UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

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 RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF RELATED CLASS ACTION

INTRODUCTION

Section 1005 of the American Rescue Plan Act of 2021 grants debt relief to farmers and ranchers solely on the basis of race. Under Section 1005, every farmer and rancher with an eligible loan and who is a racial minority will receive a payment of 120 percent of the loan amount as of January 1 of this year. Every white farmer and rancher, regardless of circumstances, is categorically ineligible.

Unsurprisingly, this program invited a dozen lawsuits throughout the country, brought by different farmers in different locations with different experiences. But although Defendants previously lauded the benefits of percolation in other challenges to Section 1005, they now seek to force the plaintiffs in 11 cases, including this one, to step aside while the plaintiffs in *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.), determine the rights of every farmer with an eligible loan, in litigation that will likely take years to resolve.

Defendants' attempt to halt this case indefinitely in favor of *Miller* should be denied. Earlier this week, a federal court in Tennessee rightly denied Defendants' request to put the

plaintiff's challenge in that case on hold. *Holman v. Vilsack*, 21-cv-01085-STA-jay, 2021 WL 3354169 (W.D. Tenn. Aug. 2, 2021) (attached as Exhibit 1). As the *Holman* court explained, "Plaintiff could well have to wait years before he is able to resume his case in this Court." *Id.* at *3. That is true here as well, and is reason enough to reject Defendants' proposed stay. *See McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982) ("[S]tay orders will be reversed when they are found to be immoderate or of an indefinite duration.").

Defendants do not satisfy any of the factors for a stay. Their proposed stay would prejudice Plaintiff Jarrod McKinney, who would be deprived of the right to press his claims and obtain his requested relief with his chosen counsel. By contrast, litigation burdens on Defendants do not constitute undue hardship justifying a stay. Defendants' argument on judicial economy also fails. Defendants' out-of-circuit authorities are inapposite here, where Plaintiff is not a latecomer, but has been at least as diligent as the *Miller* plaintiffs in pursuing claims raised at roughly the same time. Courts in this Circuit routinely deny similar motions where, as here, there are significant differences in litigation strategy and it is more convenient for Plaintiff to press his claims in the district in which he resides. Defendants' Motion for a Stay (ECF No. 24) should be denied.

BACKGROUND

I. Plaintiff Jarrod McKinney's Challenge to Section 1005's Race-Based Loan Assistance Program

Section 1005 of the American Rescue Plan Act of 2021 distributes debt relief solely on the basis of race. Before Section 1005's enactment, one senator called its race-based debt relief provisions "unbelievable" and stated that he didn't know "how that could ever be constitutional."[1] Many farmers agreed. In the months following Section 1005's enactment, farmers across the

[1] Sen. Pat Toomey, No Justification for $1.9 Trillion Democrat Spending Bill (Mar. 3, 2020) https://www.toomey.senate.gov/newsroom/press-releases/toomey-no-justification-for-19-trillion-democrat-spending-bill.

country brought lawsuits to challenge its constitutionality. *See* Defs' Mot. to Stay Proceedings, ECF No. 24 at 2–3 (listing cases). These farmers—and their varying counsel—have pursued differing strategies and sought different kinds of relief.

Plaintiff Jarrod McKinney is a farmer in Naples, Texas. *See* ECF No. 10, McKinney PI Decl. ¶ 2. He splits his time—tending to roughly 60 pairs of cattle from 5 p.m. to 10 p.m. each day after finishing work at an insurance agency. *Id.* ¶¶ 3–4. In 2019, Mr. McKinney took out a farm loan from the U.S. Department of Agriculture's Farm Service Agency to buy additional land and increase the size of his farm. *Id.* ¶ 5. As of January 1, 2021, this loan had a balance of over $180,000. *Id.* If Mr. McKinney were a member of any racial minority group, he would be entitled to a payment of over $200,000 under Section 1005. *See* § 1005(a)(2) (authorizing "payment in an amount up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer or rancher as of January 1, 2021"). But because he identifies as white, including in documents submitted to the USDA and the Farm Service Agency, ECF No. 10, McKinney PI Decl. ¶ 7, he is categorically ineligible to receive any payments under Section 1005.

Mr. McKinney filed his complaint on June 10, 2021, ECF No. 1, and his Motion for Preliminary Injunction on June 17, 2021, ECF No. 9. Mr. McKinney's two-count complaint alleges that the race-based provisions of Section 1005 violate the equal protection component of the Due Process Clause of the Fifth Amendment, and as such, cannot be lawfully implemented under the Administrative Procedure Act. *See* ECF No. 1. The complaint named both the Secretary of Agriculture and the Administrator of the Farm Service Agency as Defendants, and requested declaratory relief, injunctive relief, and nominal damages.

On July 1, 2021, the U.S. District Court for the Northern District of Texas certified two classes of farmers and ranchers in another case, *Miller v. Vilsack*, 4:21-cv-595, ECF No. 60 (N.D.

Tex. July 1, 2021). On July 12, Defendants filed what they styled as a "motion to stay proceedings pending resolution of related class action [i.e., *Miller*]." ECF No. 24 at 1. They have filed similar motions in other cases that challenge Section 1005. *Id.* at 2 & n.1. Earlier this week, the United States District Court for the Western District of Tennessee denied one such motion. *See* Exh. 1.

II. Other Farmers' Challenge Various USDA Programs, Including Section 1005, in *Miller v. Vilsack*

Miller involves a broad challenge to numerous USDA programs, including Section 1005. *See Miller*, ECF No. 1 (filed Apr. 26, 2021).[2] The original complaint mentions Section 1005 only once, *id.* ¶ 5, alongside "[n]umerous other federal statutes [that] limit government aid to individuals who qualify as a socially disadvantaged farmer or rancher." *Id.* ¶ 6 (internal quotation marks omitted). The *Miller* complaint thus asks that court to "declare unconstitutional *any* statute limiting the benefits of federal programs to 'socially disadvantaged farmers and ranchers.'" *Id.* ¶ 19 (emphasis added).

Mr. Miller is represented by America First Legal, which by its own account is "led by senior members of the Trump Administration **who were at the forefront of the America First movement**."[3] The group believes that "our most fundamental rights and values are being systematically dismantled by an unholy alliance of corrupt special interests, big tech titans, the fake news media, and liberal Washington politicians."[4]

The *Miller* complaint includes three claims. First, it contends that Department of Agriculture programs containing racial exclusions violate both the Constitution and Title VI of the Civil Rights Act of 1964. *See* ECF No. 1 (Claim One). Second, it argues (in the alternative) that

[2] ECF citations in this section refer to filings in *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.).
[3] https://www.aflegal.org/about (emphasis in original).
[4] *Id.* As stated below, an organization espousing such partisan and vitriolic views cannot properly represent Mr. McKinney's interests.

the term "socially disadvantaged group" in USDA programs must be construed to include "white ethnic groups that have suffered past prejudice and discrimination." *Id.* (Claim Two). Third, it contends (again in the alternative) that the term "socially disadvantaged farmer or rancher" must include individuals that "have any discernable trace of minority ancestry." *Id.* (Claim Three).

Initially, the sole plaintiff and proposed class representative was Sid Miller, the Agriculture Commissioner for the State of Texas (in his personal capacity). *Id.* ¶ 3. Importantly, although Mr. Miller sought to invalidate numerous federal statutes, including the debt relief provisions of Section 1005, he did not allege (and has never alleged) that he holds any farm loans that would be eligible for debt relief under Section 1005. He nonetheless sought to "represent a class of all farmers and ranchers in the United States who are currently excluded from the Department's interpretation of 'socially disadvantaged farmer or rancher.'" *Id.* ¶ 31.

Over a month later, Mr. Miller filed an amended complaint, moved to certify two classes, and moved for a preliminary injunction. ECF Nos. 11–13, 17–18 (June 2, 2021). Mr. Miller's amended complaint raises the same claims and sought the same relief as his original complaint, but added four plaintiffs who, unlike Mr. Miller, allege that they hold farm loans that would be eligible for debt relief under Section 1005. ECF No. 11 ¶¶ 19–23. The amended complaint also (for the first time) sought to certify a "second and more narrow class"—with only the new plaintiffs as class representatives—that includes "all farmers and ranchers in the United States who are encountering, or who will encounter, racial discrimination from the United States Department of Agriculture on account of [Section 1005]." *Id.* ¶ 42.

On July 1, the *Miller* court certified the two classes proposed by the *Miller* plaintiffs and issued a preliminary injunction.[5] ECF No. 60. In response to the court's request for a proposed discovery plan, the parties declared that they "do not believe factual discovery is necessary for the § 1005 constitutional claim" and set the completion of briefing for cross-motions for summary judgment in April 2022. ECF No. 70 at 2–3 (attached as Exhibit 2).

STANDARD OF DECISION

"The party seeking a stay bears the burden of justifying a delay tagged to another legal proceeding." *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983). The movant "must make out a clear case of hardship or inequity in being required to go forward" if there is even a fair possibility that the stay will work damage to someone else. *Id.* (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936)). "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.*

A district court has broad discretion in this area, but the discretion is not unbounded. Proper use of this authority "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* Courts should consider "(1) possible harm to the non-movant, (2) hardship or inequity for the movant in being required to go forward, and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of

[5] In *Miller* and in this case, Defendants complained that a preliminary injunction would be duplicative. The *Miller* court disagreed. *See* Order, ECF No. 60 at 21 ("[A]lthough the Government argues that any injunctive relief is unnecessary so long as injunctions on the same issue are in place from other courts, the existence of overlapping injunctive relief from other courts does not serve to automatically eliminate irreparable harm in parallel litigation . . . .") (citing cases). If anything, the *Miller* court benefitted from decisions percolating through other courts, and cited the reasoning of those decisions favorably. *See id.* at 15, 18; *see also Holman v. Vilsack*, 21-cv-01085, ECF No. 41 at 12–13 (W.D. Tenn. July 8, 2021) (adopting reasoning from previous courts in granting a third preliminary injunction enjoining enforcement of Section 1005).

law which could be expected to result from a stay." *Fishman Jackson PLLC v. Israely*, 180 F. Supp. 3d 476, 489 (N.D. Tex. 2016) (internal citations and quotation marks omitted). A court must also carefully consider the time reasonably expected for resolution of the other case, in light of the principle that "stay orders will be reversed when they are found to be immoderate or of an indefinite duration." *McKnight*, 667 F.2d at 479.

ARGUMENT

I. Defendants' Proposed Stay Should Be Denied as Immoderate

The Fifth Circuit has long held that stay orders must not be immoderate or of an indefinite duration. *Id.* But that is precisely the stay that Defendants propose. Indeed, Defendants cannot offer even a guess as to when the *Miller* case will be finally resolved. [6] Despite the fact that the parties will not engage in fact discovery in *Miller*, briefing on motions for summary judgment will not be completed until next April. Exh. 2 at 3. And with the *Miller* plaintiffs "likely" to file a second amended complaint, there is a substantial risk of even further delay. *Id.* at 2.

The United States District Court for the Western District of Tennessee pointed to this fact in denying Defendants' Motion to Stay in another case challenging Section 1005. *See* Exh. 1. As that court explained, "if this matter is stayed, [the plaintiff] would have no say whatsoever in the pace at which *Miller* would proceed, including whether extensions of deadlines may be requested or granted by either party, or whether the government may seek en banc review by the Fifth Circuit, or whether ultimate review by the U.S. Supreme Court may occur." *Id.* at 3 (internal quotation marks omitted). In *Holman*, as in this case, Plaintiff "could well have to wait years before he is

[6] Although Defendants intimate that a stay *might* be lifted if the Fifth Circuit reversed the district court's decision to certify the classes in *Miller*, they have declined to state whether they will even appeal the district court's decision. *See Miller*, ECF No. 44 at 7 n.6.

able to resume his case in this Court." Exh. 1 at 3.[7] The proposed stay should be denied because it is immoderate.

II. Defendants' Proposed Stay Should Be Denied Under the Factors Established in This Jurisdiction

Even if Defendants' proposed stay were not immoderate, Defendants have failed to meet their burden of justifying a stay. In considering a motion to stay proceedings, courts in this Circuit look to "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Fishman Jackson*, 180 F. Supp. 3d at 482. Those factors counsel against a stay in this case.

A. A Stay Would Damage Mr. McKinney's Rights

A stay would damage Mr. McKinney's rights by depriving him of the ability to litigate his chosen claims, with his chosen counsel, in his chosen forum. The differences between the litigation postures in this case and in *Miller* counsel against a stay.

First, while Mr. McKinney has brought a focused challenge to the race-based provisions of Section 1005, the *Miller* plaintiffs pressed a broader challenge to multiple statutes that limit the benefits of federal programs to socially disadvantaged farmers and ranchers. *See Miller*, Compl., ECF No. 1 ¶ 6. The *Miller* plaintiffs also raise additional claims that are not pressed in this case. These include a Title VI claim and two alternative claims that would require a court to evaluate

[7] Defendants cannot explain how a stay would benefit the Court's consideration of the issues in this case. On the contrary, Defendants contend that Mr. McKinney will "be bound by any class-wide judgment" in *Miller*. ECF No. 24 at 8. Thus, Defendants are not requesting a stay for the *Miller* Court to simplify the issues, but instead are asking for the "litigant in one cause [to] be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Wedgeworth*, 706 F.2d at 545.

the "social disadvantage" of both various white racial groups and those with "any discernible trace of minority ancestry." *Id.* (Claim Two). To be sure, the *Miller* plaintiffs sought class certification on the first claim, and subsequently indicated that they may pursue claims "*only* against the continued enforcement of the racial exclusions in Section 1005 of the American Rescue Plan Act," Exh. 2 at 2. But even assuming the propriety of abandoning multiple claims that were pressed in the *Miller* complaint, that only underscores the different approaches taken by the *Miller* plaintiffs and Mr. McKinney. For example, the *Miller* plaintiffs' alternative claim that Section 1005 should be construed to include all farmers and ranchers of certain white ethnic groups is troubling. *See Miller*, Compl., ECF No. 1 (Claim Two). Even if that claim is abandoned, it reveals a fundamental misunderstanding of core equal protection principles. *See Miller v. Johnson*, 515 U.S. 900, 911 (1995) (requiring the government to treat all persons as individuals, not "as simply components of a racial . . . class").[8]

Second, Mr. McKinney intends to marshal facts to support his claims. By contrast, the parties in *Miller* "do not believe factual discovery is necessary for the § 1005 constitutional claim." *See* Exh. 2 at 2.[9] Perhaps this is why the *Miller* plaintiffs, unlike Mr. McKinney, did not name the Administrator of the Farm Service Agency (FSA) as a defendant. Because the FSA is the entity that provided Mr. McKinney with his loan and possesses paperwork regarding Mr. McKinney's race, the FSA and its officers could prove to be a valuable source of information in this case. In

[8] The potential damage these puzzling arguments could inflict on Mr. McKinney's rights are exacerbated here because both this case and *Miller* are in the Fifth Circuit. Thus, although Defendants are calling for an indefinite stay, even a temporary one could prejudice Mr. McKinney by allowing *Miller* to set circuit-wide precedent before Mr. McKinney could have this Court, let alone an appellate court, adjudicate his rights.

[9] But despite entirely dispensing with fact discovery, the parties in *Miller* do not anticipate completing briefing on cross-motions for summary judgment until April 2022. Exh. 2 at 3. This highlights that a stay would bind Mr. McKinney to not just the legal strategy, but also the pace—no matter how unhurried—at which the parties choose to litigate the claims in *Miller*.

all, an order granting a stay would prejudice Mr. McKinney by preventing him from engaging in factual discovery to prove his case.

Third, Mr. McKinney requests relief beyond what the plaintiffs have asked for in *Miller*. Mr. McKinney's request for nominal damages, for instance, would prevent mootness in case Defendants change the program at the eleventh hour. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

Fourth, as each of the above differences underscore, a stay would prejudice Mr. McKinney by depriving him of his chosen counsel. Mr. McKinney is represented by a public interest organization with a long track record of advocating for equality under the law. By contrast, America First Legal, the entity representing the *Miller* plaintiffs, is closely associated with views espoused by some members of the Trump Administration, including overtly partisan rhetoric.[10] Defendants should not be allowed to force Mr. McKinney to be associated with ideologically incompatible counsel when he is already represented by his preferred counsel. *See Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 509 F. Supp. 3d 212, 229 (M.D. Pa. 2020) ("The general right to hire and consult with counsel of choice in civil litigation falls within the ambit of the First Amendment."), *appeal filed* (Jan. 28, 2021).

In all of these respects, the "interests of the *Miller* plaintiffs are not completely aligned with Plaintiff's interests." *Holman*, Exh. 1 at 3. Defendants' proposed stay would force Mr. McKinney to take his chances in another action with other counsel who have litigated the case

[10] *See, e.g.*, *Doing the Bidding of Open Border Radicals, Biden's DOJ Again Issues Another Disastrous Immigration Decision*, America First Legal (July 15, 2021), https://www.aflegal.org/news/doing-the-bidding-of-open-borders-radicals-bidens-doj-again-issues-another-disastrous-immigration-decision (stating that the Attorney General is "[n]ot content with opening the floodgates for illegal immigration through ending nearly every successful policy that secured the border under the Trump Administration . . .").

differently, never communicated with Mr. McKinney, and purportedly represent thousands of unnamed class members, yet believe that individualized notice to those members is unnecessary at this point. Exh. 2 at 4; *see also Miller*, Memo. in Support of Class Cert., ECF No. 13 at 2 (indicating that the nationwide class comprises at least 21,000 farmers). [11]

B. Defendants Would Not Suffer Undue Hardship or Inequity if Required to Proceed with This Case

Defendants have failed to meet their burden of establishing a "clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255. Defendants blithely assert that merely requiring Defendants to defend Plaintiff's claim "would drain the courts' and the Government's resources without any apparent benefit to Plaintiff." ECF No. 24 at 9. But Defendants' conclusory allegations that this case will not "benefit" Plaintiff are simply false. *See supra* at Arg. II.A. And Defendants have provided no evidentiary support to support their contention that defending a lawsuit would "drain" the government's resources. In all events, "being required to defend a lawsuit does not constitute a hardship or inequity." *Garmendiz v. Capio Partners, LLC,* 8:17-cv-00987, 2017 WL 3208621, at *2 (M.D. Fla. July 26, 2017). Otherwise, a party seeking a stay could be said to suffer "a hardship or inequity" in every case.

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

A stay would not promote the "orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to

[11] Mr. McKinney intends to request to opt out of the *Miller* classes. *See Penson v. Terminal Transp. Co., Inc.*, 634 F.2d 989 (5th Cir. 1981) (recounting a number of 23(b)(2) class actions that have provided for opt-outs to "ameliorate any 'antagonistic interests' between the class representatives and the absent members" and to "permit the class members to seek monetary relief in individual actions if they so chose"). Defendants' argument that Mr. McKinney would necessarily be bound by a judgment impacting another class raises a "serious possibility" of a due process violation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011). But irrespective of Mr. McKinney's ability to opt out of the *Miller* class, *this* Court should deny Defendants' stay motion.

result from a stay." *Fishman Jackson*, 180 F. Supp. 3d at 482. As one court in this Circuit recently suggested, it does not promote the orderly course of justice to require one litigant "to stand aside while a litigant in another [case] settles the rule of law that will define the rights of both." *Id.* at 490 (quoting *Landis*, 299 U.S. at 255). Instead, the "orderly justice" factors counsel for a stay in a different context—one in which the resolution of the appeal in another case, although factually relevant, will not define the parties' legal rights. *See id.* Because this Court will not be able to "rule independently" on Mr. McKinney's claims if a stay were granted, *id.*, a stay will not promote the orderly course of justice.

Defendants also spill much ink asking this Court to defer to *Miller* as the "first-filed case." *See* ECF No. 24 at 8–12. That argument misses the mark on multiple points. ***First***, Defendants have failed to demonstrate a substantial overlap to trigger the first-filed presumption. *See Louisiana v. Biden*, 2:21-cv-00778, 2021 WL 1885650, at *2 (W.D. La. May 10, 2021). As discussed above (at Arg. II.A), the parties in *Miller* and in this case have set forth different theories and request different forms of relief. In addition, it cannot be said that "much of the proof adduced . . . would likely be identical" where the parties in *Miller* have elected to forgo fact discovery altogether. *Int'l Fid. Ins. Co. v. Sweet Little Mexico Corp.*, 665 F.3d 671, 678 (5th Cir. 2011); Exh. 2 at 2.

Second, even if substantial overlap exists, courts may exercise discretion and decline application of the first-to-file rule in light of "compelling circumstances." *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407 (5th Cir. 1971). The first-filed rule "is not meant to be rigid, mechanical, or inflexible, but is to be applied in a manner that best serves the interests of justice." *Vital Pharmaceuticals, Inc. v. Derek Andrew Inc.*, 07-61177-CIV, 2007 WL 9710943, at *3 (S.D. Fla. Dec. 18, 2007). Perhaps for that reason, the *Holman* court denied Defendants' Motion without

even discussing the first-to-file presumption. *See* Exh. 1. In the Fifth Circuit, "[t]he *Volkswagen* convenience factors for a motion to transfer venue can be utilized to determine if compelling circumstances exist that warrant not applying the first-to-file rule." *DynaEnergetics Europe v. Hunting Titan, Inc.*, 6:20-cv-00069-ADA, 2020 WL 3259807, at *2 (W.D. Tex. June 16, 2020). Courts consider private factors such as "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) (*Volkswagen I*). They also consider public factors such as "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law." *Id.* Here, the factors are either neutral or counsel hearing Mr. McKinney's case in this forum. For instance, this forum, as Mr. McKinney's home forum, provides open access to sources of proof—particularly where the parties in the *Miller* case do not intend to obtain fact discovery. And because Mr. McKinney is a farmer in this District, there is a strong local interest in having his case decided at home.

There are additional "equitable considerations" that call for not applying the first-to-file presumption. *Wakaya Perfection, LLC v. Youngevity Int'l, Inc.*, 910 F.3d 1118, 1124 (10th Cir. 2018). As Defendants themselves stressed in another challenge to Section 1005, courts should not "prevent[] legal questions from percolating through the federal courts." *Wynn v. Vilsack*, 3:21-cv-00514, Defs' Opp. to Mot. for Prelim. Inj., ECF No. 22 at 40. Although Defendants were mistaken that a nationwide injunction would halt cases from percolating, they are correct that percolation "permits the airing of competing views that aids [the federal courts'] own 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). In addition to the benefits of percolation, the need to preserve Mr. McKinney's ability to press his independent arguments and obtain his requested relief with his counsel of choice are equitable consideration that weigh against a stay.

Moreover, now that at least one court (*Holman*) has refused to grant the government's similar request for a stay in a challenge to Section 1005, *see* Exh. 1, granting a stay in this case will not result in a single uniform proceeding. Even if this Court were to grant Defendants' motion, separate proceedings challenging Section 1005 will continue. Staying this case would thus not obviate the possibility of differing opinions on this important issue, but it would prevent the issue from percolating in this Court.

Third, the out-of-circuit cases cited by Defendants are inapposite because they involve latecomers who allowed their claims to languish well behind proceedings in another court. In this case, the original complaint in *Miller* featured a single plaintiff who had no farm loans and thus would have lacked standing to challenge Section 1005.[12] The amended complaint in *Miller* remedied that defect by adding plaintiffs with standing, but that document was filed just eight days before Mr. McKinney initiated his challenge in this Court, and the *Miller* classes were not certified until nearly a month later—after Mr. McKinney filed his complaint and moved for a preliminary injunction in this Court.

Defendants' cited authorities present cases with different litigation postures. *See* ECF No. 24 at 10–12. The district court in *Taunton Gardens Co. v. Hills*, 557 F.2d 877 (1st Cir. 1977), for

[12] Although the initial complaint sought to certify a class of farmers, the request was improper because the only "class representative" in the original *Miller* complaint did not have standing to challenge Section 1005. *See Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768–69 (5th Cir. 2020).

instance, was considering a motion for preliminary injunction while a *final judgment* in a concurrent case had been issued. *See Taunton Gardens Co. v. Hills*, 421 F. Supp. 524, 525–26 (D. Mass. 1976) (referencing *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976)). And in contrast to the immoderate stay urged by Defendants in this case, the First Circuit noted that "the duration of the stay [was] adequately circumscribed by reference to the determination of the appeal presently pending." *Taunton Gardens*, 557 F.2d at 879.[13] The proceedings in *Jiaming Hu v. U.S. Dep't of Homeland Sec.*, 4:17-cv-2363, 2018 WL 1251911 (E.D. Mo. Mar. 12, 2018), lagged behind the class action raising the same claims, with the complaint in *Hu* being filed over three months after the complaint and two months after the motion for preliminary injunction were filed in a parallel case. *See Nio v. U.S. Dep't of Homeland Sec.*, 323 F.R.D. 28 (D.D.C. 2017). *See also Richard K. v. United Behavioral Health*, 18-cv-6318, 2019 WL 3083019, at *5 (S.D.N.Y. June 28, 2019), report and recommendation adopted, 18-cv-6318, 2019 WL 3080849 (S.D.N.Y. July 15, 2019) (deferring to a class action lawsuit filed over four years before the complaint in *Richard K.*). In all, because Mr. McKinney is diligently pursuing his own claims, this Court should reject Defendants' efforts to force him to "stand aside while a litigant in another [case] settles the rule of law that will define the rights of both." *Landis*, 299 U.S. at 254–55.

CONCLUSION

Defendants' Motion to Stay Proceedings should be denied.

DATED: August 6, 2021.

[13] The Second Circuit's decision in *Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist.*, 112 F. App'x 89, 91 (2d Cir. 2004), is similarly unhelpful to Defendants. The Second Circuit's decision in the case provides only cursory analysis, and the government's briefs reveal that the classes including the *Mackey* plaintiffs had been certified in *two* other cases before the plaintiffs filed their complaint. *See* Br. of N.Y. State Ed. Dep't, *Mickey v. Bd. of Educ. for Arlington Cent. Sch. Dist.*, 03-7860, 2004 WL 3438192 (2d Cir. filed Mar. 16, 2004).

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 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
Wencong Fa

Exhibit 1

P. Opp. to Mot. to Stay/Order, *Holman v. Vilsack*

Court: E.D. Tex. Case No. 2:21cv212-RWS

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

ROBERT HOLMAN, Plaintiff, v. THOMAS J. VILSACK, in his official capacity as Secretary of the United States Department of Agriculture, and ZACH DUCHENEAUX, in his official capacity as Administrator of the Farm Service Agency, Defendants.	)	Civil Action No. 1:21-cv-01085-STA-jay

ORDER DENYING DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF RELATED CLASS ACTION

Before the Court is Defendants' motion to stay proceeding pending resolution of *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.), a related class action. (ECF No. 45). Plaintiff has filed a response and opposes the motion. (ECF No. 48.) For the reasons set forth below, Defendants' motion is **DENIED**.

"A district court's power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). However, "it is also clear that a court must tread carefully in granting a stay of proceedings, since a party has a right to a determination of its rights and liabilities without undue delay." *Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977). "[T]he burden is on the party seeking the stay to show that there is pressing need for delay, and that neither the other

party nor the public will suffer harm from entry of the order." *Id*. at 396; *see also Landis*, 299 U.S. at 255 ("Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.") In this case, Defendants have not met their burden.

As noted by Defendants, Plaintiff filed this action to challenge the USDA's implementation of Section 1005 of the American Rescue Plan Act of 2021 ("ARPA"). (ECF No. 1.) This Court granted Plaintiff's request for a preliminary injunction and enjoined disbursement of Section 1005 funds on a nationwide basis pending resolution of the case on the merits. (ECF No. 41.) Defendants contend that Plaintiff is a member of the two classes certified by the *Miller* Court under Rule 23(b)(2), and Defendants will be bound by any relief granted to the classes with respect to Plaintiff should the *Miller* plaintiffs' claim prevail. Defendants argue that, continued adjudication of Plaintiff's claims in this Court, separate from the class to which he belongs, would be unnecessarily duplicative and risk inconsistent results. Defendants further argue that a stay would not prejudice Plaintiff who will benefit from any judgment applicable to the classes and who, in the meantime, is protected by the preliminary injunctions entered by the *Miller C*ourt and this Court. According to Defendants, a stay would also preserve judicial resources and prevent hardship to Defendants who would otherwise be required to continue defending against duplicative claims in separate courts.

Plaintiff has responded by correctly pointing out that his primary authority, *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021), is not binding precedent in *Miller*, whereas it is binding in this Court. ("The government asks the Court to take this matter out of the hands of a Plaintiff who has already prevailed on a motion for preliminary injunction, and have his fate determined by other parties with other legal counsel in a court in a different judicial circuit that isn't bound by *Vitolo*

v. Guzman, 999 F.3d 353 (6th Cir. 2021)." (Resp. p. 8, ECF. No. 48.)) This fact alone militates against granting a motion to stay.

However, beyond that, the Court agrees with Plaintiff's argument that, if this matter is stayed, he "would have no say whatsoever in the pace at which *Miller* would proceed, including whether extensions of deadlines may be requested or granted by either party, or whether the government may seek en banc review by the Fifth Circuit, or whether ultimate review by the U.S. Supreme Court may occur." (*Id.* at p. 9.) Plaintiff could well have to wait years before he is able to resume his case in this Court.

Additionally, the interests of the *Miller* plaintiffs are not completely aligned with Plaintiff's interests, thus negating Defendants' claim of duplicative lawsuits. Plaintiff has alleged in his complaint that loan forgiveness will bar him from obtaining future loans from the USDA. While the government's position is that it can allow future loan eligibility for those who receive loan forgiveness under Section 1005, this Court has not decided the issue, and the issue has not been raised in *Miller*. Therefore, if the government accepts the suggestion of the *Miller* Court that "defendants will have a choice in whether to respond to the proposed injunction by extending loan forgiveness to all farmers and ranchers, or whether to respond by withholding loan forgiveness from everyone," *Miller*, No. 4:21-cv-595, ECF No 18 at PageID 675, and chooses to eliminate the race requirement of Section 1005, Plaintiff's claim concerning eligibility for future loans will be left unadjudicated. Finally, Plaintiff may choose to opt out of the *Miller* classes, thus leaving his interest unrepresented.

In summary, Defendants have not shown that a stay is warranted in this matter, and their motion to stay proceedings is **DENIED**. The parties are **DIRECTED** to confer and then submit a joint proposed scheduling order to the Court's ECF inbox in word processing format within

fourteen (14) days of the entry of this order. The Clerk of the Court will set a scheduling conference by separate order.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
CHIEF UNITED STATES DISTRICT JUDGE

Date: August 2, 2021.

Exhibit 2

P. Opp. to Mot. to Stay/Jt. Rep., *Miller v. Vilsack*

Court: E.D. Tex. Case No. 2:21cv212-RWS

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1IN THE 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*.	Civil Action No. 4:21-cv-595-O

JOINT REPORT

The Court ordered the Parties "to meet and confer and submit a joint report by July 16, 2021, informing the Court how this case will proceed." ECF No. 66. The Court directed such report to "address a proposed plan for the conduct of discovery, Plaintiffs' notification of class members, and whether the parties anticipate the case going to trial," as well as "anything else the parties find pertinent." *Id.*

There are two outstanding contingencies that will affect how Plaintiffs wish to proceed. First, Defendants have not yet decided whether to appeal the district court's order of July 1, 2021, which granted Plaintiffs' motion for preliminary injunction and enjoined the use of racial preferences in the administration of section 1005 of the American Rescue Plan Act. Second, Defendants have asked other district courts considering similar lawsuits over the constitutionality of section 1005 to stay their proceedings pending proceedings in this class-action lawsuit.

Nevertheless, the Parties have conferred and are in general agreement as to how this case will proceed if Defendants decline to appeal the district court's order of July 1, 2021.

1. If the Defendants do not appeal the preliminary injunction in this case, the Parties agree that judicial efficiency will be served by narrowing the issues in this litigation to those pursued by the certified classes. Plaintiffs moved to certify two classes to pursue claims "*only* against the continued enforcement of the racial exclusions in section 1005 of the American Rescue Plan Act," Pls.' Reply ISO Class Cert. at 1, ECF No. 41, and this Court certified those classes on July 1, 2021, Order, ECF No. 60. Plaintiffs' Amended Complaint also alleged other claims for which Plaintiffs did not seek class certification and which Defendants have moved to dismiss under Fed. R. Civ. P. 12(b), *see* ECF No. 49. If the Defendants do not appeal the preliminary injunction in this case, in lieu of further briefing on that motion, Plaintiffs state that they will likely file a Second Amended Complaint under Rule 15(a) that omits those claims, and instead assert only the claim of the two classes that § 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause. Plaintiffs will therefore file an unopposed motion to stay briefing on Defendants' pending Motion to Dismiss; the Parties propose filing a joint status report concerning briefing on that motion within seven days of Defendants' filing a notice of interlocutory appeal or the time for appeal expiring.

2. Narrowing the litigation in this manner will permit the Parties to proceed toward final judgment in this litigation on the claims for which Defendants have already answered, and for which this Court has already entered a preliminary injunction. The Parties anticipate that discovery on the § 1005 constitutional claim will be comparatively straightforward. The Parties do not believe factual discovery is necessary for the § 1005 constitutional claim, but believe that expert discovery will aid the Court and Parties in developing a full and complete record for decision.

With the understanding that only that claim will remain, the Parties have agreed to the following schedule for the conduct of discovery and dispositive motion briefing in this case:

- Initial Expert Reports – December 17, 2021
- Rebuttal Expert Reports – January 14, 2022
- Expert Depositions Complete by – February 11, 2022
- Simultaneous cross-motions for summary judgment – March 11, 2022
- Simultaneous response briefs – April 1, 2022

Given the significance of a final judgment evaluating the constitutionality of an Act of Congress, the Parties believe that a period of several months is needed to develop an adequate and complete record to inform the Court's final judgment. The Parties anticipate relying on expert testimony to address the claims in this case, and it will take substantial time for the Parties to first identify and retain such expert(s), for the expert(s) to review and analyze data reaching back decades and spanning the entire country, for the expert(s) to detail their findings in a report, for the Parties to review the competing reports and develop rebuttal reports as may be appropriate, for the Parties to depose the expert(s), and for the Parties to then incorporate that information, together with other information available, into briefing. The Parties do not believe that this schedule will prejudice Plaintiffs or the other members of the certified classes, who have obtained a preliminary injunction that, unless vacated by this or another court, will remain in place until final judgment.[1]

3. The Parties anticipate that, with the benefit of a full record developed through expert reports and expert depositions, this litigation may be resolved on cross-motions for summary judgment and without trial. If the litigation is not resolved at summary judgment, the Parties will

[1] Defendants have not appealed or sought a stay of this Court's preliminary injunction, but reserve their right to do so. Should the preliminary injunction be vacated for any reason, any party may move in this Court to adjust the schedule proposed here.

confer on whether a trial is then appropriate and will submit a proposed schedule to govern any further proceedings.

4. The Parties are continuing to discuss notice for the class members. Because the classes are certified under Rule 23(b)(2) and do not seek monetary damages, the Parties believe that immediate individualized notice is not necessary at this stage in the proceedings. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) ("[i]n the degree there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum" (quoting *See* Fed. R. Civ. P. 23 (advisory committee notes))). Some of the class members have brought separate lawsuits challenging Defendants' enforcement of section 1005. Those cases include: *Faust v. Vilsack,* 21-cv.-548 (E.D. Wis.); *Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla.); *Carpenter v. Vilsack*, 21-cv-103-F (D. Wyo.); *Holman v. Vilsack*, 1:21-cv-1085 (W.D. Tenn.); *Kent v. Vilsack*, 3:21-cv-540 (S.D. Ill.); *McKinney v. Vilsack*, 2:21-cv-212 (E.D. Tex.); *Joyner v. Vilsack*, 1:21-cv-1089 (W.D. Tenn.); *Dunlap v. Vilsack*, 2:21-cv-942 (D. Or.); *Rogers v. Vilsack*, 1:21-cv-1779 (D. Colo.); *Tiegs v. Vilsack*, 3:21-cv-147 (D.N.D.); *Nuest v. Vilsack*, 21-cv-1572 (D. Minn.). Plaintiffs' counsel intends to notify counsel in each of those cases of this Court's decision to certify the class.

5. The Parties have attached a proposed order for the Court's convenience.

Dated: July 16, 2021

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CERTIFICATE OF SERVICE

I certify that on July 16, 2021, a copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ *Jonathan F. Mitchell*
JONATHAN F. MITCHELL
Counsel for Plaintiffs and the Certified Classes

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

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

[PROPOSED] ORDER ON DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF RELATED CLASS ACTION

Pending before the Court is the Defendants' Motion to Stay Proceedings in this case (Docket No. 24), pending resolution of a class action on related issues. Having reviewed the motion, Plaintiff's response, the record in this case, and being fully apprised, it is hereby ORDERED:

That Defendants' Motion is DENIED; and

Pursuant this Court's Order of July 26, 2021 (Docket No. 31), Defendants' Answer to the Complaint shall be filed within 14 days of the date of this Order.