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

SID MILLER, on behalf of himself and others similarly situated, et al., *Plaintiffs*, *v.* TOM VILSACK, in his official capacity as SECRETARY OF AGRICULTURE, *Defendant.*	Case No. 4:21-cv-00595

THE NATIONAL BLACK FARMERS ASSOCIATION'S AND THE ASSOCIATION OF AMERICAN INDIAN FARMERS' MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

The National Black Farmers Association ("NBFA") and the Association of American Indian Farmers ("AAIF") previously filed an unopposed conditional motion to intervene as Defendants. Dkt. No. 24. They now seek to activate that conditional motion and formally intervene because the government-Defendant's summary judgment filings establish a divergence in interests, so that the government cannot adequately represent NBFA, AAIF, and their members. In particular, the government-Defendant's proposed remedy, that the Court rewrite § 1005 of the American Rescue Plan Act of 2021 so it is no longer targeted at aiding "socially disadvantaged farmers and ranchers," is inconsistent with the statute's purpose, as doing so would further harm those farmers and ranchers. Therefore, as laid out in the accompanying brief, the Court should allow NBFA or AAIF to intervene under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, Federal Rule of Civil Procedure 24(b). Pursuant to Federal Rule of Civil Procedure 24(c), NBFA and AAIF previously submitted a proposed Answer to Plaintiffs' First Amended

Class-Action Complaint. Dkt. No. 24-5. Attached as Exhibit A, NBFA and AAIF include a proposed Answer to Plaintiffs' Third Amended Class-Action Complaint.

NBFA and AAIF have met and conferred with the parties. Counsel for the government-Defendant stated they oppose intervention without providing any basis or reason. Counsel for Plaintiffs stated they opposed intervention because the government-Defendant adequately represents NBFA's and AAIF's interests.

Dated: March 18, 2022

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

On March 15, 16, and 17, 2022 David Muraskin, on behalf of NBFA and AAIF, emailed Gene Hamilton, Dusty Filmore, Chad Filmore and Jonathan Mitchell, counsel for Plaintiffs asking for their position. On March 17, Mr. Mitchell responded via email that Plaintiffs oppose this motion because the government-Defendant adequately represents NBFA and AAIF and that he did not believe a telephone conversation was required to discuss the parties' positions.

On March 16, 2022, David Muraskin, on behalf of NBFA and AAIF, conferred via telephone with Michael F. Knapp and Kyla Snow, on behalf of the Secretary. Mr. Knapp stated that the Secretary opposes this motion.

Dated: March 18, 2022

Respectfully submitted,

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THE NATIONAL BLACK FARMERS ASSOCIATION'S AND THE ASSOCIATION OF AMERICAN INDIAN FARMERS' BRIEF IN SUPPORT OF THEIR MOTION TO INTERVENE AS DEFENDANTS

Section 1005 of the American Rescue Plan Act of 2021 authorizes the U.S. Department of Agriculture ("USDA") to "provide a payment in an amount up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer or rancher" with qualifying loans. Plaintiffs contend § 1005 is unconstitutional because it is "excluding individuals and entities from the benefit of that federal program on the grounds of race, color, and national origin." *E.g.*, Third Am. Compl., Dkt. No. 135, ¶¶ 20-23.

NBFA and AAIF previously moved to conditionally intervene as Defendants. Dkt. No. 24. In so doing, they followed the direction of the Seventh Circuit, which instructs would-be intervenors wishing to join the side of the government to wait until a clear divergence of interests emerges before seeking to formally intervene, as the government is presumed to adequately represent the public. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engs.*, 101 F.3d 503, 509 (7th Cir. 1996). This Court endorsed this approach in this case. *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 6129207, at *3 (N.D. Tex. Dec. 8, 2021), *appeal docketed*, No. 21-11271 (5th Cir. Dec. 22, 2021).

That divergence has now occurred, and NBFA and AAIF should be allowed to enter the case as Intervenor-Defendants. All current parties state that "if the Court concludes that § 1005 is unconstitutional," it can and should remedy that violation through an "extension of the benefits to those excluded under the challenged provision." Def.'s MSJ Br., Dkt. No. 168, at 35; *see also* Third Am. Compl. ¶ 32(d) (requesting the Court issue an injunction preventing "any racial exclusions").

NBFA and AAIF contend that is incorrect. Rewriting § 1005 to forgive the liability of anyone who has outstanding, qualifying loans is not a means to remedy racial discrimination (the law's purpose). In fact, the government-Defendant's evidence establishes this solution would

perpetuate and enhance racial inequities. Section 1005 is not simply a payoff for past bias. It is meant to level a tilted playing field. Reimagining § 1005 so it forgives loans irrespective of the fact that USDA discriminated only against certain groups is inconsistent with Congress's goal, and consequently unlawful.

Thus, NBFA and AAIF have the right to enter the case as parties under Federal Rule of Civil Procedure 24(a)(2) to protect the interests of the socially disadvantaged farmers and ranchers they represent. In the alternative, the Court should exercise its discretion to allow NBFA and AAIF to enter as parties under Rule 24(b).

I. NBFA and AAIF can intervene as a matter of right.

Rule 24(a)(2) provides: "On timely motion, the court must permit anyone to intervene who … claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Under this rule, a movant is entitled to intervene where it satisfies four elements: (1) the application is timely; (2) the applicant has an interest relating to issues in the litigation; (3) that interest may, as a practical matter, be impaired or impeded by disposition of the case; and (4) the applicant's interest is not adequately represented by the parties in the lawsuit. *Wal-Mart Stores, Inc. v. Texas Alcoholic Bev. Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016). The Fifth Circuit emphasizes this rule "is to be liberally construed." *Id.* Nonetheless, it (like many courts) also imposes a rebuttable presumption that if would-be intervenors wish to enter on the side of the government, the government will adequately represent their interests. *Id.* at 569.

Recognizing this rebuttal presumption makes early intervention on the side of the government difficult, but that "the government's representation … may turn inadequate," the

Seventh Circuit instructs such a potential intervenor "to file at the outset of the case a standby or conditional application for leave to intervene and ask the district court to defer consideration of the question of adequacy of representation until the applicant is prepared to demonstrate inadequacy." *Solid Waste*, 101 F.3d at 508–09. The purpose of this conditional motion is to remove any allegation of "foot-dragging," as it establishes the potential intervenor's interest in the action in a timely manner. *Id*. at 509. If necessary, the proposed intervenor can later establish its interests have diverged from the government's—thus the government can no longer adequately represent the intervenor's interests—rebutting the presumption and substantiating the intervenor's right to enter. *Id.*

NBFA and AAIF followed this direction and filed a conditional motion, which established each of the elements of their right to intervene under Rule 24(a)(2), except that the government would not adequately represent their interests. The motion was timely, filed weeks after the litigation began and before a responsive pleading had been filed or discovery had commenced. Conditional MTI 7 (citing *Wal-Mart*, 834 F.3d at 565; *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994); *Buckland v. Ohio Nat'l Life Assurance Corp.*, 2015 WL 13188295, *2 (N.D. Tex. Oct. 7, 2015) (O'Connor, J.)) (also explaining how NBFA and AAIF would be prejudiced if they were denied entry, which is part of the Fifth Circuit's timeliness analysis). NBFA's and AAIF's conditional motion also established they have an interest in the litigation, attaching declarations that they are membership organizations working to secure the financial solvency of Black and Native American farmers and ranchers, including through obtaining loan forgiveness like that provided under § 1005; and that their members have loans that would be forgiven under § 1005 as written. *Id.* at 4–5 (citing attached declarations in support); *id.* at 8 (citing *Wal-Mart*, 834 F.3d at 566; *Texas v. United States*, 805 F.3d 653, 659 (5th Cir. 2015); *Sierra Club v. Glickman*, 82 F.3d

106, 109 (5th Cir. 1996)). Accordingly, NBFA and AAIF also demonstrated that the disposition of the suit could impair or impede their interests. *Id.* at 8 (citing *Glickman,* 82 F.3d at 109-10). In addition, NBFA and AAIF explained that their declarations established associational Article III standing, *id.* at 6 (citing *Cooper v. Tex. Alcoholic Bev. Comm'n*, 820 F.3d 730, 737 (5th Cir. 2016); *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010)), which allows them to "pursue relief" distinct from the parties, *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1648 (2017).

Lest there be any doubt that NBFA's and AAIF's conditional motion made out all but the final requirement for Rule 24(a)(2) intervention, Defendant already conceded in this case that the Federation of Southern Cooperatives, whose members also included qualifying socially disadvantaged farmers and ranchers, have a "stake in the outcome" of the litigation. Def. Opp. Int., Dkt. No. 136, at 1. Defendant argued only that intervention under Rule 24(a)(2) was inappropriate because the Federation failed to establish at that time that the government-Defendant would not adequately represent the Federation's interests. *Id.* at 7–13. Nonetheless, Defendant recognized the Federation's interest was so significant Defendant could not object to discretionary intervention under Rule 24(b), *id.* at 1, 13–15, even though the motion was filed sixth months into litigation—and four months after NBFA and AAIF had filed their own conditional motion to intervene, *id.* at 2–5. The Court denied the Federation intervention, explaining the proper course was for it to proceed as NBFA and AAIF did, by filing a conditional motion to intervene that would not be acted upon until "developments in this lawsuit indicate that the organizations' interests diverge from [Defendant]'s." *Miller*, 2021 WL 6129207, at *3. In sum, NBFA and AAIF did everything to entitle them to intervene at the point their interests diverge from the government-Defendant, as

that Defendant and this Court considering an essentially identically situated party already recognized.

The government-Defendant's summary judgment filings now provide that final element entitling NBFA and AAIF to intervene under Rule 24(a)(2). Those papers establish that the government-Defendant does not and cannot represent NFBA's and AAIF's interests because NBFA and AAIF disagree on the appropriate remedy if § 1005 is held unconstitutional. Divergence on remedy is a standard reason why an existing party cannot represent the proposed intervenor's interests, even given the rebuttable presumption the government will provide adequate representation. *E.g.*, *AAP v. FDA*, No. PWG-18-883, 2019 WL 5964548, at *4 (D. Md. Oct. 2, 2019) (holding trade association entitled to intervene as of right on the side of the government to challenge remedy), *aff'd sub nom. In re Cigar Ass'n of Am.*, 812 F. App'x 128 (4th Cir. 2020); *see also Int'l Franchise Ass'n, Inc. v. City of Seattle*, No. C14-848 RAJ, 2014 WL 12515261, at *3 (W.D. Wash. Sept. 15, 2014) (stating later disagreement with government-defendant on remedy would justify intervention as a matter of right).

Further, the extent of the divergence here is deep, underscoring the need for intervention: NBFA and AAIF believe the record already disproves the Court could rewrite § 1005 to be facially neutral, as the government-Defendant recommends. The government-Defendant concedes that whether the Court should strike down or expand an unconstitutional law turns on what "'Congress likely would have chosen'" had it known its race-conscious law would be unenforceable. Def.'s MSJ Br. 35 (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017)). Section 1005's legislative history details that Congress enacted the law to remedy racial bias. The law was drafted to address USDA's "undeniable … dark history of past discrimination against minority farmers." *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021); *see also, e.g.*, 167 Cong. Rec.

S1,264–65 (daily ed. Mar. 5, 2021) (statement of Sen. Debbie Stabenow) ("Congress includes [Section 1005] to address the longstanding and widespread systemic discrimination within the USDA, particularly within the loan programs, against socially disadvantaged farmers and ranchers."); *id.* at S1,265–66 (statement of Sen. Cory Booker) (explaining § 1005 seeks to prevent a "wave of foreclosures" against minority farmers); Sec'y of Agric. Thomas J. Vilsack before H. Comm. on Agric. (Mar. 25, 2021) ("[Section 1005] respond[s] to the cumulative impacts of systemic discrimination and barriers to access that have created a cycle of debt.")[1]. This history undermines any suggestion Congress would have chosen to pass a race neutral law. One does not remedy racial bias by denying the imbalance it created.

In fact, the government-Defendant demonstrates his proposed remedy would reinforce racial inequities. Defendant's brief explains, Def.'s MSJ Br. 36, the House found the discrimination motivating § 1005 resulted in socially disadvantaged farmers and ranchers receiving a smaller "share of the farm loans and payments administered by USDA." H.R. Rep. No. 117-7, at 12 (2021). This was true not just in absolute numbers, but in the "proportiona[l]" share of "agricultural credit." 167 Cong. Rec. S1,265. Accordingly, the government-Defendant lays out that if the Court were to eliminate § 1005's application to socially disadvantaged farmers and ranchers, and expand it to all similarly situated borrowers, that would transform § 1005 from a $4 billion initiative into a $40 billion one. Def.'s MSJ Br. 37. Put another way, non-socially disadvantaged farmers *already received ten times more funds* from USDA through the loan programs at issue. Because of this biased history, "non-minority 'farms are between 129% and 336% larger than Asian farms,' on average, and 'between 103% and 347% larger than Black

[1] Available at https://www.usda.gov/media/press-releases/2021/03/25/opening-statement-thomas-j-vilsack-house-committee-agriculture.

farms.'" *Id.* at 14 (citing Robb Rpt. at 64). Therefore, rewriting § 1005 to forgive all qualifying loans would effectively double the discriminatory harm caused by the USDA that Congress sought to remedy. USDA has already hindered the economic development of socially disadvantaged farmers and ranchers. If USDA were now allowed to reimburse all qualifying loans, it would further diminish the relative market power of socially disadvantaged farmers and ranchers, as once again a disproportionate share of funds would flow to their peers, who have already benefited from the agency's willingness to look beyond the color of their skin or background.

Moreover, as the government-Defendant's expert explained, USDA's discrimination leaves socially disadvantaged farmers and ranchers more financially vulnerable than their peers. USDA's discrimination has taken the form of "[d]elayed" or "reduced" loans and a "lack of technical assistance." Def.'s MSJ Br. 10 (citing Robb Rpt. at 2–5, 16–38, 84–85; USCCR, *Equal Opp'y in Farm Programs* 79 (1965)). As a result, socially disadvantaged farmers and ranchers were unable to purchase supplies and seedlings, or make timely payments on debt incurred for those items. *Id.*; *see also id.* at 11 (citing Robb Rpt. at 24–26); *In re Black Farmers Discrimination Litig.,* 856 F. Supp. 2d 1, 8 (D.D.C. 2011) (USDA's discrimination "deprived countless farmers of desperately needed credit and payments under various aid programs, with the result that many farmers suffered severe financial losses."). The effect is that socially disadvantaged farmers and ranchers currently produce less per acre than their peers. Accordingly, they have not been able to save or grow their farms to the same extent—and the latter increases their injury because USDA programs "reward the largest farms the most." *Id.* at 14–16. Thus, "minority farmers are facing much higher rates of default and are disproportionally on the brink of foreclosure relative to non-minority farmers." *Id.* at 18. In arguing that § 1005 should be extended if it is found unconstitutional Defendant overlooks these facts demonstrating discrimination has compounding

effects well beyond the outstanding loan balance. Redressing such misconduct requires the agency to generate equity, not merely create the appearance of present-day equality, as Congress recognized.

Defendant may argue that some relief is better than none, particularly because two recent facially race-neutral USDA programs—the Market Facilitation Program and Coronavirus Food Assistance Program—overwhelmingly funded "non-minority farmers." Def.'s MSJ Br. 16–17. While it is true USDA did not evenly distribute those funds, this should serve as a warning that USDA's ingrained discriminatory culture cannot be trusted to administer a race-neutral law in a neutral fashion. This recent conduct is certainly not a recommendation for giving the agency freer rein. What is more, as the government-Defendant recognizes, the inequitable distribution of pandemic relief created unique "urgen[cy]" among socially disadvantaged farmers and ranchers for funds. *Id.* at 17. Especially when combined with the other ways USDA's discrimination has hampered socially disadvantaged farmers' and ranchers' growth, if the government were to forgive all qualifying loans, that would further empower those with less need to take advantage of their position. The Court would be enabling, and the government would be facilitating, farmers and ranchers who have been able to build wealth thanks to easier access to USDA credit to buy out minority farmers or otherwise increase their competitive advantages. They would be blessing the loss of more socially disadvantaged owned farms and ranches, the precise outcome § 1005 was passed to avoid. For all these reasons, the government-Defendant's proposed remedy has no relation to § 1005's goals of addressing systemic racism.

NBFA and AAIF have the right to present this argument as parties. They filed their conditional motion to intervene in a timely manner and filed these papers to activate that motion just days after the divergence of interests appeared. NBFA and AAIF represent socially

disadvantaged farmers and ranchers who Congress meant to benefit from § 1005. Defendant, in advocating that the Court convert a statute designed to correct racial discrimination into one that denies and enhances that reality, can no longer represent NBFA's and AAIF's interests. Without party status, the Court could grant the government-Defendant's requested remedy, produce the precise harm that NBFA and AAIF fear, and no party would have standing to appeal that decision. Both the Government and Plaintiffs would have received their requested remedy. *E.g.*, Third Am. Compl. ¶ 32(d) (requesting as the lead form of that the Court order the program operate without "racial exclusions or discriminatory racial preferences"). NBFA and AAIF should be allowed to intervene under Rule 24(a)(2).

II. In the alternative, the Court should grant permissive intervention.

Were the Court to deny intervention under Rule 24(a)(2), it should exercise its discretion to allow NFBA and AAIF to intervene under Rule 24(b). That rule allows intervention of a party who makes a timely motion and "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). District courts have broad discretion on this issue and may permit intervention when: (1) the motion is timely, (2) the intervenor's claim or defense has a question of law or fact in common with the existing action; and (3) intervention will not delay or prejudice the adjudication of the rights of the original parties. *Siesta Village Mkt., LLC v. Perry*, 2006 WL 1880524, at *1 (N.D. Tex. July 7, 2006).

As explained above, NBFA's and AAIF's motion is timely twice over, with them having timely filed their conditional motion for intervention and timely activated that motion. Their objection to the remedy proposed by Defendant is unquestionably in common with the main action. Moreover, because NBFA's and AAIF's divergence in interests from the government-Defendant focuses on the proposed remedy, their participation will not delay or prejudice the original parties

in any way. They do not seek discovery, nor to address the merits at this stage. So long as Plaintiffs and Defendant will not suggest NBFA or AAIF have waived any argument by failing to make a filing, they are willing to rely on the arguments made by the parties, in their other filings, and in these intervention papers. To the extent the parties or Court prefers another filing, NBFA and AAIF are willing to make a submission of such a length and on such a timeline as requested. Thus, should the Court deny intervention under Rule 24(a)(2), it should grant permissive intervention under Rule 24(b).

CONCLUSION

For the foregoing reasons, the NBFA and AAIF respectfully request the Court allow them to intervene.

Dated: March 18, 2022

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 March 18, 2022, which will serve all counsel of record.

Dated: March 18, 2022

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