on an agreement made by parties with interests adverse to those of the Federation before the Federation was allowed to intervene. *See Miller*, 2022 WL 851782, at *3–4 (concluding that the Federation had established an adversity of interest between itself and the Secretary).

Notably, the district court's order did not analyze—or even cite—this Court's opinion directing the district court to allow the Federation's intervention of right. ECF No. 186 at 1–6. In place of analysis, the district court summarily concluded that "the Fifth Circuit's opinion and judgment do not require the Court to reopen fact discovery," and that "[n]othing in the Fifth Circuit's opinion contemplates *fact* discovery." *Id.* at 5.

F. The district court refuses to reconsider its ban on fact discovery.

On April 13, 2022, the Federation moved the district court to reconsider its ban on fact discovery. ECF No. 187 & 187-1. The Federation explained that barring it from taking fact discovery violated the letter and spirit of this Court's mandate and amounted to an "unreasonable" limitation on the Federation's intervention of right. ECF No. 187-1 at 5. Plaintiffs and the Secretary opposed reconsideration. ECF Nos. 193 (Secretary) & 194 (Plaintiffs).

Two days later, the district court entered a three-page order denying reconsideration. ECF No. 196. As before, the district court provided no analysis of this Court's opinion directing the Federation's intervention of right. *Id.* at 2. On the question of whether it had complied with the letter and spirit of this Court's mandate, the district court gave this one-sentence answer: "The Federation continues to misread the Fifth Circuit's opinion, which neither requires nor implies that the Federation is entitled to fact discovery." *Id.*

G. The district court denies the Federation's experts the data needed to prepare a reliable report.

On May 13, 2022, the Federation asked the district court (1) to compel the Secretary to disclose the loan data the Federation's experts needed to prepare their report; and (2) to extend case deadlines to remedy the Secretary's delay in disclosing that data. ECF Nos. 199 & 199-1. As noted, the Federation had requested certain loan data from USDA in its portion of the joint status report, and the district court had ordered the production of "loan data"—without qualification—by a date certain. In its motion to compel, the Federation explained the importance of the missing data—the Federation's expert attested that he could not perform a reliable analysis without it—and the need for an appropriate extension of the expert deadlines pending only the production of reasonably complete loan data. ECF Nos. 199, 199-1, 199-2.

The district court denied both requests in a four-page order. ECF No. 202. Saying that the motion "amounts to asking, once again, for fact

discovery," the district court "denie[d]" the Federation's request "for the reasons stated" in its prior orders barring the Federation from taking fact discovery. *Id.* at 4. Once again, it neither cited nor analyzed this Court's opinion. *Id.*

H. The district court refuses to certify its orders barring fact discovery for interlocutory appeal.

On May 27, 2022, the Federation moved the district court to certify its orders (ECF Nos. 186, 196, 202) barring fact discovery for interlocutory appeal under 28 U.S.C. § 1292(b). ECF Nos. 203 & 203-1.

In its supporting brief, the Federation explained why all three statutory prerequisites for interlocutory appeal were met. ECF No. 203. First, the orders barring fact discovery involved controlling questions of law—whether the ban on fact discovery (1) violated the mandate and (2) was an unreasonable limitation on the Federation's intervention. Second, there was, at the very least, substantial ground for difference of opinion about the district court's power to bar the Federation from taking any fact discovery. Third, an immediate appeal would materially advance the ultimate termination of this litigation by saving resources in the event the district court were again reversed. ECF No. 203-1. Both Plaintiffs and the Secretary opposed the motion. ECF Nos. 205 (Secretary) & 206 (Plaintiffs). Plaintiffs' two-sentence opposition simply "incorporate[d] by reference the arguments presented in [the Secretary's] response." ECF No. 206 at 1.

The district court denied certification. ECF No. 207. Without citing this Court's opinion, the district court held that both its compliance with the

mandate and its power to deny the Federation fact discovery were not controlling questions; that there was not substantial ground to differ with its conclusions; and that an immediate appeal would not materially advance the termination of the litigation, even if the court were again reversed. *Id.*

* * *

The Federation does not take lightly the filing of a petition for a writ of mandamus. But the district court's refusal to respect this Court's mandate—and the Secretary's collusion with Plaintiffs to ensure Section 1005 is defended on an incomplete record—has left the Federation with no choice. Unless the writ issues, the Federation's right to intervene, a right guaranteed by this Court's decision in *Miller*, will be effectively nullified.

REASONS WHY THE WRIT SHOULD ISSUE

"Mandamus is appropriate where (1) the petitioner has shown a clear and indisputable right to the writ; (2) the court is satisfied that the writ is appropriate under the circumstances; and (3) the petitioner has no other adequate means to attain the relief [it] desires." *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 350 (5th Cir. 2017) (quotation omitted).

"These hurdles, however demanding, are not insuperable." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004). "They simply reserve the writ for really extraordinary causes." *Id.* And "in extraordinary cases, mandamus petitions 'serve as useful safety valves for promptly correcting serious errors.'" *In re Gee*, 941 F.3d 153, 158 (5th Cir. 2019) (per curiam) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009)).

"The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Cheney*, 542 U.S. at 380 (quotation omitted). So when a party seeks mandamus to "'confine a trial court to a lawful exercise of its prescribed authority," as the Federation seeks here, "'the court should issue the writ almost as a matter of course.'" *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (quoting *Schlazenhauf v. Holder*, 379 U.S. 104 (1964)); *accord United States v. Denson*, 603 F.2d 1143, 1149 (5th Cir. 1979) (en banc) (Rubin, J.) ("[I]f a district court exceeds the scope of its judicial authority, the aggrieved party should be granted the writ almost as a matter of right.").

The Federation meets each requirement for mandamus. *First*, the district court's ban on fact discovery violates the mandate rule and therefore constitutes clear and indisputable error. *Second*, the writ is appropriate under the circumstances because the district court's violation of the mandate means that the constitutionality of a federal statute will be decided on an incomplete record missing evidence that this Court recognized "may be highly relevant to" the statute's constitutionality. *Third*, the Federation has no adequate means other than mandamus to obtain relief from the district court's blanket ban on fact discovery given that court's refusal to reconsider the ban and its refusal to certify its orders for interlocutory appellate review. The writ should issue forthwith.

I. The district court clearly and indisputably erred.

The Federation's right to a writ of mandamus is clear and indisputable because the district court clearly abused its discretion in two respects. First, the district court clearly abused its discretion when it banned all fact discovery in violation of the letter and spirit of this Court's mandate. Second, the district court clearly abused its discretion when it failed to apply the appropriate legal standard to evaluate its compliance with the mandate.

A. District courts must abide by this Court's mandate.

The right to the writ is clear and indisputable if the district court clearly abuses its discretion. *In re Itron*, 883 F.3d 553, 568 (5th Cir. 2018). District courts have no discretion to violate the mandate; compliance with the mandate is a nondiscretionary duty. *See M. D. ex rel. Stukenberg v. Abbott*, 977 F.3d 479, 481 (5th Cir. 2020).

Thus, the right to the writ is clear and indisputable if the district court violates its nondiscretionary duty to comply with the letter and spirit of the mandate. *See In re Abbott*, 956 F.3d 696, 713 (5th Cir. 2020) ("Petitioners have demonstrated their clear and indisputable right to the writ" by showing a violation of the mandate), *cert. granted, judgment vacated on other grounds sub nom. Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021); *see also In re Gee*, 941 F.3d at 159 ("if the district court has violated a non-discretionary duty, the petitioner necessarily has a clear and indisputable right to relief."); *In re Digicon Marine, Inc.*, 966 F.2d 158, 160 (5th Cir. 1992) (granting mandamus because "the district court had no discretion" (quotation omitted)). Because the district court shirked its

nondiscretionary duty to comply with the mandate, mandamus is appropriate. *See Abbott*, 956 F.3d at 713.

B. The district court violated the mandate rule.

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. Stukenberg*, 977 F.3d at 483 (reversing district court for violating the mandate rule); *In re Deepwater Horizon*, 928 F.3d 394, 400 (5th Cir. 2019) (same).

"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) (emphasis added). "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). Thus, "the district court should consult the reviewing court's opinion to ascertain what was intended by [the] mandate." *Id.* (quotation omitted).

The district court here violated the letter and spirit of this Court's mandate when construed in light of this Court's opinion.

In *Miller*, this Court held that the Federation was entitled to intervene as a matter of right because it, unlike the Secretary, would seek and present evidence "that USDA is *continuing* to actively discriminate against its members." *Id.* The Federation's interest in presenting this evidence, the

Court explained, "not only *directly* conflicts with the Secretary's position, but also potentially exposes the agency to liability." *Id.* at *3. Recognizing that one court considering Section 1005 has said that "'evidence of continued discrimination' may be 'crucial'" to its successful defense, this Court reasoned that the Federation's interest in seeking and presenting such evidence was "germane to the case because evidence of continued discrimination *may be highly relevant* to proving a compelling governmental interest" and thus establishing Section 1005's constitutionality. *Id.* (quoting *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021)) (emphasis added).

"Tak[ing] into account" this Court's opinion in *Miller* and "the circumstances it embraces" (*Gen. Universal Sys.*, 500 F.3d at 453), the letter and spirit of this Court's mandate required that the district court grant the Federation the opportunity to take targeted fact discovery designed to uncover evidence of ongoing discrimination by USDA.

Allowing the Federation to seek and present evidence of current discrimination by USDA—something the Secretary has not done and concededly will not do[1]—was *the* rationale for this Court's decision holding

[1] The Secretary has admitted that his defense of Section 1005 "rel[ies] on intentional discrimination at USDA *in the past* and then the negative ramifications of *that*." Fifth Circuit No. 21-11271, Doc. # 00516166889 at 21 n.8 (emphasis added) (quotation omitted). And this Court's opinion recognizes that Petitioner 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 [Petitioner's] intervention.").

that the Federation is entitled to intervene as a matter of right. *See Miller*, 2022 WL 851782, at *3–4. At oral argument, the Court recognized that the opportunity to seek and present evidence of current discrimination by the USDA is the reason why intervention of right was necessary, and why amicus curiae status would not suffice. *See* Oral Argument Recording at 3:48–3:56 (Judge Haynes declaring that "get[ting] to do discovery" would be "the most critical thing" the Federation would get to do as a party that it would not be able to do as an amicus). And in its opinion, this Court 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.

Despite all of this, the district court categorically barred the Federation from taking *any* fact discovery notwithstanding the significant, self-imposed limitations that the Federation voluntarily proposed so that the proceedings would be neither unduly prolonged nor disrupted. ECF Nos. 186 & 196. That alone violates the letter and spirit of this Court's mandate and constitutes clear and indisputable error warranting mandamus relief. *See Abbott*, 956 F.3d at 713.

But that is not the only clear and indisputable error. The district court committed another clear abuse of discretion when it failed even to "consult [this Court's] opinion to ascertain what was intended by [the] mandate." *Tollett*, 285 F.3d at 364. That was unambiguous error, because "[i]n implementing the mandate, the district court *must* take into account the

appellate court's opinion and the circumstances it embraces." *Gen. Universal Sys.*, 500 F.3d at 453 (emphasis added).

Rather than consult this Court's opinion, the district court simply declared—without citation or analysis—that nothing in this Court's opinion contemplated fact discovery. ECF Nos. 186 & 196. Inasmuch as it construed the mandate without "tak[ing] into account the appellate court's opinion and the circumstances it embraces" (*Gen. Universal Sys.*, 500 F.3d at 453), "the district court clearly abused its discretion by applying the wrong legal standard." *Def. Distributed v. Bruck*, 30 F.4th 414, 427 (5th Cir. 2022) (granting mandamus). This clear abuse of discretion is a second, independent ground for issuing the writ.

In sum, the district court clearly abused its discretion both when it violated the mandate rule and when it failed to apply the appropriate legal standard to determine the scope of the mandate. The Federation's right to the writ is therefore clear and indisputable.

II. The writ is appropriate under the circumstances.

The writ is appropriate under the circumstances for two independent reasons. *First*, issuing the writ "is especially important where the issues implicated have importance beyond the immediate case" (*Def. Distrib.*, 30 F.4th at 426 (quotation omitted))—something certainly true in this case, which raises constitutional issues of nationwide significance. *Second*, this Court and other federal appellate courts have long recognized that issuing a writ of mandamus is "the appropriate action" to compel compliance with the mandate. *Kapche v. City of San Antonio*, 304 F.3d 493, 500 (5th Cir. 2002)

(per curiam); *see also Abbott*, 956 F.3d at 713 (granting mandamus to compel compliance with the mandate).

A. The issues implicated have wide-ranging importance.

This case involves statutory and constitutional challenges to a Congressional enactment. *See* ECF No. 135. It is, moreover, one of twelve similar cases pending in jurisdictions across the country, almost all of which have been stayed pending resolution of this case.[2] Thus, there can be no dispute that the case implicates issues with "importance beyond the immediate case." *Def. Distrib.*, 30 F.4th at 426 (quotation omitted); *see also In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 294 (5th Cir. 2015) (writ was appropriate in the circumstances given pendency of another case raising similar issues).

If allowed to stand, the district court's orders barring fact discovery mean that the constitutionality of Section 1005 will be adjudicated without any consideration of evidence of ongoing discrimination, despite this Court's conclusion that such evidence is potentially "highly relevant" to the statute's constitutionality. That is "a patently erroneous result" (*In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309, 318 (5th Cir. 2008) (en banc) (granting writ of

[2] *See Kent v. Vilsack*, 21-cv-540 (S.D. Ill.) (stay denied per ECF No. 26); *Faust v. Vilsack*, 1:21-cv-548 (E.D. Wis.) (stayed per ECF No. 66); *Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla.) (stayed per ECF No. 84); *Carpenter v. Vilsack*, 21-cv-103 (D. Wyo.) (stayed per ECF No. 33); *Holman v. Vilsack*, 1:21-cv-1085 (W.D. Tenn.) (stayed per ECF No. 79); *McKinney v. Vilsack*, 2:21-cv-212 (E.D. Tex.) (stayed per ECF No. 40); *Joyner v. Vilsack*, 1:21-cv-1089 (W.D. Tenn.) (stayed per ECF No. 21); *Dunlap v. Vilsack*, 2:21-cv-942 (D. Or.) (stayed per ECF No. 42); *Rogers v. Vilsack*, 1:21-cv-1779 (D. Colo.) (stayed per ECF No. 36); *Tiegs v. Vilsack*, 3:21-cv-147 (D.N.D.) (stayed per ECF No. 20); *Nuest v. Vilsack*, 21-cv-1572 (D. Minn.) (stayed per ECF No. 19).

mandamus)) because "courts traditionally have refused to decide constitutional questions on an incomplete or inadequate record." *United States v. Blackwell*, 694 F.2d 1325, 1345 n.9 (D.C. Cir. 1982). As the Supreme Court has explained, "[a]djudication" of issues that "have far-reaching import" "should rest on an adequate and full-bodied record." *Pub. Affs. Assocs., Inc. v. Rickover*, 369 U.S. 111, 113 (1962).

Accordingly, because the issues presented by this petition have importance well beyond this case, mandamus is appropriate under the circumstances presented.

B. This Court and other federal appellate courts recognize mandamus as the appropriate tool to compel compliance with the mandate.

"It is black-letter law that a district court must comply with a mandate issued by an appellate court." *Stukenberg*, 977 F.3d at 482. This Court has "underscored that the mandate rule is 'essential to the orderly administration of justice[.]'" *Id.* at 482 (quoting *United States v. Pineiro*, 470 F.3d 200, 205 (5th Cir. 2006)). Accordingly, the Supreme Court, this Court, and other federal appellate courts have recognized that mandamus is the appropriate tool to compel compliance with the mandate. For this reason too mandamus is "appropriate in the circumstances" here.

The Supreme Court has repeatedly recognized compelling compliance with the mandate as a traditional ground for mandamus. Mandamus is the "traditional[]" means "to confine a lower court to the terms of an appellate tribunal's mandate." *Will v. United States*, 389 U.S. 90, 95–96 (1967).

Indeed, "[i]t is … a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court." *U.S. Dist. Ct.*, 334 U.S. at 264.

This Court has followed the Supreme Court's lead. It has said that mandamus is "the appropriate action" to compel a district court to comply with the mandate (*Kapche*, 304 F.3d at 500), and, as recently evidenced, it has not hesitated to employ mandamus to do so. *See Abbott*, 956 F.3d at 713. For over 65 years, it has been "settled" in this Circuit that "if the lower court misconstrues a decree of an appellate court and does not give full effect to the mandate, [its] action may be controlled by writ of mandamus." *In re United States*, 207 F.2d 567, 570 (5th Cir. 1953) (per curiam) (quotation marks omitted).

This Court is by no means alone. Other circuits consider mandamus the appropriate means to compel compliance with the mandate. *See, e.g.*, *In re F.C.C.*, 217 F.3d 125, 133 (2d Cir. 2000) ("Mandamus is properly granted for . . . [p]rotection of a superior court's mandate, to assure that the terms of the mandate are scrupulously and fully carried out, and that the inferior court's actions on remand are not inconsistent with either the express terms or the spirit of the mandate.") (quotation marks, citations, and brackets omitted); *SBRMCOA, LLC v. Bayside Resort, Inc.*, 596 F. App'x 83, 88 (3d Cir. 2014) (granting mandamus where the district court's "ruling on remand [was] at least incongruous with the 'spirit' of [the] mandate").

Accordingly, because the Supreme Court, this Court, and other federal appellate courts have recognized mandamus as the appropriate tool to

compel compliance with the mandate, and because the district court has violated this Court's mandate, the writ is "appropriate in the circumstances" presented here.

III. The Federation has no other adequate means to obtain relief.

Having exhausted all avenues of recourse below, the Federation has no adequate means other than mandamus to obtain relief from the district court's ban on fact discovery.[3] The district court's violation of the mandate is no simple error to be corrected on appeal following final judgment; it is a continuing affront to vertical *stare decisis* and rules "essential to the orderly administration of justice." *Stukenberg*, 977 F.3d at 482 (quotation omitted). The Court should put it to a stop now.

This Court considers direct appeal inadequate when the district court's error, if not corrected by mandamus, "will have worked irreversible damage and prejudice by the time of final judgment." *Lloyd's Register*, 780 F.3d at 289. Just so here. If the district court is not compelled to comply with this Court's mandate and to allow the Federation to take fact discovery, the constitutionality of Section 1005 will be decided on an incomplete record attributable to unreasonable discovery limitations agreed to by parties with a shared interest in keeping evidence of discrimination from coming to light. The Court should not countenance that patently erroneous result.

[3] As recounted above (at 10–13), the district court denied the Federation's motion for reconsideration, its motion to compel, and its motion for certification under § 1292(b).

CONCLUSION

The Court should grant a writ of mandamus compelling the district court to comply with this Court's mandate. Specifically, the Court should direct the district court to (1) vacate its orders (ECF Nos. 186, 196, 202) prohibiting the Federation from conducting fact discovery and denying the Federation's expert the loan data necessary to prepare a reliable report; and (2) enter a revised scheduling order allowing the Federation to conduct the targeted fact discovery identified in its portion of the joint status report (ECF No. 184 at 9–10).

Dated: June 17, 2022

Respectfully submitted,

/s/ Andrew E. Tauber

Andrew E. Tauber
Counsel of Record for Petitioner
WINSTON & STRAWN LLP
1901 L St. NW
Washington, DC 20036
(202) 282-5288
atauber@winston.com

George C. Lombardi
Julie A. Bauer
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601

Kobi K. Brinson
WINSTON & STRAWN LLP
300 South Tryon Street, 16th Floor
Charlotte, NC 28202

Chase J. Cooper
Jordan B. Redmon
Ashley Jones Wright
WINSTON & STRAWN LLP
2121 N. Pearl Street, Suite 900
Dallas, TX 75201

Janelle Li-A-Ping
WINSTON & STRAWN LLP
333 South Grand Avenue
Los Angeles, CA 90071

Mark D. Rosenbaum
Nisha Kashyap
PUBLIC COUNSEL
610 S. Ardmore Ave.
Los Angeles, CA 90005

Jon M. Greenbaum
Dorian L. Spence
LAWYERS' COMMITTEE
OF CIVIL RIGHTS UNDER LAW
1500 K St. NW, Suite 900
Washington, DC 20005

Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that this Petition was served via email on all of record on June 17, 2022. I further certify that a copy of this Petition will be sent via Fed Ex to U.S. District Judge Reed O'Connor at the following address:

U.S. District Judge Reed O'Connor
501 West 10th Street, Room 201
Fort Worth, Texas 76102-3673

Dated: June 17, 2022

/s/ Andrew E. Tauber
Andrew E. Tauber
Counsel of Record for Petitioner

CERTIFICATE OF COMPLIANCE

This petition complies with (1) the type-volume limitation of Federal Rule of Appellate Procedure 21(d) because it contains 6,468 words, excluding the parts exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Georgia Pro) using Microsoft Word (the same program used to calculate the word count).

Dated: June 17, 2022

/s/ Andrew E. Tauber
Andrew E. Tauber
Counsel of Record for Petitioner

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

June 17, 2022

Mr. Andrew E. Tauber
Winston & Strawn, L.L.P.
1901 L Street, N.W.
Washington, DC 20036-3506

No. 22-10600 In re: Fed of S Coop/Land Asst
USDC No. 4:21-CV-595

Dear Mr. Tauber,

We have docketed the petition for writ of mandamus, and ask you to use the case number above in future inquiries.

Filings in this court are governed strictly by the Federal Rules of **Appellate** Procedure. We cannot accept motions submitted under the Federal Rules of **Civil** Procedure. We can address only those documents the court directs you to file, or proper motions filed in support of the appeal. See FED. R. APP. P. and 5TH CIR. R. 27 for guidance. We will not acknowledge or act upon documents not authorized by these rules.

All counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" naming all parties represented within 14 days from this date, see FED. R. APP. P. 12(b) and 5TH CIR. R. 12. This form is available on our website www.ca5.uscourts.gov. Failure to electronically file this form will result in removing your name from our docket. Pro se parties are not required to file appearance forms.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

ATTENTION ATTORNEYS: Direct access to the electronic record on appeal (EROA) for pending appeals will be enabled by the U S District Court on a per case basis. Counsel can expect to receive notice once access to the EROA is available. Counsel must be approved for electronic filing and must be listed in the case as attorney of record before access will be authorized. Instructions for accessing and downloading the EROA can be found on our website

at http://www.ca5.uscourts.gov/docs/default-source/forms/instructions-for-electronic-record-download-feature-of-cm. Additionally, a link to the instructions will be included in the notice you receive from the district court.

Sealed documents, except for the presentence investigation report in criminal appeals, will not be included in the EROA. Access to sealed documents will continue to be provided by the district court only upon the filing and granting of a motion to view same in this court.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

ATTENTION: If you are filing Pro Se (without a lawyer) you can request to receive correspondence from the court and other parties by email and can also request to file pleadings through the court's electronic filing systems. Details explaining how you can request this are available on the Fifth Circuit website at http://www.ca5.uscourts.gov/docs/default-source/forms/pro-se-filer-instructions. This is not available for any pro se serving in confinement.

Special guidance regarding filing certain documents:

General Order No. 2021-1, dated January 15, 2021, requires parties to file in paper highly sensitive documents (HSD) that would ordinarily be filed under seal in CM/ECF. This includes documents likely to be of interest to the intelligence service of a foreign government and whose use or disclosure by a hostile foreign government would likely cause significant harm to the United States or its interests. Before uploading any matter as a sealed filing, ensure it has not been designated as HSD by a district court and does not qualify as HSD under General Order No. 2021-1.

A party seeking to designate a document as highly sensitive in the first instance or to change its designation as HSD must do so by motion. Parties are required to contact the Clerk's office for guidance before filing such motions.

Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

cc:
Mr. Charles William Fillmore
Mr. Hartson Dustin Fillmore III
Mr. Gene Patrick Hamilton
Mr. Scott Martin Hendler
Mr. Jonathan F. Mitchell
Ms. Karen S. Mitchell
Mr. David Samuel Muraskin
Mr. Jack Starcher
Ms. Rebecca Ruth Webber

Provided below is the court's official caption. Please review the parties listed and advise the court immediately of any discrepancies. If you are required to file an appearance form, a complete list of the parties should be listed on the form exactly as they are listed on the caption.

Case No. 22-10600

In re: Federation of Southern Cooperatives/Land Assistance Fund,

Petitioner