UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DISTRICT

JARROD MCKINNEY, Plaintiff, v. THOMAS J. VILSACK, in his official capacity as U.S. Secretary of Agriculture; ZACH DUCHENEAUX, in his official capacity as Administrator, Farm Service Agency, Defendants.	§ § § § § § § § § § § §	Civil Action No. 2:21-cv-00212-RWS

PLAINTIFF'S SUR-REPLY IN RESPONSE TO MOTION TO STAY

Defendants' reply confirms that a stay is unwarranted here. "[S]tay orders will be reversed when they are found to be immoderate or of an indefinite duration," *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982), but the stay that Defendants propose could well "force Plaintiff to wait years before he is able to resume his case in this Court." *Holman v. Vilsack*, 1:21-cv-01085, 2021 WL 3354169, at *2 (W.D. Tenn. Aug. 2, 2021). Defendants do not dispute this.

Even if it were not immoderate, Defendants' proposed stay should be denied. Mr. McKinney does not "assert[] a novel right to have his claims litigated in two courts simultaneously," ECF No. 33 at 1, but instead wants only to litigate his claims with his chosen counsel in this Court. Defendants' proposed stay would not save them from any undue hardship but would unfairly prejudice Mr. McKinney. And a stay would not promote the orderly course of justice, but would instead encourage a disorderly race to the courtroom and prevent the percolation of important issues in any case in which any court has certified a nationwide class.

I. Defendants' Proposed Stay Should Be Denied as Immoderate

That Defendants' proposed stay is "immoderate or of an indefinite duration" is reason enough to deny it. *See McKnight*, 667 F.2d at 479. It is true that "the parties have proposed a schedule" in *Miller*. ECF No. 33 at 2. But Defendants do not—and cannot—dispute that with briefing and likely multiple rounds of appeal still to go in that case, Mr. McKinney may "wait years before he is able to resume his case in this Court." *Holman*, 2021 WL 3354169, at *2.

That is perhaps why Defendants hang their hat on the contention that if a stay is granted, "Mr. McKinney's claim will not sit idle," but "will proceed apace *in the class action*, together with the claims of all members of the certified classes." ECF No. 33 at 2 (emphasis in original). But any case stayed in favor of another will presumably involve similar claims proceeding apace in the other case. Whether a proposed stay is immoderate, then, must be determined by the length that *the particular case* would be put on hold. *See, e.g.*, *McKnight*, 667 F.2d at 479 ("In the present

case, the stay of McKnight's case is indefinite, but it may last for seven years or longer."); *Holman*, 2021 WL 3354169, at *2 (denying a stay that would put the plaintiff's *case* on hold, perhaps for years, despite Defendants' argument that plaintiff's *claim* would be litigated in the *Miller* class action). Here, a stay would put Mr. McKinney's case on hold indefinitely.[1]

The out-of-circuit cases upon which Defendants rely do not address this factor. The Court in *Richard K.* deferred to a class action lawsuit filed over four years before the complaint in that case. *See Richard K. v. United Behav. Health*, 18-cv-6318, 2019 WL 3083019, at *5 (S.D.N.Y. June 28, 2019) (report and recommendation adopted). The decision in *Aleman ex rel. Ryder Sys., Inc. v. Sancez*, 21-cv-20539, 2021 WL 917969, at *2 (S.D. Fla. Mar. 10, 2021), is not a ruling on a stay motion, and the stay it mentions was jointly agreed upon by the parties. *See id.* Defendants' proposed stay is immoderate and should be denied.

II. Defendants' Proposed Stay Should Be Denied Under the Relevant Factors

A. A Stay Threatens to Prejudice Mr. McKinney

A stay threatens to inflict a bevy of "possible harm[s] to [Mr. McKinney]." *Fishman Jackson PLLC v. Israely*, 180 F. Supp. 3d 476, 489 (N.D. Tex. 2016). ***First*,** it is indisputable that both the original and amended complaints in *Miller* raise different claims than Mr. McKinney has raised. *See* ECF No. 32 at 4–6. And although (as Mr. McKinney recognized), *id.* at 9, the *Miller* plaintiffs may abandon some of those claims to focus on Section 1005, they have not done so yet. Even if they do make that change at some point, the claims pressed in the initial and first amended

[1] Since the district court's decision in *Holman*, two courts have granted Defendants' Motion to Stay in other cases. *See* ECF Nos. 34–35. Mr. McKinney respectfully disagrees with those decisions, which did not address the immoderate nature of Defendants' proposed stay. Further, unlike this case, neither of the two cases in which a stay has been granted involves a pending motion for preliminary injunction.

complaints reveal a fundamental misunderstanding of equal protection principles that counsel in favor of allowing Mr. McKinney to press his chosen claims with his chosen counsel. *See id.*

On that score, the constitutional concerns that would arise if Mr. McKinney is deprived of his ability to press his chosen claims—with his chosen counsel—as a named plaintiff in this case are at their peak. *See id.* at 10–11 & n.11 (citing due process and First Amendment concerns). Defendants attempt to sidestep these important concerns by cautioning this Court not to "second-guess[] or interfere[]" with the *Miller* court's determination that class counsel "will adequately represent the interests of class members." ECF No. 33 at 4. But that conflates the presumption of adequacy of representation under Rule 23, which presumes that unnamed plaintiffs are satisfied with any counsel advocating for similar interests, and Mr. McKinney's specific situation—where he has pressed his claims with his chosen counsel before the *Miller* class was certified.[2]

Second, a stay would deprive Mr. McKinney of the opportunity to gather facts to prove his claims. That this is "a facial challenge to an act of Congress" changes nothing. *Id.* at 3. A plaintiff is entitled to appropriate fact discovery and Mr. McKinney, like the plaintiffs in *Wynn* and *Holman*, and unlike the plaintiffs in *Miller*, has chosen not to foreclose it. *See Wynn v. Vilsack*, 21-cv-00514, ECF No. 43 (M.D. Fla. July 8, 2021) (scheduling order); *Holman*, 1:21-cv-01085, ECF No. 51 (joint proposed scheduling order).[3] ***Third***, "if this matter is stayed, [Mr. McKinney] would have no say whatsoever in the pace at which *Miller* would proceed." *Holman*, 2021 WL 3354169, at *2. That the preliminary injunction has been adjudicated in *Miller* does not change the fact that the

[2] It is true that the parties' joint report in *Miller* provides for notice to counsel about class certification. But that is beside the point. Nothing in the joint report requires class counsel to communicate with Mr. McKinney on a regular basis, provide Mr. McKinney with documents obtained in the case, or inform Mr. McKinney that he could request an opt-out. *See* ECF No. 32-2 at 4.

[3] Indeed, the plaintiff in *Wynn* has already propounded discovery.

parties do not expect to complete briefing on dispositive motions until April 2022—and it gives no assurances as to "whether extensions of deadlines may be requested or granted by either party." *Id.*[4] ***Fourth***, Defendants' assertion that Mr. McKinney does not explain how his request for nominal damages "differentiates [his interests] from those in *Miller* in any appreciable way," ECF No. 33 at 3, is incorrect. The request prevents Defendants from mooting the case at the eleventh hour. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

B. Defendants Would Not Suffer Undue Hardship if Required to Proceed

Defendants still do not provide any evidentiary support for their earlier contention that defending Section 1005 in this Court would "drain . . . the Government's resources." ECF No. 24 at 9; *see also Garmendiz v. Capio Partners, LLC*, 8:17-cv-00987, 2017 WL 3208621, at *2 (M.D. Fla. July 26, 2017) ("[B]eing required to defend a lawsuit does not constitute a hardship or inequity."). Instead, they contend that allowing this case to go forward would interfere with the orderly administration of the *Miller* class action and risk inconsistent adjudications. *See* ECF No. 33 at 5. But their assertion that a separate lawsuit would necessarily interfere with the class action is flawed—particularly where the *Miller* court retains the discretion to allow individual farmers to opt-out of the certified classes. *See Penson v. Terminal Transp. Co., Inc.*, 634 F.2d 989, 994 (5th Cir. 1981). Further, permitting "the airing of competing views" in different courts is a feature, not a bug, that "aids . . . the decisionmaking process." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of a stay). And now that at least one other

[4] Defendants cite to *Faust* in support of their argument that an existing preliminary injunction forecloses the need for further action. But Defendants fail to disclose that the opinion in *Faust* represents the minority view, as two courts granted preliminary injunctions *after* the injunction was granted in *Wynn*. *See* ECF No. 32 at 6 n.5 (citing orders granting preliminary injunctions in *Miller* and *Holman*).

court (*Holman*) has denied Defendants' request to stay a challenge to Section 1005, a stay here would not even promote the uniformity Defendants now desire.[5]

C. A Stay Would Not Promote the Orderly Course of Justice

As Mr. McKinney has explained, the first-to-file rule only applies in cases of substantial overlap—which does not exist here. *See* ECF No. 32 at 8–10; *see also supra* II.A. In any event, beyond calling the argument "dubious," Defendants do not even address the equitable considerations mentioned in Mr. McKinney's opposition. *See* ECF No. 32 at 13–14.

Even if the first-to-file rule were presumptively applicable, "compelling circumstances" may "warrant not applying" it. *DynaEnergetics Europe v. Hunting Titan, Inc.*, 6:20-cv-00069-ADA, 2020 WL 3259807, at *2 (W.D. Tex. June 16, 2020). Here, Defendants' broad theory would have breathtaking consequences. It would encourage a plaintiffs to race a class action lawsuit to the courthouse in any case involving a challenge to a federal law. That would foreclose others from pressing important constitutional claims with their chosen counsel and obliterate the oft-stated maxim that the class action "is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). And although the Supreme Court has repeatedly lauded the benefits of percolation, Defendants' rationale would arbitrarily prevent percolation in any case in which any court has certified a nationwide class—even where that certification comes *after* the other case is filed. It would entitle one judge in one district to control litigation on issues of nationwide importance. And it would encourage forum shopping rather than promote the orderly course of justice.

Defendants' Motion to Stay (ECF No. 24) should be denied.

[5] Defendants' theory proves too much. The parties dispute whether the cases are "duplicative," but under Defendants' reasoning, a stay would be warranted whenever *any* of the claims overlap.

DATED: August 20, 2021.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2021, I filed the foregoing document with the Clerk of the Court through the District Court's ECF system, which will send notice of this filing to all counsel of record.

s/ Wencong Fa
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