No. 22-10600

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: FED OF S COOP/LAND ASST,

Petitioner.

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

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

In Re: Fed of S. Coop/ Land Asst, No. 22-10600 (5th Cir.)

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

/s/ *Jack Starcher*
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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

The United States respectfully opposes the petition for a writ of mandamus, filed on June 17, 2022, by the Federation of Southern Cooperatives/Land Assistance Fund (the Federation).

INTRODUCTION

Petitioner (the Federation) intervened in this pending district court action to defend the constitutionality of a United States Department of Agriculture (USDA) program that benefits its members. On an earlier interlocutory appeal, this Court held that the Federation was entitled to intervene of right because it would argue that the program at issue is justified by current discrimination against its members, whereas the Government would argue only that the program is justified by the ongoing effects of past discrimination.

The Federation now asks this Court to override the district court's discretionary judgments about the most efficient way to conduct this case, and take the extraordinary step of ordering the district court to allow the Federation to take extensive fact discovery—all despite the fact that the Federation itself repeatedly represented to the district court (and the parties) that no such discovery would be necessary, and that it would not seek such discovery if allowed to intervene.

The Federation cannot meet the high standard for mandamus. To obtain mandamus relief, a party must first establish that there are "no other adequate means to attain the relief he desires." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). The Federation cannot do so here because it offers no reason why this Court would not be able to effectively review these discovery disputes on appeal from a final judgment (assuming the Federation is ultimately dissatisfied with the outcome of this case). That alone warrants denial of the petition.

Mandamus relief also requires that the petitioner show a "clear and indisputable" right to the writ. *Cheney*, 542 U.S. at 381. The Federation cannot satisfy that requirement either. The district court's discovery orders—which do no more than hold the Federation to its word—are a

reasonable exercise of the district court's broad discretion to manage discovery, and are certainly not the kind of clear, egregious error that warrants mandamus. Perhaps recognizing the futility of seeking mandamus review of ordinary discovery orders, the Federation asserts that its mandamus petition seeks to enforce this Court's mandate from the Federation's earlier appeal of the district court's denial of its motion to intervene. But nothing in this Court's earlier decision purported to direct the district court's resolution of discretionary questions about the appropriate scope of discovery on remand.

To the contrary, the district court's discovery orders are entirely consistent with this Court's mandate. While forbidding the Federation from engaging in the extensive fact discovery it sought on remand, the court allowed the Federation access to the data considered by the parties' experts. That data includes extensive USDA loan information covering the years 2000-2020 broken down by race and ethnicity, which covers a range of metrics related to applicant characteristics, USDA loan requirements, and approval rates. The Federation is also allowed—consistent with its representations to this Court—to introduce

declarations or other testimony from Federation members and other farmers in support of its summary-judgment motion.

Thus, there is no merit to the Federation's suggestion that the district court's discovery and case-management decisions have prevented the Federation from effectively presenting or developing evidence of current discrimination. As the Court is aware, discovery disputes are common in civil litigation. At least in the absence of a strong claim of privilege or similar legal prerogative (of which there is none here), however, a district court's management of discovery is virtually never proper grist for mandamus. Because the Federation has not demonstrated either a clear and indisputable right to relief or that its claimed injuries could not be remedied in an ordinary appeal following final judgment, the petition should be denied.

STATEMENT

A. Statutory and Factual Background

On March 11, 2021, the President signed into law the American Rescue Plan Act of 2021 (ARPA), providing $1.9 trillion in economic assistance. *See* Pub. L. No. 117-2, 135 Stat. 4. Among other initiatives, Congress appropriated the funds necessary to pay off "up to 120 percent

of the outstanding indebtedness" of certain "socially disadvantaged farmer[s] or rancher[s]" with direct or guaranteed USDA farm loans. *See id.* § 1005, 135 Stat. at 12-13. By statute, "socially disadvantaged farmer[s] or rancher[s]" are those belonging to any "group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." 7 U.S.C. § 2279(a)(5)-(6); *see* ARPA §§ 1005(b)(3), 1006(c)(2)-(3) (incorporating this definition).

B. Prior Proceedings and the Federation's Motion to Intervene

1. In this class action, plaintiffs Sid Miller *et al.* claim that Section 1005 violates the equal protection component of the Due Process Clause. In June 2021, plaintiffs moved for class certification and a preliminary injunction against operation of Section 1005. The Government opposed both motions.

On July 1, 2021, the district court certified a class action and granted Plaintiffs' motion for a preliminary injunction. Dkt. No. 60. The injunction prevents USDA from making payments under Section 1005 using current eligibility criteria during the pendency of this litigation. *See id.*

2. In mid-July, the original parties filed a joint scheduling proposal. That proposal featured the parties' agreement not to take fact discovery and set out an expeditious schedule for completing expert discovery and moving to summary judgment. Dkt. No. 70. The district court entered an order adopting the parties' agreed schedule. Dkt. No. 85.

3. In October 2021, three months after the district court entered its preliminary injunction and weeks after the district court adopted the parties' discovery schedule, the Federation moved to intervene as a defendant in this action. Dkt. No. 93-1. The Federation is a nonprofit association of Black farmers, landowners, and cooperatives, some of whose members are assertedly eligible for assistance under Section 1005. The Federation sought intervention as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure or, in the alternative, permissive intervention under Rule 24(b).

In its motion, the Federation represented that—if allowed to intervene—it did not "intend to seek reconsideration of any rulings in the case to date" or "seek to relitigate any prior rulings." Dkt. No. 93-1, at 15, 22. Consistent with that position, the Federation stated that it sought to introduce two types of evidence to support its defense of Section 1005

alongside the government: (1) expert testimony; and (2) testimony concerning "present-day and historical discrimination against minority farmers" through "stories or narratives of Black farmers or other farmers of color." *Id.* at 20.

The Government opposed the motion to intervene as a matter of right, arguing that the Federation could not show that the Government would fail to adequately vindicate its claimed litigation interest in defending the constitutionality of Section 1005. But the Government did not oppose permissive intervention, relying in part on the Federation's representations that it would not "seek to relitigate any prior rulings." The Government specifically observed that it "underst[ood]" those representations to mean that the Federation would not "seek to conduct fact discovery" or to "otherwise disrupt the schedule" that the district court had entered. Dkt. No. 136, at 15.

In its reply brief in support of intervention, the Federation did not dispute that understanding. Instead, the Federation indicated that the only factual evidence it intended to develop and present if allowed to intervene would be declarations from Federation members and other socially disadvantaged farmers related to their "lived experiences" of

discrimination. Dkt. No. 141, at 8; *see also id.* at 7 (stating that the "Federation has identified specific evidence—direct testimony from present-day, debt burdened Black farmers about their own experiences of discrimination—that" it wished to present). The Federation expressed no intention to seek the kind of expansive fact discovery it now demands.

4. The district court denied the Federation's motion. Dkt. No. 143. With respect to intervention of right, the court relied on this Court's decisions establishing two "presumptions" of adequate representation. First, the court noted that "where the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required." *Id.* at 3 (quoting *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994)). Second, the court ruled that the Government's representation was presumptively adequate because the Federation and the Government indisputably "share the same objective" and "seek[] the same relief" in this lawsuit—namely, to vindicate the constitutionality of the statute so that debt relief can be provided to eligible farmers. *Id.* The district court also denied the Federation's motion for permissive intervention. *Id.* at 5.

C. Appeal of Intervention Decision

The Federation appealed. On appeal, the Federation continued to indicate that it would not seek fact discovery if allowed to intervene. *See* Appellant Mot. to Stay at 11, *Miller v. Vilsack*, No. 21-11271 (5th Cir. Jan. 7, 2022) (moving to stay the Court's proceedings to preserve its opportunity "to fully participate in vital proceedings, including expert discovery and, perhaps, summary judgment motions"); Appellant Br. at 19-20, *Miller*, No. 21-11271 (describing the kinds of "testimonial" evidence that the Federation intended to submit through declarations of Federation members who experienced discrimination).

This Court ultimately held that the Federation should have been allowed to intervene of right. *Miller v. Vilsack*, No. 21-11271, 2022 WL 851782 (5th Cir. Mar. 22, 2022). This Court first held that the so-called "governmental" presumption described in *Hopwood* did not apply in this case. *Id.* at *3.

As for the fact that the Federation and the Government "share the 'same ultimate objective," this Court noted that "in order to overcome [that presumption], 'the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party.'"

2022 WL 851782, at *3. This Court held that the Federation had "'show[n] adversity of interest' by demonstrating that its interests diverge from the [Government's] 'in a manner germane to the case.'" *Id.* In particular, while the Government argues that Section 1005 is justified primarily by past discrimination and the continuing effects of that discrimination, the "Federation argues that USDA is *continuing* to actively discriminate against its members." *Id.* That position, this Court observed, "not only directly conflicts with the [Government's] position, but also potentially exposes the agency to liability." *Id.* In light of that adversity of interest, this Court "conclude[d] that the Federation has successfully rebutted" the relevant presumption and established inadequate representation sufficient to justify intervention as of right. *Id.* at *4. This Court "[reversed] the district court's denial of intervention as a matter of right and [remanded] with the directive to permit the Federation's intervention." *Id.*

D. Proceedings on Remand

1. On April 5, 2022, the district court—consistent with this Court's mandate—granted the Federation's intervention motion. Dkt. No. 185. The district court also ordered the parties (now including the Federation)

to submit a joint status report addressing what changes should be made to the briefing and discovery schedule in light of the Federation's intervention.

In that joint status report, the Government asked the court to hold the Federation to the representations it had made to the district court and the parties in seeking to intervene—namely, that it agreed that the case could be resolved without fact discovery. Dkt. No. 184, at 3. The Government agreed, however, that the Federation should have access to the data considered by the parties' experts, which includes extensive USDA loan data covering the years 2000-2020. *Id.* at 4.[1] That data includes information broken down by race and ethnicity, and covers a range of metrics related to applicant characteristics, USDA loan requirements, and approval rates. *Id.* The Government also supported allowing the Federation—consistent with its earlier representations—to introduce declarations or other testimony from Federation members and other farmers in support of its summary-judgment motion. *Id.*

[1] In the joint status report, the government inadvertently described that loan data as covering 2000-*2010*. That was an error—the data considered by the Government's expert and disclosed to the Federation covers the years 2000-2020. *See* Dkt. No 168-2 (Government's expert report).

The Federation, however, for the first time indicated that it wanted to take extensive fact discovery from the Government beyond the loan data that the Government had already agreed to disclose as part of expert discovery. The proposed fact discovery would include additional loan data from 2010 to the present, depositions of USDA and FSA officials, and extensive discovery related to USDA's past efforts to identify and remedy racial discrimination. Dkt. No. 184, at 9-10. As elaborated in later filings, the Federation made clear that it wished to take extremely broad discovery. *See* Dkt. No. 187-1, at 11-12. In support of that change in position, the Federation relied on dicta from this Court's decision in the intervention appeal and claimed that this Court's mandate required the district court to allow the Federation to walk away from its earlier representations. Dkt. No. 184, at 8-9.

The Government explained that complying with the Federation's proposed discovery "would likely prove extremely burdensome and time consuming, and could potentially require the Court to intervene." Dkt. No. 184, at 6. As the Government detailed, the information the Federation sought was not readily available, and "conduct[ing] the searches necessary to produce documents and data responsive to the

broad range of categories of documents ... and prepar[ing] for five depositions of fact witness[es]" would greatly delay resolution of the case, during which time the Government would continue to be subject to the district court's preliminary injunction. *Id.*

2. The district court ultimately refused to allow the Federation to revise its position on fact discovery for six "independent reasons." Dkt. No. 186, at 2. First, "the Federation consistently represented that it would not relitigate prior rulings, which include the Court's scheduling order limiting discovery to expert testimony." *Id.* The court emphasized that the Government expressly relied on those representations when it agreed not to oppose permissive intervention, and that the Federation did not correct that understanding, thereby "allow[ing] everyone—including the Fifth Circuit—to believe that [the Federation] sought no more discovery than what the original parties agreed to." *Id.* at 3.

Second, the Federation waited to seek intervention until after the parties already agreed that no fact discovery was necessary, and while expert discovery was well underway. Its intervention motion therefore did not give the Federation free rein "to relitigate issues already decided." *Sierra Club v. Espy*, 18 F.3d 1202, 1206 n.3 (5th Cir. 1994). Third, no

party has the "right" to reopen discovery once closed. Dkt. No. 186, at 3 (quoting *John Doe No. 1 v. Glickman*, 256 F.3d 371, 378 (5th Cir. 2001)). Fourth, the court found that prohibiting the Federation from taking the extensive fact discovery it sought was a reasonable condition of participation, particularly in light of the loan data the Federation would receive through expert discovery exchanges. *Id.* at 4.

Fifth, the Federation "failed to show good cause to amend the scheduling order to reopen fact discovery." Dkt. No. 186, at 4. In so holding, the court accepted the Government's unrebutted representations that the discovery the Federation sought would impose significant burdens and greatly delay final resolution of the case. The court emphasized that its "preliminary injunction will remain in place for the duration of this lawsuit," meaning that the parties have a strong countervailing "interest in expeditious resolution of this case." *Id.*

Finally, the district court noted that even without the expansive fact discovery it sought, the Federation would have ample opportunity to present evidence of current discrimination by participating in expert discovery (including by gaining access to the USDA loan data used to prepare the Government's expert report) and submitting declarations

from farmers who have experienced recent discrimination. *Id.* at 5. The Federation moved for reconsideration, Dkt. No. 187, which the district court denied, Dkt. No. 196.

3. After receiving the data that the Government's expert relied on in preparing her expert report, the Federation moved to compel the Government to produce additional "USDA loan data" included in the categories of fact discovery the Federation had proposed in the parties' joint status report. Dkt. No. 199. The district court again denied the Federation's attempt to drastically expand the scope of discovery. Dkt. No. 202.

4. The Federation sought certification of the district court's discovery orders for interlocutory appeal under 28 U.S.C. § 1292(b). Dkt. No. 203. On June 6, 2022, the district court denied that motion. Dkt. No. 207. Almost two weeks later, the Federation filed the instant mandamus petition.

ARGUMENT

A writ of mandamus is "a drastic and extraordinary remedy reserved for really extraordinary causes." *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 350 (5th Cir. 2017) (quoting *Cheney v. U.S. Dist. Court for*

D.C., 542 U.S. 367, 380 (2004)). This Court will grant a petition for a writ of mandamus only if the petitioner satisfies three conditions. *Id.* First, the petitioner must show that there are "no other adequate means to attain the relief he desires." *Cheney*, 542 U.S. at 380. Second, the court "must be satisfied that the writ is appropriate under the circumstances." *Id.* at 381. And third, the petitioner must show a "clear and indisputable" right to the writ. *Id.* Because Federation cannot establish at least the first and third of those conditions, its petition should be denied.

I. The Federation Has Not Established that It Has "No Other Adequate Means to Attain" Review of the Challenged Discovery Orders

The Federation cannot show that there are "no other adequate means to attain the relief [it] desires." *Cheney*, 542 U.S. at 380. The Federation seeks immediate mandamus review of three discovery orders. But as a general rule, the normal appeal process provides the opportunity to obtain relief from a district court's pretrial discovery orders. As this Court has held in related contexts, a court of appeals can "effectively review the district court's interlocutory discovery order on appeal from a final judgment." *Periodical Publishers Serv. Bureau, Inc. v. Keys*, 981 F.2d 215, 218 (5th Cir. 1993). Accordingly, civil litigants generally must

wait until after final judgment to vindicate their rights relative to such orders. *See* 28 U.S.C. § 1291; *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108-09 (2009).

While this Court has sometimes allowed immediate review in cases where a district court has ordered parties to submit to discovery that would immediately impose substantial, irreparable harms, *e.g.*, *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 449 (5th Cir. 2019) (order would disclose confidential third-party information and cause injury not remediable by ordinary appeal), no such exigency exists here. The inconvenience of having to wait until after final judgment to challenge a district court's discovery orders, *see* Pet. 25, is not a basis for mandamus, but rather the ordinary operation of the final judgment rule. As this Court has recognized, "the fact that a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final judgment has never sufficed" to justify immediate review. *Williams v. Catoe*, 946 F.3d 278, 280 (5th Cir. 2020) (cleaned up) (quoting *Mohawk Indus.*, 558 U.S. at 107). The same is true here.

Indeed, this Court has repeatedly rejected similar attempts by litigants to obtain immediate review of discovery decisions. *See, e.g.*, *A-*

Mark Auction Galleries v. American Numismatic Ass'n, 233 F.3d 895, 899 (5th Cir. 2000) (collecting cases). And for good reason: If this Court were to allow immediate review of these types of discovery orders, it would give license to the sort of piecemeal litigation that the Supreme Court has long discouraged. *See Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.,* 426 U.S. 394, 403 (1976).

The Federation's only response is the observation that some errors, "if not corrected by mandamus, 'will have worked irreversible damage and prejudice by the time of final judgment.'" Pet. 25 (quoting *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 282, 289 (5th Cir. 2015)). But the Federation then immediately explains why the errors it complains of here will *not* "work[] irreversible damage": All that will happen if the district court's discovery orders are allowed to stand is that "the constitutionality of Section 1005 will be decided on" a record that the Federation believes to be "incomplete." Pet. 25. That is exactly the kind of argument that the Federation, as a party, will be free to make on appeal in the event it is ultimately dissatisfied with the district court's final judgment. *See, e.g.*, *Mohawk Indus.*, 558 U.S. at 108-09.

II. The Federation Has Not Established That It Has a "Clear and Indisputable Right to the Writ"

1. As this Court has stressed, a writ of mandamus is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Depuy Orthopaedics*, 870 F.3d at 350. But there is nothing "extraordinary" about the district court's actions here. The Federation seeks mandamus review of discretionary district court orders about the scope of discovery—orders that turned on petitioner's own representations to the district court and this Court about the discovery it would seek if it were allowed to intervene. "[T]he scope and conduct of discovery are within the sound discretion of the trial court." *Williams v. Lockheed Martin Corp.*, 990 F.3d 852, 863 (5th Cir. 2021) (alteration in original). Even in the context of an appeal as of right, therefore, this Court will reverse a discovery order "*only* if it is 'arbitrary or clearly unreasonable,' *and* the complaining party demonstrates that it was prejudiced by the ruling." *HC Gun & Knife Shows, Inc. v. City of Houston*, 201 F.3d 544, 549 (5th Cir. 2000) (citation omitted).

The Federation could not demonstrate reversible error here under that deferential standard, and it plainly cannot do so under the heightened mandamus standard. The district court gave *six* independent

reasons why it refused to allow the Federation to conduct the extensive fact discovery it sought. But this Court need go no further than the first: The district court refused to allow the Federation to seek fact discovery because the Federation itself has repeatedly represented that it would not seek fact discovery if it were allowed to intervene.

As noted above, *supra* pp. 5-6, the Federation waited to seek intervention until six months after this suit was filed and weeks after the district court entered a discovery schedule that provided only for expert discovery. And then, in seeking to intervene, the Federation represented that it did not "intend to seek reconsideration of any rulings in the case to date" or "seek to re-litigate any prior rulings." Dkt. No. 93-1, at 15, 22. Consistent with that position, the Federation did not suggest in its motion that it intended to seek fact discovery from the Government. *See id.* at 20.

The Federation was well aware that the parties and the court understood those representations to indicate that the Federation would not seek to relitigate the appropriate scope of discovery if allowed to intervene. The Government made explicit that it "understood" the Federation to say that it did not intend to "seek to conduct fact discovery"

or to "otherwise disrupt the schedule" that the district court had entered. Dkt. No. 136, at 15. And the Government relied on that understanding in deciding not to oppose the Federation's motion for permissive intervention. *See id.* Yet the Federation did nothing in its reply brief in support of intervention to dispute the Government's understanding. To the contrary, the Federation's representations in its reply brief continued to indicate that it would not seek fact discovery from the Government. *See* Dkt. No. 141, at 8; *see also id.* at 7.

Perhaps that was a strategic choice; perhaps the Federation thought its intervention motion was more likely to succeed if it agreed not to challenge the district court's pre-existing orders setting the scope of discovery. Whatever the reason, the Federation is evidently disappointed with the consequences of its earlier strategic litigation decisions. But that disappointment does not demonstrate that the district court erred in holding the Federation to its word, much less that it committed the sort of clear, unmistakable error that would justify mandamus. *Cf. Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) ("Judicial estoppel prevents a party from asserting a position

in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.").

The district court's decision to deny the Federation's discovery requests is justified for another reason: The Federation does not address the Government's representations, which the district court credited, that complying with the Federation's proposed fact discovery "would likely prove extremely burdensome and time consuming," and that "conduct[ing] the searches necessary to produce documents and data responsive to the broad range of categories of documents ... and prepare for five depositions of fact witness" would greatly delay resolution of the case. Dkt. No. 184, at 6. Those predictable delays are particularly significant here because the Government remains subject to the district court's preliminary injunction barring implementation of Section 1005. Thus, any delay in the resolution of these proceedings prolongs the uncertainty for the socially disadvantaged farmers Section 1005 was intended to benefit. Those significant delays and burdens provide an additional basis to justify the district court's refusal to alter the discovery schedule. *See* Dkt. No. 186, at 4 (holding that, in light of the Government's representations, the Federation had not shown good cause

to modify discovery schedule); s*ee also* Fed. R. Civ. P. 16(b)(4) (a discovery "schedule may be modified only for good cause and with the judge's consent").

2. The Federation does not seriously grapple with any of the district court's reasons for denying the extensive fact discovery that the Federation belatedly requested. Instead, the Federation claims, Pet. 18-21, that this Court's mandate in the earlier intervention appeal precluded the district court from exercising its broad discretion regarding the "scope and conduct of discovery" on remand, *Williams*, 990 F.3d at 863. This Court's mandate did no such thing.

The mandate rule "compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *General Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007) (quoting *United States v. Castillo*, 179 F.3d 321, 329 (5th Cir. 1999)). But "a mandate is controlling [only] as to matters within its compass." *In re Deepwater Horizon*, 928 F.3d 394, 398 (5th Cir. 2019) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)).

Questions about the scope of discovery on remand were not briefed or decided in this Court's intervention holding. The central legal question that this Court decided in the earlier appeal was whether the Federation had overcome the presumption of adequate representation that arises when the intervenor and the party they seek to intervene on behalf of "share the same objective" in litigation.[2] *Miller v. Vilsack*, No. 21-11271, 2022 WL 851782, at *3 (5th Cir. Mar. 22, 2022). This Court held that the Federation had overcome that presumption because it had "'show[n] adversity of interest' by demonstrating that its interests diverge from the [Government's] 'in a manner germane to the case.'" *Id.* While that decision turned to some extent on the kinds of *arguments* that the Federation might make in district court if allowed to intervene, this Court had no occasion to address what kinds of *evidence* the Federation would be entitled to on remand. Neither the parties nor the Court discussed the district court's broad discretion to manage discovery on remand. And nowhere in the briefing or argument before this Court did the parties address a key justification for the district court's discovery

[2] This Court also decided whether the "governmental" presumption applies and concluded that it did not for reasons not relevant to this petition. *See* 2022 WL 851782, at *3 n.4.

orders at issue here—the Federation's own repeated representations that it would not seek to alter the scope of discovery if allowed to intervene.

Nor were those discovery-related issues "impliedly" decided. As this Court recently reiterated, "[a]n issue is tacitly decided only when its disposition is a 'necessary predicate[ ] to the ability to address the issue or issues specifically discussed' in the appellate court's opinion." *Westfall v. Luna*, No. 21-10159, 2022 WL 797410, at *4 (5th Cir. Mar. 15, 2022) (per curiam) (quoting *In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001)).

In claiming that the Court's mandate obligated the district court to grant the Federation whatever fact discovery it requested, the Federation relies on language from this Court's earlier decision (1) stating that evidence of current discrimination would be "relevant" (without specifying what particular evidence the Federation would be entitled to) and (2) observing that it "stands to reason that, if given the opportunity to conduct discovery as a party, the Federation would seek evidence demonstrating current discrimination by the USDA against its members." 2022 WL 851782, at *3 & n.6. Those statements cannot carry the weight that the Federation places on them. This Court did not purport to prejudge any discovery request from the Federation. Nor did

it purport to limit the district court's general discretion to shape the scope of discovery or mandate that any particular fact discovery be made available to the Federation.[3]

The Federation fares no better in claiming that the district court's decision violated the "spirit" of this Court's earlier decision. *See* Pet. 18. While forbidding the Federation from taking the particular fact discovery it sought on remand, the court allowed the Federation access to the data considered by the parties' experts, which includes extensive USDA loan data covering the years 2000-2020. That data includes information broken down by race and ethnicity, and other metrics including rates of approvals, withdrawals, and rejections of loan applications, average dollar amounts of approved loans, loan processing times, and rates of delinquency. *See* Dkt. No. 184, at 4. The Federation is also allowed—consistent with its representations to this Court—to introduce declarations or other testimony from Federation members and other farmers in support of its summary-judgment motion. The Federation

[3] Indeed, as discussed above, the only specific "evidence of current discrimination" that the Federation discussed in its earlier briefing before this Court indicated that it would submit its own evidence—consisting of declarations from its members about their lived experiences. *See supra* p. 6.

provides no explanation why that evidence will not allow them to present their argument, consistent with this Court's earlier decision, that Section 1005 is justified by current discrimination on the part of USDA.

CONCLUSION

The Federation's petition for a writ of mandamus should be denied.

Respectfully submitted,

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JUNE 2022

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2022, I electronically filed the foregoing response with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Jack Starcher
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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 21 because it contains 5098 words. It complies with applicable typeface and type-style requirements because it was prepared using Microsoft Word in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Jack Starcher
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Tom Vilsack, in his official capacity
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