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

MEMORANDUM OF LAW IN SUPPORT OF THE FEDERATION OF SOUTHERN COOPERATIVES/LAND ASSISTANCE FUND'S MOTION TO INTERVENE AS A DEFENDANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Plaintiffs commenced this action to permanently enjoin Secretary Tom Vilsack ("Secretary" or "Defendant") from implementing Section 1005 of the American Rescue Plan Act ("Section 1005")[1]—a program designed to greatly assist "socially disadvantaged farmers and ranchers." Although Plaintiffs purport to advocate for equal protection under the law, they are trying to eradicate the government's effort to correct a longstanding history of discrimination against Black farmers and other farmers of color. Discriminatory conduct in the context of the U.S. Department of Agriculture's ("USDA") loan programs has greatly disadvantaged Black farmers, and to this day, many are burdened with substantial debt because of these discriminatory practices. The loan-forgiveness assistance promised by Section 1005 would finally give these farmers an opportunity to sustain their livelihoods without crippling debt.

Yet the relief sought by Plaintiffs would undo this progress and harm the interests of many who are not yet parties to the lawsuit, including proposed intervenor, the Federation of Southern Cooperatives/Land Assistance Fund (the "Federation"). The Federation is a non-profit cooperative association of Black farmers, landowners, and cooperatives. The Federation's membership includes farmers who are eligible for loan forgiveness under Section 1005. Indeed, Plaintiffs' proposed permanent injunction would profoundly harm members of the Federation who carry substantial debts and have made significant farming plans in reasonable anticipation of assistance under Section 1005. These interests differ from the interests of the Secretary. Although the

[1] In their original complaint, Plaintiffs also challenged Section 1006, which appropriated funds for various forms of assistance to socially disadvantaged farmers and ranchers, including extending grants and loans and "provid[ing] outreach, mediation, financial training" and "improv[ing] land access," § 1006(b)(1)-(2). *See* ECF No. 1, ¶ 5. Plaintiffs' Second Amended Complaint removes all reference to Section 1006. *See generally* ECF No. 87; *see also* ECF No. 83, ¶ 5 ("In lieu of litigating the pending motion to dismiss, the parties have agreed that Plaintiffs shall file a Second Amended Complaint on or before September 24, 2021, narrowing their complaint to an equal protection and Title VI challenge to Section 1005 of the American Rescue Plan Act. *See* Fed. R. Civ. P. 15(a)(2).").

Secretary is interested in upholding the constitutionality of Section 1005, he is foremost concerned with public interests such as maintaining the integrity of the federal COVID-19 response and preserving the federal agency's relationships with beneficiaries of Section 1005; he does not, like the Federation's members, have a personal stake in the availability of funds under Section 1005.

Thus, the interests of the Federation and its members will be adequately represented only if the organization is permitted to intervene. The Federation easily meets the requirements for intervention as a matter of right under Federal Rule of Civil Procedure 24(a): 1) its motion to intervene is timely; 2) it has an interest that is related to the property or transaction that forms the basis of this matter; 3) the disposition of this matter may impair or impede the Federation's ability to protect its interest; and 4) the existing parties do not adequately represent the Federation's interest. *See John Doe No. 1 v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001). In the alternative, the Federation also meets the standard for permissive intervention under Rule 24(b). For these reasons, this Court should grant the Federation's motion to intervene as a defendant.

FACTUAL BACKGROUND[2]

Historical Discrimination in USDA Lending to Black Farmers

Section 1005 of the American Rescue Plan Act directs the USDA to deliver debt relief through loan assistance for socially disadvantaged farmers and ranchers. Section 1005 authorizes the Secretary of the USDA to give a "payment in an amount up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer or rancher as of January 1, 2021, to pay off the loan directly or to the socially disadvantaged farmer or rancher." Am. Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005(a)(2), 135 Stat. 4. The USDA defines "socially disadvantaged" farmers

[2] A movant's factual allegations are taken as true for purposes of deciding a motion to intervene. *See Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015).

and ranchers ("SDFR") consistent with Section 2501 of the Food, Agriculture, Conservation, and Trade Act of 1990, 7 U.S.C 2279(a) ("Section 2501"). According to Section 2501, an SDFR is a farmer or rancher of a socially disadvantaged group whose members have been subjected to racial or ethnic prejudice with no regard to their individual qualities. *Id.* The USDA has interpreted the term SDFR as including, but 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; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28,329, 28,330 (May 26, 2021).

USDA's definition of SDFR is appropriate considering the long history of discrimination against minority famers in USDA loan programs that has spanned for decades. The Farm Service Agency ("FSA"), housed under the USDA, was created in 1933 as a part of the New Deal to address the fall of crop prices after the Great Depression and provide loans to family -sized farms that were not able to obtain credit from commercial banks or other lenders. *History of USDA's Farm Service Agency*. Agency History, USDA, https://www.fsa.usda.gov/about-fsa/history-and-mission/agency-history/index (last accessed Sept. 24, 2021); *Garcia v. Vilsack: A Policy and Legal Analysis of a USDA Discrimination Case*, 3-4 (2013), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R40988.pdf.

Between 1937 and 1961, four congressional changes to USDA loan programs had a disproportionate adverse impact on Black farmers. Jonathan Coppess, The History and Development of USDA Farm Loan Programs, Part 3: 1946 to 1961, Mar. 25, 2021, https://farmdocdaily.illinois.edu/2021/03/the-history-and-development-of-usda-farm-loan-programs-part-3-1946-to-1961.html. The Acts of 1937, 1946, 1956, and 1961 revised eligibility for USDA loans. *Id*. The revisions ultimately changed eligibility from farm tenants, laborers, and

sharecroppers to family farm owner-operators with farm background and either farming training or experience, unable to get credit elsewhere. *Id*. The revisions made it easier for FSA county committees—which exercise "vast discretion and ability to impact the loan making decision" and consist almost entirely of White men—to deny loans to Black farmers, sharecroppers, and laborers. *Id*.; *see also* the Federation's Appendix in Support of Its Motion to Intervene ("App.") at 009 (Declaration of Cornelius Blanding ("Blanding Decl.") ¶ 9). As a result, the number of Black farmers in the country decreased by a staggering 90.6% between 1920 and 1969. *See* Coppess, *supra*. (citing census data that showed 925,708 Black farm operators in 1920, versus 88,393 in 1969).

Since 1965, the federal government has confirmed the pattern of discrimination against Black farmers in terms of loans and conservation payments. *See* Environmental Working Group, Timeline: Black Farmers and the USDA, 1920 to Present, https://www.ewg.org/research/black-farmer-usda-timeline/ (last accessed Sept. 24, 2021). In 1997, the USDA created the Civil Rights Action Team ("CRAT"). USDA, Civil Rights Action Team, Civil Rights at the United States Department of Agriculture (1997). In a report issued that year, CRAT found that Black farmers were experiencing the same discrimination documented in reports dating back to 1965. *Id*. at 14. The report found:

> The minority or limited-resource farmer tries to apply for a farm operating loan through the FSA county office well in advance of planting season. The FSA County office might claim to have no applications available and ask the farmer to return later. Upon returning, the farmer might receive an application without any assistance in completing it, then be asked repeatedly to correct mistakes or complete oversights in the loan application. Often those requests for correcting the application could be stretched for months . . . By the time processing is completed, even when the loan is approved, planting season has already passed and . . . the farmer's profit is then reduced. If the farmer's promised FSA loan finally does arrive, it may have been arbitrarily reduced . . . . [I]n some cases, the FSA loan never arrives . . . .

Id. at 15.

Unfortunately, the pattern of discriminatory conduct with respect to FSA loans continues, and many Black farmers today face substantial debt because of this discrimination. *See generally* App. at 001 (Declaration of Marcus Anton Batten ("Batten Decl.")), 013 (Declaration of Kelvin James Cannon ("Cannon Decl.")), 018 (Declaration of Fredrick Hall ("Hall Decl.")), 022 (Declaration of Brandon Smith ("Smith Decl.")), and 025 (Declaration of Bobby L. Wilson ("Wilson Decl.")). The benefits offered by Section 1005 serve as a crucial lifeline for these farmers whose debts affect the longevity of their farms. *Id*. at 004 (Batten Decl. ¶ 19), 016 (Cannon Decl. ¶ 16); 020 (Hall Decl. ¶ 19), 028 (Wilson Decl. ¶ 34). Without the promised loan forgiveness, many farmers will lose their farms to foreclosure and bankruptcy. *See, e.g.*, App. at 004 (Batten Decl. ¶ 19). After learning that they were eligible for assistance through Section 1005, many farmers made significant farming plans and purchases in material and foreseeable reliance on the debt relief they were promised to receive. Conversely, they will face severe, life-changing disadvantage—if not outright ruin—if the relief does not come through. *Id.* at 011 (Blanding Decl. ¶ 17), 004 (Batten Decl. ¶ 15), 015–16 (Cannon Decl. ¶ 15), 020 (Hall Decl. ¶ 16), 023 (Smith Decl. ¶ 6), and 026–27, 028 (Wilson Decl. ¶¶ 18, 34). They will suffer because the program has been enjoined, especially because many of them made plans in reasonable reliance on the promised relief.

The Interest of the Federation and Its Members in this Case

The Federation was created in 1967 by twenty-two cooperatively owned organizations and leaders to be a catalyst for the development of self-supporting communities, as well as to advocate at the local, state, and national levels on behalf of Black farmers and to help develop economically poor rural communities. App. at 006 (Blanding Decl. ¶ 2). The organization functions as a nonprofit cooperative association of Black farmers, landowners, and cooperatives. *Id.* The

Federation is unique as an organization because it has a cooperative membership as well as a land assistance fund. *Id.* The Federation has roughly 20,000 members, which include agricultural/producer, consumer, and worker cooperatives, as well as farmers and landowners. *Id.* at 007. Its membership is almost exclusively Black, and many of the farmers who are part of the Federation are multigenerational farmers. *Id.* Federation members are located all over the southeast United States, including in Texas, Georgia, Mississippi, Alabama, Florida, South Carolina, and Louisiana. Individual members join its membership database through an application and payment of dues. *Id.*

The Federation serves its members through advocacy, technical assistance, and support services. App. at 007 (Blanding Decl. ¶ 3). For example, in 1980, Congress commissioned the Federation to conduct a study entitled, "The Impact of Heir Property on Black Land Tenure in the Southeastern Region of the United States." *Id.* The study culminated in nineteen recommendations submitted to the United States Department of Agriculture ("USDA") and Congress regarding USDA services, including loans. *Id.*

The Federation offers essential technical assistance to its members in many forms, including support for the USDA loan-application process, conservation assistance, and legal support. *Id.* (Blanding Decl. ¶ 4). The Federation helps farmers interested in applying for a loan work through the local FSA office. *Id.* Assisting members during the USDA loan-application process is an especially important part of the Federation's work, given that loan applications are lengthy, complex, and difficult to complete, and members have reported that their local FSA offices do not offer help in completing the forms. *See id.* at 024 (Smith Decl. ¶ 6, 9) ("I have had difficulties white ranchers never had to face, long delays, no or unhelpful responses [from] USDA personnel, generally little or no help . . . It's never routine like it is for white ranchers.").

Additionally, the Federation provides education and technical support on natural resource conservation services, which entails equipping farmers, ranchers, and forest landowners with the knowledge and tools needed to conserve, maintain, and restore the natural resources on their land and improve the health of their operations for the future. *Id.* The Federation also offers legal assistance on land tenure and retention issues. *Id.*

The Federation's Land Assistance Fund is an integral part of the organization and the result of a merger with the Emergency Land Fund almost forty years ago. *Id*. at 007–08 (Blanding Decl. ¶ 5). Historically, the Land Assistance Fund provided low-cost loans to farmers and heir -property landowners to resolve legal issues and save their land. *Id.* Support for heir-property landowners is important because these farmers have inherited their land through intestacy laws because there was no estate-planning mechanism in place. *Id.*

Overall, members of the Federation face great financial burdens with respect to their farms. *Id.* (Blanding Decl. ¶ 6). Many Black farmers operate with heavy debt loads, and the farming industry makes gaining a profit very difficult. *Id.*; *see also, e.g.*, *id.* at 002 (Batten Decl. ¶ 4) ("I currently have three direct and/or guaranteed USDA loans through the FSA that total approximately $1,100,000."), 026 (Wilson Decl. ¶ 17) ("The amount of my USDA loan debt is $300,000."). In addition, many farms have more expenses than revenue because of increasing input costs and fluctuating market prices. *Id*. at 008 (Blanding Decl. ¶ 6). To avoid potential financial ruin, Black farmers try to obtain loans through the FSA, considered a "lender of last resort." *Id.* This is significant because the FSA is supposed to extend operating, equipment, and farm ownership loans to farmers when they cannot get loans through a traditional bank or farm credit system. *Id.* However, even though the FSA is the lender of last resort, many Black farmers cannot even get an FSA loan because of racial discrimination. *Id.* As a result, Black farmers end up paying

for expenses out of pocket or relying on predatory loans/high interest loans. *Id.*; *see also id.* at 024 (Smith Decl. ¶ 8). The Federation has gathered data on discriminatory practices by local FSA offices through countless reports of Black farmers who have had an FSA loan application denied, even if the farmer has significant farming experience, sufficient credit history, and ability to pay back an FSA loan. *Id.* at 008 (Blanding Decl. ¶ 6).

Even when Black farmers receive an FSA loan, the loan programs are discriminatorily administered in ways that exacerbate their debt. *Id*. (Blanding Decl. ¶ 7). When Black farmers *are* approved for a loan, there is often a delay in the disbursement of their funds. *Id.*; *see also id.* at 014 (Cannon Decl. ¶ 8) ("The local white farmers who submitted their applications when I submitted my application received their FSA loans much earlier in the farming season [giving] them a significant advantage as they were able to plan, plant, and harvest crops earlier, as well as get their crops to market faster."), 024 (Smith Decl. ¶ 8), 027 (Wilson Decl. ¶¶ 22–23) (declaring that he had to wait two-and-a-half years to receive an FSA farm ownership loan and that he would have lost his farm if he had not been able to borrow money from a family member and draw down from his retirement account). Oftentimes, the disbursement of funds is too late for Black farmers to take advantage of a full growing season. *Id.* at 008 (Blanding Decl. ¶ 7); *see also id.* at 003 (Batten Decl. ¶ 10), 014 (Cannon Decl. ¶¶ 7–9), 019 (Hall Decl. ¶ 6) ("Since I started farming over 30 years ago, I have not received my USDA loan funds before July, which is far too late to start planting the crops that I grow."). This means that they have incurred more debt because they could not use the loans to optimize their crops for that year. *Id.* at 008 (Blanding Decl. ¶ 7), 019 (Hall Decl. ¶ 8). Further, USDA provides operation loans that are designated for the general operations of the farm. *Id.* at 008 (Blanding Decl. ¶ 7). Black farmers have reported that FSA agents have unreasonably required them to justify certain expenses under their operation loans. *Id.* at 009. The

additional step of justifying an expense to an FSA agent can be significant, especially if a farmer needs to address an immediate need, such as a crop infestation. In such a situation, a small delay can lead to the devastation of an entire crop. *Id.*

Discrimination against Black farmers is linked to the fact that the overwhelming majority of decision-makers on the local committees that approve or deny FSA loans are White men—specifically, White farmers, who are in direct competition with Black farmers for loans. *Id.* (Blanding Decl. ¶¶ 8, 9); *see also* USDA, Civil Rights at the United States Department of Agriculture: A Report by Civil Rights Action Team, at 20 (Feb. 1997) (finding that 94% of FSA county committees had no women or minority members). Black farmers are required to deal directly with the FSA offices and county committees. *Id.* (Blanding Decl. ¶ 9). County committees act as gatekeepers for USDA loan programs. *Id.*; *see also* App. at 019 (Hall Decl. ¶ 9) ("The local FSA committee has five or six white farmers, and they have to approve my loan application. They never explain the criteria they use when they are making decisions about an application. Even though I am a local farmer, I have never been asked to join the committee."). During the COVID-19 pandemic, some FSA offices reportedly have informed Black farmers that they cannot visit the office despite allowing White farmers to do so. *Id*. at 009 (Blanding Decl. ¶ 8); *see also id.* at 015 (Cannon Decl. ¶ 10) ("In March 2020, early in the pandemic, I was told that I was prohibited from entering the FSA office because of coronavirus protocols. However, I saw white farmers in the office with the local FSA agents during that same time period despite their coronavirus protocols.").

At the beginning of the COVID-19 pandemic, the Federation circulated a survey among its members to assess their priorities. *Id.* at 009 (Blanding Decl. ¶ 10). The number-one need identified by participants was direct financial assistance for their farms. *Id.* Many survey

participants have debt that has increased over the past three years because of market loss and inability to obtain financing for farming operations. *Id.* These troubles were only exacerbated by the pandemic. *Id.* Over half of the members surveyed said that they would seek debt relief if offered. *Id.*

Given that debt relief is essential to farmers, the Federation provides outreach, education, and technical assistance to Black farmers to access USDA debt relief programs. *Id.* at 009 (Blanding Decl. ¶ 11). Debt relief programs are critical given the USDA's longstanding, well-documented practice of race-based discrimination against farmers of color. *Id.* at 009–10. The Federation has gathered data on discrimination against farmers through complaints it has received from its members. *Id.* at 010. The Federation considers it rare to encounter any Federation member who has not experienced some form of race-based bias or discrimination. *Id.*

One of the early attempts of addressing this discrimination was through the *Pigford* class action settlement. *Id*. (Blanding Decl. ¶ 12); *see also Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000). The *Pigford* lawsuit confirmed that the USDA discriminated against Black farmers and also highlighted how many Black farmers must rely on high-interest, predatory loans because they cannot obtain an FSA loan. *Id.* The cash awards through the settlement were generally $50,000 per farmer, *Pigford*, 185 F.R.D. at 108, which was insufficient to remedy their losses or for them to prosper. *Id.*; *see also* App. at 029 (Hall Decl. ¶ 10) ("I have filed a formal written complaint to the USDA regarding discrimination I have experienced in an attempt to recover monies from the agency during the *Pigford* settlements. However, my complaint and claims were denied."). The insufficiency of the *Pigford* settlement further demonstrates the significance of debt relief under Section 1005. *Id.* at 010 (Blanding Decl. ¶ 12).

Many members of the Federation received a letter from the USDA informing them of their eligibility for debt relief under Section 1005. *Id.* (Blanding Decl. ¶ 13); *see also, e.g.*, *id.* at 020 (Hall Decl. ¶ 15), 027 (Wilson Decl. ¶ 19). The Federation conservatively estimates that 154 of its members are eligible for debt relief under Section 1005. *Id.* at 010 (Blanding Decl. ¶ 13).

When Section 1005 was first announced, the Federation observed a great deal of excitement in many of its members because the program was a great opportunity for them to get out of debt and gain financial stability. *Id.* at 010–11. (Blanding Decl. ¶ 14). Accordingly, the Federation hosted a webinar and educational workshops providing members with information about the program. *Id.* It also shared information about the program through the Federation's website, state newsletter, and regional newsletters. *Id.* Outreach related to Section 1005 has taken up considerable staff time and resources. *Id.* Because it is focusing its efforts on Section 1005 and the temporary injunction against the program, the Federation has had to shelve other programs. *Id.*

Although some members had received information from the USDA on how much debt relief they would receive, none of the Federation's members received any money before the nationwide injunction against Section 1005 was implemented. *Id.* (Blanding Decl. ¶ 15). When the injunction was first announced, many members expressed extreme disappointment and were deeply concerned about the future of their farming operations. *Id.*

The injunction against Section 1005 has required follow-up work for The Federation. *Id.* (Blanding Decl. ¶ 16). The Federation's state-level directors and outreach coordinators have had to shift priorities to dedicate time to membership inquiries about how the nationwide injunction will affect the future of the program. *Id.* Members are frustrated by the injunction, and this has caused some tension between members and the Federation's outreach staff, because the Federation's credibility has been negatively affected. *Id.*

If the injunction against Section 1005 becomes permanent, Federation members will suffer grave and irreparable harm. *Id*. (Blanding Dec. ¶ 17). Many Black farmers will lose their land and farming equipment to foreclosures. *Id.* The number of Black farmers in the United States has dramatically decreased over the last 50 years. *Id.* The number will shrink even further if Section 1005 is permanently enjoined. *Id.* Debt relief is a lifeline for many members of the Federation, and without the program they have nowhere else to go for financial support. *Id.* Additionally, many farmers have planned their farming seasons with the assumption that they will receive funds from the debt relief program. *Id.* Because of the anticipated debt relief, farmers overprepared for the season by spending additional money on seeds, farming equipment, and expanding their farm operations. *Id.* Without the debt relief, farmers will lose their anticipated income, their ability to take care of their families, and their ability to fulfill their financial obligations. *Id.* at 012; *see also id*. at 016 (Cannon Decl. ¶ 16 ("If I do not receive my anticipated debt relief from USDA, I will be unable to adequately support myself and my 2 little girls, who are 4 and 6-years-old. I'd lose everything -- my house, my truck, and all my farm equipment. My family will be homeless."), 023 (Smith Decl. ¶ 6) ("The hold up in the program and the halt in the funding leaves us very vulnerable. I worry about this every day. . . . If I can't ranch and work our land, I fear for the futures of my sons."), 004 (Batten Decl. ¶ 19), 028 (Wilson Decl. ¶¶ 34–35). Although the USDA has indicated to the Federation that it will not move forward with foreclosures of farms, it is unclear how long the foreclosure suspension will last or what impact it will have on non-USDA loans. *Id*. at 012 (Blanding Dec. ¶ 17).

PROCEDURAL BACKGROUND

Plaintiff Sid Miller filed this lawsuit on behalf of "himself and others similarly situated" on April 26, 2021. ECF No. 1. Plaintiffs allege that Section 1005 violates Title VI of the Civil

Rights Act of 1964, 42 U.S.C. §2000d, and the United States Constitution, on grounds that it provides benefits to socially disadvantaged farmers and ranchers ("SDFRs"). ECF No. 87, at ¶¶ 20–24.

On June 2, 2021, Plaintiffs moved for class certification, ECF No. 12, and a preliminary injunction to prevent the USDA "from discriminating on account of race or ethnicity in administering section 1005 of the American Rescue Plan Act," ECF No. 17. The Secretary filed his answer[3] on June 29, 2021, and moved to dismiss (in part) Plaintiffs' Amended Complaint under Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. ECF Nos. 49-51. After a hearing on June 30, 2021, ECF No. 59, the Court granted the Plaintiffs' motions for class certification and preliminary injunction on July 1, 2021, ECF No. 60.

On September 22, 2021, the Court stayed Plaintiffs' deadline to respond to the Defendant's motion to dismiss and granted Plaintiffs leave to file a second amended complaint. ECF No. 85. Plaintiffs filed their Second Amended Complaint that same day. ECF No. 87.

ARGUMENT

I. The Federation Is Entitled to Intervene as of Right.

The Federation is entitled to intervene as of right because it has an interest in the debt relief provided under Section 1005, and no existing party is adequately representing SDFRs, including many of the Federation's members, who will be most directly affected by the outcome of this case.

[3] The Federation seeks the same relief as the Secretary: dismissal of the Plaintiffs' complaint. *Compare* ECF No. 51 (Secretary's Answer to Am. Compl.) at 8, *with* the Federation's Proposed Answer to Second Amended Complaint, at 7, filed herewith. Thus, it is not necessary for the Federation to establish standing. *See Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998) ("Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so."). It is well established, however, that an organization has standing to represent its members who have been injured. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975).

Federal Rule of Civil Procedure 24(a) allows a party to intervene as a matter of right "[u]pon timely application . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a).

To prevail on a motion to intervene as a matter of right, the proposed intervenor must show: "(1) the motion to intervene is timely; (2) the potential intervener asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest." *John Doe No. 1 v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001). "Federal courts should allow intervention where no one would be hurt and . . . greater justice could be obtained." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). "Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

A. The Federation's motion to intervene is timely.

To determine whether a motion to intervene is timely, a court must consider four factors: "(1) how long the potential intervener knew or reasonably should have known of her stake in the case into which she seeks to intervene; (2) the prejudice, if any, the existing parties may suffer because the potential intervener failed to intervene when she knew or reasonably should have known of her stake in that case; (3) the prejudice, if any, the potential intervener may suffer if the court does not let her intervene; and (4) any unusual circumstances that weigh in favor of or against

a finding of timeliness." *Glickman*, 256 F.3d at 376. However, these factors are a "framework," *id*., "not a formula for determining timeliness." *Edwards v. City of Houston*, 78 F.3d 983, 1004 (5th Cir. 1996). Accordingly, a motion to intervene may still be timely "even if all the factors do not weigh in favor of a finding of timeliness." *Glickman*, 256 F.3d at 376.

Here, the factors weigh heavily in favor of a finding of timeliness. First, the Federation is filing this motion less than six months after this lawsuit was first filed (i.e., the very earliest point at which the Federation could have possibly become aware of an interest in the case). Courts in many other instances have found motions to intervene timely even after the passage of many months, or even years, after a proposed intervenor should have known of its stake in the suit. *See, e.g.*, *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248–50 (5th Cir. 2009) (allowing a motion to intervene that had been filed *two years* after the proposed intervenor had become aware of its interest in the suit, due to the lack of prejudice to the existing parties caused by any delay and the significant prejudice the movant would have faced if not permitted to intervene); *Ass'n of Prof'l Flight Attendants v. Gibbs*, 804 F.2d 318 (5th Cir. 1986) (five months). Furthermore, as the Fifth Circuit has noted, most cases rejecting intervention on the basis of timeliness involve motions filed after the entry of judgment. *See Edwards*, 78 F.3d at 1001 (collecting cases). Here, there has been no entry of judgment, nor does the Federation intend to seek reconsideration of any rulings in the case to date.

Second, no prejudice to the Plaintiffs will result if this motion is granted. This factor only concerns prejudice caused by any delay by the proposed intervenor in seeking intervention, "not that prejudice which may result if intervention is allowed." *Id*. at 1002 (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977)). Courts look favorably to granting intervention before the completion of discovery. *See Rotstain v. Mendez*, 986 F.3d 931, 938 (5th Cir. 2021).

Here, the Federation has not exercised any delay in filing this motion which would prejudice the parties, and discovery has not closed (if it has even begun). *See* Order, ECF No. 85.

Third, the Federation and its members will suffer prejudice if not permitted to intervene. "Critical to [this] inquiry is adequacy of representation"; accordingly, "[i]f the proposed intervenors' interests are adequately represented, then the prejudice from keeping them out will be slight." *Lelsz v. Kavanaugh*, 710 F.2d 1040, 1046 (5th Cir. 1983). As discussed in more depth below, the Federation's interests are not adequately represented by the existing parties to the litigation. While the Federation, like the Secretary, seeks to have this action dismissed, its members have a significantly greater stake in upholding Section 1005 because they will lose access to financial support by way of debt relief and their reliance interests, which in many cases will very likely result in loss of their farms and livelihood. *See* App. at 004 (Batten Decl. ¶ 19), 011 (Blanding Decl. ¶ 17), 016 (Cannon Decl. ¶ 16), 023 (Smith Decl. ¶ 6), 028 (Wilson Decl. ¶¶ 34–35).

Finally, there are no unusual circumstances that weigh against a finding of timeliness here. *See Glickman*, 256 F.3d at 376. Thus, all four factors weigh in favor of a finding of timeliness.

B. The Federation has a substantial interest in the underlying litigation.

The Federation has interests at stake in this litigation because of its members' interest in the promised debt relief and reliance thereupon. A cognizable interest for the purpose of intervention entails a "direct, substantial, legally protectable interest in the proceedings." *Edwards*, 78 F.3d at 1004. Accordingly, "the inquiry turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015).

Benefits distributed by the government are legally protected property interests. *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 735 (5th Cir. 2008). Though "not all government benefits programs create constitutionally recognized property interests," *id.*, such an interest does arise where the individual has "a legitimate claim of entitlement" to the funds. *Bd. of Regents of State Colls v. Roth*, 408 U.S. 564, 577 (1972). A governmental benefit is especially worthy of protection where, as here, individuals have come to rely on it; as Judge Andrew Hanen recently recognized, "it is not equitable for a government program that has engendered [] significant reliance to terminate suddenly." *Texas v. United States*, No. 1:18-CV-00068, 2021 U.S. Dist. LEXIS 133117, at *13 (S.D. Tex. July 16, 2021) (enjoining prospective administration of the Deferred Action for Childhood Arrivals ("DACA") program but allowing current DACA recipients to keep their status given the reliance that they, their loved ones, and other stakeholders had placed in the program).

Moreover, a "vested interest" is "not required" to intervene. *Edwards*, 78 F.3d at 1004 (quoting *Howard v. McLucas*, 782 F.2d 956, 959 (11th Cir. 1986)). For example, the Fifth Circuit has previously held that a consent decree's "prospective interference with promotion opportunities can justify intervention." *Black Fire Fighters Ass'n of Dallas v. City of Dallas*, 19 F.3d 992, 994 (5th Cir. 1994). As a result, even if the benefit has not yet been disbursed, it may still satisfy the "substantial interest" requirement for intervention.

The Federation has a direct and substantial interest in its members' ability to access the funds allocated to them through Section 1005. Many Federation members have received—and reasonably and foreseeably relied on—letters from FSA notifying them that they were eligible for debt relief. *See* App. at 010 (Blanding Decl. ¶ 13); *see also, e.g.*, *id.* at 020 (Hall Decl. ¶ 15), 026 (Wilson Decl. ¶ 19). While Federation members have not yet been formally approved for funds,

their interest is sufficient for purposes of intervention because they either have applied or intend to apply for relief under Section 1005 due to their eligibility. *Cf. Black Fire Fighters Ass'n*, 19 F.3d at 994. Additionally, members have incurred further farming costs or have made farming plans to make their farms more economically viable in reliance upon receiving debt relief. App. at 011 (Blanding Decl. ¶ 17), 004 (Batten Decl. ¶ 15), 015 (Cannon Decl. ¶ 15), 020 (Hall Decl. ¶ 16), 023 (Smith Decl. ¶ 5), and 026, 028 (Wilson Decl. ¶¶ 18, 34). Thus, a permanent injunction preventing implementation of Section 1005 would greatly impair the interests of Federation members.

C. Disposition of this case is likely to impair the Federation's interests.

The disposition of this case is likely to impair the Federation's interests because if not permitted to intervene, the Federation's interests and those of its members will be prejudiced. This factor does not require a "showing by the applicant for intervention that he will be bound by the disposition of the action." *Edwards*, 78 F.3d at 1004. However, this factor does weigh heavily in a situation where "(a) the judge cannot anticipate the extent to which a final judgment will bind the movant, or (b) the judge finds that although the movant has an identical interest with a party, he has a sufficiently greater stake than the party that the party's representation may be inadequate to protect the movant's interest." *United States v. Jefferson Cty.*, 720 F.2d 1511, 1517 (11th Cir. 1983). For example, in *X-Drill Holdings Inc. v. Jack-Up Drilling Rig,* 320 F.R.D. 444 (S.D. Tex. 2017), this factor was satisfied where the applicant would have been "prohibit[ed] from making any claim" against the defendant and "from recouping any of the sale proceedings currently held in the registry of the court." *Id*. at 499. Here, a ruling in favor of Plaintiffs would mean that Defendant would be enjoined from distributing funds appropriated by Congress to assist Federation members. Further, the Federation would not be able to appeal any adverse judgment,

impairing or impeding its ability to protect its interests. *See Edwards v. City of Houston*, 37 F.3d 1097, 1107 (5th Cir. 1994) ("[P]art of the ability to protect their interests is the ability to subjugate the district court's disposition of their case to appellate scrutiny. . . . Concomitant with having one's day in court is appellate review of that day.").

D. The Secretary does not adequately represent the Federation's interests.

The Federation's interests are not adequately represented by the current parties. While the intervenor carries the burden of demonstrating inadequacy, that burden is "minimal." *Edwards*, 78 F.3d at 1005; *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Furthermore, "the applicant need not show that the representation by existing parties will be, for certain, inadequate"; rather, "the Rule is satisfied if the applicant shows that the representation of his interest 'may be' inadequate." *Texas*, 805 F.3d at 661.

When, as here, a government or its agent is party to the litigation, "the applicant for intervention must demonstrate that its interest is in fact different from that of the state and that the interest will not be represented by the state." *Id*. An intervenor must show "how these allegedly divergent interests would have any impact on the state's defense" of the challenged policy.

For example, in *Brumfield v. Dodd*, 749 F.3d 339 (5th Cir. 2014), parents of children enrolled in a state voucher program sought to intervene as defendants in a suit against the state challenging the program. Though both the state and the parents shared the goal of upholding the constitutionality of the program, the court nonetheless recognized a divergence of interests: "The state has many interests in this case—maintaining not only [the voucher program] but also its relationship with the federal government and with the courts that have continuing desegregation jurisdiction. The parents do not have the latter two interests; their only concern is keeping their vouchers." *Id*. at 346.

As in *Brumfield*, this matter concerns a challenge to a program under which specific individuals receive defined financial benefits from the government. Like the state in *Brumfield*, Defendant here has "many interests"—upholding the constitutionality of the statute, maintaining the integrity of the overall federal COVID-19 response and economic recovery, and preserving the federal agencies' relationships with current participants in this and other programs. By contrast, like the intervenors in *Brumfield*, the Federation is much more focused in its concerns: that its members secure financial benefits from the program and that the constitutionality of racial justice programs be upheld. Moreover, although the Federation's members will be most impacted by the outcome of this case, the record is currently devoid of any stories or narratives of Black farmers or other farmers of color.

Furthermore, the federal government's interests in preserving the federal agencies' relationship with current participants in the program created by Section 1005 may also be instructive in how these interests diverge from the interests of the Federation. In particular, the Secretary of Agriculture can hardly be expected to articulate the USDA's present-day and historical discrimination against minority farmers and inadequacies of previous reforms—certainly not to the same extent that victims of that discrimination will, particularly when doing so could expose his agency to liability and constitute evidence in potential later suits claiming discrimination. *See, e.g.*, App. at 008–10 (Blanding Decl. ¶¶ 6–12) (describing discrimination against Black farmers by the USDA and the insufficiency of the *Pigford* class action settlement to remediate such discrimination), 024 (Smith Decl. ¶ 8–9), 001–04 (Batten Decl. ¶¶ 3, 5, 9–11, 16–18), 013–15 (Cannon Decl. ¶¶ 4, 6–14), 018–20 (Hall Decl. ¶¶ 5–12), 027–28 (Wilson Decl. ¶¶ 22–26, 28–32). The Secretary and the Federation may well have different views about whether and to what extent previous attempts to remedy past discrimination have been successful.

Government reports of the status of Black farmers and the Federation's reports of that status will likely conflict. Indeed, it is certain that the Federation will present the case of past governmental discrimination more comprehensively and compellingly than the government has to date, and it can be counted upon to do so going forward. Accordingly, the Federation and its members will not be adequately represented by Defendant Vilsack.

II. Alternatively, the Federation Should Be Permitted to Intervene Under Rule 24(b)(2).

Even if the Court concludes that the Federation does not qualify for intervention of right pursuant to Rule 24(a), the Federation should be permitted to intervene under Rule 24(b). Rule 24(b) provides, in relevant part:

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). "Federal courts should allow intervention where no one would be hurt and the greater justice could be obtained." *Texas*, 805 F.3d at 657 (internal quotation marks and citations omitted).

When ruling on a motion for permissive intervention, a court conducts a two-stage inquiry: "First, the district court must decide whether the applicant's claim or defense and the main action have a question of law or fact in common. If this threshold requirement is met, then the district court must exercise its discretion in deciding whether intervention should be allowed." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977).

For the first part of this analysis, courts find that a "common question of law and fact" exists where the proposed intervenor's arguments are "related to" the claims in the lawsuit. *Cf. Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 825 (5th Cir. 2003) (no

common question of law and fact where claim in lawsuit was "not related to" proposed intervenor's arguments). As discussed above, this matter concerns whether the USDA should be enjoined from administering debt relief pursuant to Section 1005, which directly affects the property interests of Federation members; there is a clear "common question of law and fact."

For the second part of the permissive intervention analysis, courts may consider "whether the intervenors' interests are adequately represented by other parties and whether they will significantly contribute to full development of the underlying factual issues in the suit." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 472 (5th Cir. 1984) (en banc) (internal quotation marks and citations omitted). The court also considers "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

As discussed at length above, the Federation's interests are not adequately represented by the existing parties. The Secretary cannot be expected to zealously create a record of historical and ongoing discrimination on the part of the USDA, which Section 1005 has been designed to remediate; and the presence of the Federation in this lawsuit will significantly contribute to the development of such factual issues. Nor would there be any undue delay or prejudice because the Federation's motion is timely, discovery is still ongoing, and the Federation does not seek to re-litigate any prior rulings. The Federation is thus entitled to permissive intervention under Rule 24(b).

CONCLUSION

For the foregoing reasons, the Federation respectfully requests intervention as of right pursuant to Rule 24(a) or, in the alternative, permissive intervention pursuant to Rule 24(b).

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Respectfully submitted,

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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 October 12, 2021, which will serve all counsel of record.

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