IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SCOTT WYNN, an individual, *Plaintiff*, v. THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture, *et al.*, *Defendants*.	No. 3:21–cv–00514–MMH–JRK

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

Scott Wynn is a member of certified classes in ongoing litigation in the Northern District of Texas. The claims pressed on Mr. Wynn's behalf in that action are substantively identical to those he presses here: that § 1005 of the American Rescue Plan Act violates equal protection under the Constitution. Defendants have moved to stay these proceedings while Mr. Wynn's claims are litigated in the class action; Mr. Wynn opposes and asserts the right to have his claims litigated in two district courts simultaneously—and, presumably, to accept whichever of the two judgments he prefers. As explained, courts in these circumstances routinely stay the individual action in favor of the class action. Indeed, three district courts recently granted Defendants' motions to stay other challenges to § 1005. *See* Orders, *Carpenter v. Vilsack*, No. 21-0103 (D. Wyo.) (Aug. 16, 2021), Dkt. 33 (here ECF No. 54-1); *Joyner v. Vilsack*, No. 21-1089 (M.D. Tenn.) (Aug. 19, 2021), Dkt. 21 (here ECF No. 55-1); *Faust v. Vilsack*, No. 21-548 (E.D. Wis.) (Aug. 23, 2021), Dkt. 66 (attached here as Ex. 1). This Court should stay these proceedings pending resolution of the *Miller* litigation.

I. Because Mr. Wynn's own claims are being litigated in another forum, the proposed stay is not immoderate and is eminently warranted.

As Defendants demonstrated, Mr. Wynn does not rebut, and the three recent decisions on similar motions confirm, courts regularly exercise their discretion to stay individual suits while a class action is litigated on behalf of the individual plaintiffs.

That is because, as the Fifth Circuit has explained in affirming the *dismissal* of such claims, "[t]o allow individual suits would interfere with the orderly administration of the class action and risk inconsistent adjudications." *Gillespie v.*

Crawford, 858 F.2d 1101, 1103 (5th Cir. 1988); *see also Fortner v. Thomas*, 983 F.2d 1024, 1031 (11th Cir. 1993) (general rule that individual action seeking relief duplicative of class action should be dismissed, but that individual action seeking damages not sought in the class action should be stayed, consolidated, or transferred). Instead, "[i]ndividual members of the class . . . may assert any equitable or declaratory claims they have, but they must do so by urging further action through the class representative and attorney, including contempt proceedings, or by intervention in the class action." *Gillespie*, 858 F.2d at 1103; *see also Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982).

Sound reason supports this general rule. As the Sixth Circuit explained: "If a class member cannot relitigate issues after final judgment in a class action suit, by analogy a class member should not be able to prosecute a separate equitable action once the member's class has been certified." *Bennett v. Blanchard*, 802 F.2d 456 (6th Cir. 1986) (citing *Goff*, 672 F.2d at 704). Allowing the member of a certified class to proceed with individual litigation in another court would "contravene the general principle that a party has no right to maintain two separate actions involving the same subject matter at the same time against the same defendant." *Richard K. v. United Behavioral Health*, 2019 WL 3083019, at *6 (S.D.N.Y. June 28, 2019), *R&R adopted*, 2019 WL 3080849 (July 15, 2019) (alterations omitted). It would "undermine the efficiency goals of class litigation," including "preventing inconsistent adjudications." *Id.*; *see Horns v. Whalen*, 922 F.2d 835 (4th Cir. 1991); *Gillespie*, 858 F.2d at 1103.

The stay that Defendants propose is appropriately limited in the context of this case—it is directly tied to ongoing litigation of *Mr. Wynn's* claims (together with those

of the other class members) in a single mandatory class action certified under Rule 23(b)(2). What Mr. Wynn proposes is that his claim be litigated simultaneously in this Court and also in the class action. The risk of inconsistent judgments inherent to this scenario is reason enough to stay the case: so long as Mr. Wynn's claims are being litigated in *Miller*, he cannot simultaneously litigate them in this separate proceeding. *See, e.g.*, *McNeil v. Guthrie*, 945 F.2d 1163, 1165 (10th Cir. 1991); *Horns*, 922 F.2d 835; *Gillespie*, 858 F.2d at 1103; *Bennett*, 802 F.2d at 456; *Goff*, 672 F.2d at 704.

Mr. Wynn thus misunderstands the requirement that a stay not be "immoderate." As the Eleventh Circuit explained in *Ortega Trujillo* itself, whether a stay is immoderate turns not only on its "potential duration" but also on "the reasons" supporting the stay. The proposed stay here is not simply so that this Court's decision might be informed by another court's adjudication of a similar issue between different parties. *Contra* Pl.'s Opp. at 15-16. Nor is it simply to avoid the burden of defending this lawsuit. Rather, the purpose of the stay is to prevent the anomalous litigation of Mr. Wynn's claims simultaneously in two courts. *Bennett*, 802 F.2d at 456. It is to avoid interference "with the orderly administration of the class action." *Gillespie*, 858 F.2d at 1103. It is to minimize the risk of "inconsistent standards." *Goff*, 672 F.2d at 704. And it is to ease the burden on both the Court and on Defendants of "*duplicative* litigation" in multiple fora, *id.* (emphasis added), which harms "the judicial system itself," *Joyner* Or. 5. As many courts have recognized, these conditions are ample reason to grant a stay in these circumstances. And, especially given that the individual

plaintiff's claim still proceeds in the class action, an "indefinite" stay is not immoderate even though it may remain in place "pending resolution of" the class action. *See Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir. 1990); *see Carpenter* Or. 9.

Confronted with this weight of precedents, Mr. Wynn does not identify any competing line of authority, but instead relies on distinctions of no meaningful significance. Mr. Wynn objects first that many of the cited cases are "out-of-circuit." Pl.'s Opp. 18. But those cases—from courts in the First, Second, Eighth, Ninth, Tenth, and Eleventh Circuits[1]—illustrate how widely accepted this practice is.[2] It is common in this circuit as well. *See, e.g.*, *Peterson v. Aaron's, Inc.*, 2015 WL 224750, at *3 (N.D. Ga. Jan. 15, 2015); *Chapman v. Progressive Am. Ins. Co.*, 2017 WL 3124186, at *2 (N.D. Fla. July 24, 2017); *see also Aleman*, 2021 WL 917969, at *2 (discussing earlier stay).

Plaintiff attempts to distinguish those cases by reducing the stay calculus to a comparison of procedural history—that is, when the class action was filed and then certified as compared to when an individual plaintiff initiated his case or received a court ruling on a pre-answer motion. *See* Pl.'s Opp. at 16-20. According to Plaintiff, a stay is inappropriate here either because Plaintiff filed his complaint two weeks before

[1] *Taunton Gardens Co. v. Hills*, 557 F.2d 877 (1st Cir. 1977); *Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist.*, 112 F. App'x 89, 91 (2d Cir. 2004); *Richard K.*, 2019 WL 3083019; *Jiaming Hu v. DHS*, 2018 WL 1251911 (E.D. Mo. Mar. 12, 2018); *Bargas v. Rite Aid Corp.*, 2014 WL 12538151 (C.D. Cal. Oct. 21, 2014); *Gonzales v. Berryhill*, 18-cv-603, ECF No. 28 (D.N.M. Mar. 5, 2019); *Aleman ex rel. Ryder Sys., Inc. v. Sancez*, 2021 WL 917969 (S.D. Fla. Mar. 10, 2021); *Sanchez-Cobarrubias v. Bland*, 2011 WL 841082 (S.D. Ga. Mar. 7, 2011).

[2] Additional cases include, for example: *Wagner v. Speedway LLC*, 2021 WL 1192691 (N.D. Ill. Mar. 30, 2021); *Hollins v. Hendricks*, 2021 WL 535842 (D. Or. Feb. 12, 2021); *Bouas v. Harley-Davidson Motor Co. Group, LLC*, 2020 WL 2334336 (S.D. Ill. May 11, 2020); *Emerson v. Sentry Life Ins. Co.*, 2018 WL 4380988 (W.D. Wis. Sept. 14, 2018); *Guill v. All. Res. Partners, L.P.*, 2017 WL 1132613 (S.D. Ill. Mar. 27, 2017); *McDaniels v. Stewart*, 2017 WL 132454 (W.D. Wash. Jan. 13, 2017).

the amended complaint was filed in *Miller* or because he obtained a preliminary injunction two weeks before the class was certified. *Id.* at 18.

But Plaintiff misleadingly quotes from a Tenth Circuit case to suggest that the date of the amended complaint is what matters, when that court explained that "the filing date[]" is what "constituted the date[] that jurisdiction attached." *Wakaya Perfection, LLC v. Youngevity Int'l, Inc.*, 910 F.3d 1118, 1126 (10th Cir. 2018); *see Penn Gen. Cas. Co. v. Pennsylvania*, 294 U.S. 189, 196 (1935) (preference is given to court "whose jurisdiction and process are first invoked by the filing of the bill"). Indeed, the propriety of the first court's jurisdiction "is never a condition precedent to applying" the first-filed rule. *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 605–06 (5th Cir. 1999). The Court in *Carpenter* rejected the same argument Plaintiff makes here as "unpersuasive" and held that "[t]here is no dispute that jurisdiction vested first with the *Miller* court." *Carpenter* Or. 6 n.2. This Court too should disregard Plaintiff's invitation to evaluate a since-superseded complaint filed in another court to determine whether a party in another case had standing. Plaintiff's focus on the timing of class certification is also misplaced. Plaintiff identifies no case that gave any weight to that factor. Indeed, many stays are expressly granted while class certification is pending.[3]

Plaintiff's purported distinctions are therefore without force. Defendants cited *Taunton Gardens*, 557 F.2d 877 (1st Cir. 1977), as an example of a stay in circumstances comparable to this case, given the significance of the government program at issue

[3] *See, e.g.*, *Hollins*, 2021 WL 535842, at *2; *McDaniels v. Stewart*, 2017 WL 132454, at *2; *Sanchez-Cobarrubias*, 2011 WL 841082, at *1; *Bargas*, 2014 WL 12538151, at *3.

there and the multitude of similar lawsuits challenging that program across the country. *See* Defs.' Mot. 13-14. Plaintiff's only retort is that *Taunton Gardens* was stayed after the related class action (*Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976)) was resolved on the merits. But that distinction is not a meaningful one. In *Underwood*, the court issued one order that simultaneously certified the class, consolidated the class's motion for a preliminary injunction with the trial on the merits, and granted the class's motion for summary judgment. *Id.* at 531-32. That *Taunton Gardens* immediately followed this three-fold order in *Underwood* does not undermine the relevance of its analysis to this case. Indeed, *Taunton Gardens* underscores that, in some circumstances, a stay may be warranted even where the individual plaintiff is *not* a member of the certified class. 557 F.2d at 878 (observing that *Taunton Gardens* plaintiffs were not part of the class certified in *Underwood*); *see also, e.g.*, *Bouas*, 2020 WL 2334336, at *2.

Mr. Wynn similarly gives no reason why it matters that the *Mackey* litigation duplicated claims in two actions instead of one, or that the district court had dismissed the claim without first entering a preliminary injunction. Rather than engage the reasoning of *Jiaming Hu*, Plaintiff invites the Court to examine its docket history. And he distinguishes *Aleman* as "not addressing a stay motion" but fails to observe that the court there described its earlier stay. Plaintiff does not rebut either that the court did enter a stay or that the stay was comparable to the one Defendants seek here. Plaintiff dismisses *Richard K.* only on the ground that more time had passed between the first and later suits. But what Plaintiff fails to do is confront the *reasons* warranting a stay in

those cases, or to explain why they do not pertain here. As Defendants have explained, the overwhelming weight of authority shows that courts routinely stay proceedings "pending [] resolution of" the class action, and that such stays are not "immoderate."[4]

Plaintiff presents no case to the contrary. In *Ortega Trujillo v. Conover & Co. Comms., Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000), Plaintiff's principal case, the court found that the district court's one-page *sua sponte* order staying the case while other courts "conclude[d] their review" of a related action was immoderate because, "contrary to the district court's assessment" of the related litigation, that case was "not progressing quickly," *id.* at 1264—in fact, it had been pending for four years, no trial date was yet set, and no end to the case was in sight, *id.* at 1263-64 & n.4. Additionally, the court's "stay order [did] not explain in detail the district court's reasoning," leaving the parties to guess as to the "possible reasons" for the stay. *Id.* at 1265.

Unlike the unexplained and indeterminate stay in *Ortega Trujillo*, the stay Defendants request here is well justified—and wholly unremarkable, as shown by the numerous cases ordering stays of similar scope. The requested stay would not be "immoderate" because it would be precisely defined with reference to final resolution of the Section 1005 class claim in *Miller*, which claim is being litigated expeditiously in that court. *See Richard K.*, 2019 WL 3083019, at *9. Under the agreed-upon schedules proposed in *Miller*, summary judgment briefing would be complete April 1,

[4] *See Aleman*, 2021 WL 917969, at *2 (explaining that, in related proceedings, the court had "entered an order staying proceedings . . . pending [] resolution of" a related class action that would "necessarily impact the proceedings in" that case); *Richard K.*, 2019 WL 3083019, at *8; *Jiaming Hu*, 2018 WL 1251911, at *4; *Taunton Gardens*, 557 F.2d at 878; *Gonzales*, 18-cv-603, ECF No. 28.

2022—only two months later than the same deadline in this case. *Compare Miller*, ECF No. 70, *with Wynn*, ECF No. 43. In the meantime, Plaintiff has already obtained a preliminary injunction—which will remain in place during the stay—that ensures that his alleged rights will not be harmed while *Miller* is litigated. And there is no risk that this modestly extended litigation schedule will lead to a loss of evidence or witness memories—neither of which is relevant to this case—as was important to the court in *Garmendiz v. Capio Partners, LLC*, 2017 WL 3208621, at *2 (M.D. Fla. July 26, 2017).

Any reliance on the recent denial of a similar motion in *Holman v. Vilsack*, 2021 WL 3354169 (W.D. Tenn. Aug. 2, 2021), is sorely misplaced. Defendants respectfully disagree with that decision. Indeed, the same court that denied a stay in *Holman* just granted one in *Joyner*, where further briefing led the court to correct its view of a plaintiff's potential to opt-out of the *Miller* litigation. *See Joyner* Or. 6; *see infra*. This Court should not compound the earlier error by permitting additional duplicative litigation. *Holman* also turned on factors not present here, such as the availability of a specific Sixth Circuit precedent and the *Holman* plaintiffs' maintenance of claims not raised here. *See Joyner* Or. 4 n.1 (distinguishing that court's earlier order in *Holman*). Contrary to Plaintiff's assertion, his claims will not wither on the vine during a stay, but instead will proceed apace in *Miller*. *See Joyner* Or. 6.

In short, the proposed stay is amply justified by the circumstances and relevant case law. The need to prevent inconsistent judgments and avoid duplicative litigation warrants staying proceedings for the time it takes to reach final judgment in *Miller*.

II. Plaintiff misunderstands the scope of the *Miller* action.

In an apparent effort to escape the weight of this authority, Mr. Wynn presents an incomplete and misleading portrait of the *Miller* litigation that warrants correction. Plaintiff does not deny that he is a member of the certified classes. But he suggests that the certified classes are pursuing "broader (and weaker) claims." Pl.'s Opp. at 10; *see id.* at 4-6. That is incorrect. Plaintiff omits that the *Miller* plaintiffs sought (and obtained) class certification only for the challenge to the validity of § 1005. *See Miller*, Reply ISO Class Cert. 1, Dkt. 41 (June 18, 2021); *Miller* Or. (ECF No. 44-1) 7, 13; *Miller* Jt. Rpt. (ECF No. 49-1). That claim—which, again, is advanced on Mr. Wynn's behalf—overlaps with Mr. Wynn's claims in this litigation. Not only is that challenge the only one for which the classes have been certified, but the "broader (and weaker) claims" are subject to a pending motion to dismiss, and class counsel has indicated that if the Government does not appeal the preliminary injunction,[5] 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." *Miller* Jt. Rpt. 2.

Plaintiff also points to other superficial differences between this litigation and the *Miller* litigation. Mr. Wynn insists that his claims are different because they include a request for nominal damages and a claim under the Administrative Procedure Act. But Mr. Wynn's APA claim is identical to, and seeks identical relief as, his

[5] The Government's deadline to appeal the preliminary injunction in *Miller* is August 30, 2021. The deadline to appeal the class certification order has already lapsed. *See* Fed. R. Civ. P. 23(f).

constitutional claim. *See* Compl. ¶ 67 (APA claim asserting that § 1005 "violate[s] the equal protection component of the Due Process Clause"); *see id.* Prayer for Relief. And Mr. Wynn's request for nominal damages is not a separate claim, but a remedy akin to a declaratory judgment; that request for $1 does not differentiate this case from *Miller* in any appreciable way. Regardless, and as the Supreme Court explained in *Landis*, it is not necessary that "the parties to the two causes must be shown to be the same and the issues identical" for a stay to issue. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Georgia ex. rel. Olens v. McCarthy*, 833 F.3d 1317, 1321 (11th Cir. 2016); *Jones v. Aranas*, 2020 WL 8881675, at *2 (D. Nev. Apr. 23, 2020).

Plaintiff also indicates that he intends to try to opt out of the *Miller* classes.[6] *See* Pl.'s Opp. 14 n.11. The courts in *Carpenter*, *Joyner*, and *Faust* all rejected the same argument in granting Defendants' motions for stays. *Carpenter* Or. 5-6; *Joyner* Or. 6; *Faust* Or. 2. As all three recognized, the *Miller* classes are Rule 23(b)(2) classes, and, as the Supreme Court has explained, (b)(2) classes are "*mandatory* classes: The Rule *provides no opportunity* for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action." *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 361-62 (2011); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1153 (11th Cir. 1983) ("The general rule in this circuit remains that absent members of (b)(2) classes have no automatic right to opt out of the lawsuit and to prosecute an

[6] Mr. Wynn's complaint that class counsel has "never communicated with Mr. Wynn" and does not intend to provide "individualized notice" to each class member, Pl.'s Opp. at 13, rings particularly hollow: in the very same paragraph Mr. Wynn cites, class counsel specifically committed to notifying Mr. Wynn's counsel of the class litigation. *See* ECF No. 49-1 at 5.

entirely separate action."). While some courts have permitted class members to opt out of (b)(2) classes, they have done so where, unlike here, the claims implicate individualized monetary relief. In those circumstances, due process concerns may require an opportunity to opt out. *See Holmes*, 706 F.2d at 1155 (noting opt-out may be required "at the monetary relief stage"). But neither Mr. Wynn nor the *Miller* classes seek monetary relief; there is no basis for permitting him to opt out of the *Miller* classes.

Even before *Wal-Mart*, courts recognized that the opportunity to opt out was incompatible with Rule (b)(2) classes seeking only injunctive relief. *See, e.g.*, *Holmes*, 706 F.2d at 1157 (11th Cir. 1983) ("Opting out of a (b)(2) suit for injunctive relief would have little practical value or effect."); *Messier v. Southbury Training Sch.*, 183 F.R.D. 350, 355-56 (D. Conn. 1998). As one court explained in certifying a class, "there is always the possibility that some members of the class will take a position different from that of those who have assumed the laboring oar in a litigation," but when the suit challenges the validity of a government program "exclusion is obviously impossible since the [government's] regulations must stand or fall as a whole." *Rosado v. Wyman,* 322 F. Supp. 1173, 1193-94 (E.D.N.Y.), *aff'd*, 437 F.2d 619 (2d Cir. 1970).

And in *Wal-Mart*, the Supreme Court curtailed the availability of Rule 23(b)(2) class actions that also seek monetary relief. It is thus doubtful whether opt-outs are available at all in Rule 23(b)(2) classes, because in such a class "the relief sought *must perforce* affect the entire class at once," *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 361-62 (2011) (emphasis added). In other words, a (b)(2) class cannot exclude plaintiffs

who bring identical cases around the country because the "key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id.* at 360; *cf. Devlin v. Scardelletti*, 536 U.S. 1, 10–11 (2002) (observing inability to opt out of 23(b)(1) class).

Regardless, as of this moment Plaintiff *is* a member of the class. A stay, rather than dismissal, "accommodates the possibilities" that the *Miller* classes are decertified or that Plaintiff is later excluded from the classes. *Richard K.*, 2019 WL 3083019, at *8; *see also Carpenter* Or. 6 (noting that plaintiff could seek to lift stay if later excluded from *Miller* class); *Joyner* Or. 7; *Ritchie Cap. Mgmt., L.L.C. v. BMO Harris Bank, N.A.*, 868 F.3d 661, 666 (8th Cir. 2017). Because Mr. Wynn "remains a member" of the *Miller* classes, he is litigating his claims in two fora. *Richard K.*, 2019 WL 3083019, at *8 n.6. This condition is contrary to the purpose of a (b)(2) class, to the rule against maintaining two separate, like actions, and to the overwhelming weight of authority on this issue.

III. Three existing injunctions eliminate any other prejudice to Plaintiff.

Mr. Wynn will incur no prejudice from any delay. He has already obtained preliminary relief equal to the final relief he seeks, and is similarly protected by two other injunctions, including in *Miller.* Put simply, Mr. Wynn is not prejudiced by a delay to obtaining his own, personalized final judgment. And Mr. Wynn's claims will not sit idle while this litigation is stayed. Quite the opposite, his claims will proceed apace *in the class action*, together with the claims of all members of the certified classes. *See Joyner* Or. 6. In these circumstances—when "the claims made in an individual

lawsuit overlap with the claims being pursued by a certified class of which the individual is a member"—stays are "routine[]." *Richard K.*, 2019 WL 3083019, at *7.

Mr. Wynn nonetheless suggests he will be prejudiced because his claims will be litigated in the *Miller* litigation by someone other than his own chosen counsel outside own chosen forum. As evidenced by the three recent decisions rejecting the same arguments, such concerns are commonly raised and rejected and are no reason to deny a stay. *See Faust* Or. 2-3; *Joyner* Or. 5; *see also, e.g.*, *Emerson v. Sentry Life Ins. Co.*, 2018 WL 4380988, at *2 (W.D. Wis. Sept. 14, 2018) (granting stay when nonmovant "fail[ed] to provide a plausible account of what she stands to lose by proceeding as a member of the [other action's] class, other than representation by the counsel of her choice"). Plaintiff's position would undermine the conceptual framework of mandatory class actions. There may be procedural mechanisms, "including intervention and amici briefs," *Faust* Or. 3, for Mr. Wynn to raise his concerns in the *Miller* litigation, but the *Miller* court has determined that class counsel will adequately represent Mr. Wynn's interests. *Miller* Or. 12. Principles of judicial comity counsel against this Court second-guessing or interfering with that determination. *Cf. Med. & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 992 (11th Cir. 2020) (certifying court alone decides Rule 23 questions). As the court explained in granting Defendants' motion for a stay in *Carpenter*, "Plaintiff's argument that her interests are only adequately served by her own attorneys flies against the *Miller* court's finding that counsel in the *Miller* case 'will adequately represent the interests of class members

similarly situated in zealously pursuing the requested relief.'" *Carpenter* Or. 6. Plaintiff's "rights and grievances as to [Defendants] will be protected and adjudicated just like any other class member's." *Emerson*, 2018 WL 4380988, at *2.

Mr. Wynn also suggests he may prejudiced because he seeks factual discovery. But he fails to identify any specific harm from delaying that discovery, such as the fading of memories or a loss of evidence. *Cf. Garmendiz*, 2017 WL 3208621, at *2. And as Mr. Wynn has already acknowledged, "the key facts in this case will be undisputed" and he "does not anticipate extensive discovery from Defendants," Jt. Notice at 2, ECF No. 42; *see id.* (proposing just one month of fact discovery before expert reports).

In a last effort to demonstrate prejudice, Plaintiff embraces, and asks the Court to embrace, the sunk-cost fallacy: that this litigation must proceed because of the time and energy already exhausted in it. Pl.'s Opp. 14-15. But a stay is a forward-looking remedy—its purpose is to avoid unnecessary litigation in the future, not to remedy costs already incurred. *Richards v. Ernst & Young LLP*, 2012 WL 92738, at *3 (N.D. Cal. Jan. 11, 2012) (granting stay "after years of litigation" because of intervening orders that expanded the burden on litigants). Thus it would not matter if the parties and Court had already sunk substantial energies into this litigation: that is not a reason to pour still more resources into duplicative litigation. *See Faust* Or. 3. Entering a stay now will not only eliminate the risk of conflicting judgments—reason enough to grant the stay—but will also eliminate potentially unnecessary discovery and briefing yet to come, and will conserve the Court's own resources in adjudicating any motions. *Cf. Carpenter* Or. 9-10 (observing that public interest supports a stay).

IV. Plaintiff's assertions of inequitable conduct do not warrant departure from the ordinary rules governing duplicative litigation.

There is a well settled and "strong presumption" in this Circuit that "favors the forum of the first-filed suit." *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005). To overcome this presumption, a plaintiff must "carry the burden of proving compelling circumstances." *Id.* Mr. Wynn accuses Defendants of engaging in "inequitable conduct" that warrants an exception. Pl.'s Opp. at 17-18.

Given the transparent lack of merit to any suggestion of forum shopping, Mr. Wynn instead makes the peculiar suggestion that a stay should be denied because Defendants previously sought a page extension in opposing the motion for preliminary injunction. Pl.'s Opp. at 17. Plaintiff next presents a confused version of judicial estoppel, insisting that because Defendants unsuccessfully opposed a nationwide injunction earlier, they are now bound to adhere to that unsuccessful argument. Defendants opposed nationwide relief before a class was certified in *Miller*, which raises distinct concerns, such as the risk of conflicting judgments and the simultaneous litigation of Mr. Wynn's claims in two forums. Regardless, it was Plaintiff's view—that a nationwide injunction is appropriate and outweighed any interest in percolation—that prevailed, and so under the rules of judicial estoppel it is *Plaintiff* who is estopped from arguing to the contrary. *See New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001). Plaintiff has not met his burden to "prov[e] compelling circumstances." *Manuel*, 430 F.3d at 1135.

The Court should stay these proceedings pending resolution of *Miller*.

Dated: August 30, 2021

Respectfully submitted,

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Certificate of Service

I hereby certify that on August 30, 2021, a copy of the foregoing motion was filed electronically via the Court's ECF system, which effects service on counsel of record.

/s/ Michael F. Knapp
MICHAEL F. KNAPP
U.S. Department of Justice

Exhibit 1

Order Granting Stay

ECF No. 66, Faust v. Vilsack, No. 1:21-cv-548 (W.D. Wisc.)

August 23, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ADAM P. FAUST, et al.,

Plaintiffs,

v. Case No. 21-C-548

THOMAS J. VILSACK, et al.,

Defendants.

DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR A STAY

Plaintiffs, twelve farmers who reside in nine different states, including Wisconsin, brought this action against the Secretary of Agriculture and the Administrator of the Farm Service Agency (FSA), seeking to enjoin officials of the United States Department of Agriculture (USDA) from implementing a loan-forgiveness program for socially disadvantaged farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA). This matter comes before the Court on Defendants' motion to stay proceedings pending resolution of a related class action in *Miller v. Vilsack*, No. 4:21-cv-595 (N.D. Tex.). For the following reasons, Defendants' motion will be granted.

The decision to grant a motion to stay proceedings is within the district court's discretion, and such power is identical to the inherent power in every court to control its docket given considerations of judicial economy and of the burden on the court and the parties. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "The proponent of the stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). In evaluating a motion to stay, courts consider "(1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in

question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court." *Grice Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010) (citations omitted). The court must balance these factors "in light of the court's strict duty to exercise jurisdiction in a timely manner." *Id.*

Defendants request that the Court stay proceedings in this case until the final resolution of the class challenge to Section 1005 in *Miller*. They assert that Plaintiffs are members of the two classes certified by the *Miller* court under Rule 23(b)(2) and that Defendants will be bound by any relief granted to the classes with respect to Plaintiffs in the event the *Miller* plaintiffs' claims prevail. Defendants contend that a stay promotes judicial economy because continued adjudication of this case would be unnecessarily duplicative, waste resources, and risk inconsistent results. In addition, Defendants argue that a stay would not prejudice Plaintiffs because they are class members and will be bound by and benefit from any final judgment applicable to the classes, they are currently protected by the nationwide preliminary injunctions that have been entered in a number of cases, including in *Miller*, and the proceedings in the two cases are just commencing.

The Court concludes that the interests of judicial economy and efficiency militate in favor of a stay. Because Plaintiffs are members of the classes certified by the *Miller* court, *Miller* involves the same parties, claims, and requests for relief. Plaintiffs do not dispute that they are class members and would receive relief in *Miller*. Instead, they argue that they may attempt to opt out of the *Miller* class. Although Rule 23(b)(2) classes generally do not mandate notice and an opportunity to opt-out, *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–63 (2011), in the event Plaintiffs do opt out of the class, they can advise the Court and move to lift the stay.

Plaintiffs argue that the right to advance their own legal theories through their own counsel are not adequately protected by a stay. They contend that the interests of Plaintiffs in this case and the class in *Miller* may not necessarily overlap and that counsel in *Miller* "may be compelled to

devote resources to arguing factual issues distinct from those of Plaintiffs in this case (and in other cases filed across the country)." Dkt. No. 61 at 9. But in granting the motion for class certification, the *Miller* court determined that class counsel "will adequately represent the interests of class members similarly situated in zealously pursuing the requested relief." Dkt. No. 51-1 at 13. To the extent Plaintiffs disagree with class counsel's litigation strategy or approach, Plaintiffs have a number of procedural mechanisms available to them to raise their concerns in *Miller*, including intervention and amici briefs. Plaintiffs also assert that it is likely that the class action will take longer to resolve than the instant case. In the event progress in the *Miller* case is significantly delayed, the injunction is lifted, or the class is decertified, Plaintiffs can seek relief in this Court. In short, a stay will not unduly prejudice Plaintiffs. Conversely, a stay would avoid hardship to the government, which would otherwise be tasked with defending against numerous, identical actions across the country at the same time. In other words, a stay would reduce the costs and burden of litigation on the parties and on the court. Staying this action will allow for judicial expediency, efficiency, and consistency.

Accordingly, Defendants' motion for a stay (Dkt. No. 51) is **GRANTED**. This case is stayed pending resolution of the class challenge to Section 1005 in *Miller v. Vilsack*, No. 4:21-cv-595 (N.D. Tex.). Defendants must file a status report every six months on the progress of the *Miller* case. The motion to intervene (Dkt. No. 34) and motion for leave to file amici curiae brief (Dkt. No. 41) are **DENIED** without prejudice. In the event the stay is lifted, the motions may be refiled.

SO ORDERED at Green Bay, Wisconsin this 20th day of August, 2021.

s/ William C. Griesbach
William C. Griesbach
United States District Judge