UNITED STATES DISTRICT COURT
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-00595-O

REPLY IN SUPPORT OF MOTION TO OPT OUT OF CERTIFIED CLASSES OR, IN THE ALTERNATIVE, TO AMEND CLASS CERTIFICATION ORDER

Movants' separate lawsuits were filed either: (1) before this case included a Plaintiff with standing to challenge Section 1005 (*Wynn*); (2) before any classes were certified (*Dunlap*, *Kent*, and *McKinney*); or (3) just days after certification (*Tiegs*). And all Movants' challenges were filed prior to the operative complaint in this case, in which Plaintiffs aligned their claims more closely with Movants'. *See* ECF No. 87 (Sept. 22, 2021). Accordingly, Defendant does not argue—as he did in motions to stay Movants' cases—that this case is entitled to priority because it was "first-filed." Instead, his position is that a (b)(2) class action must take precedence over other contemporaneous (or even earlier-filed) cases simply because it is a class action. Because Plaintiffs sought class relief, whereas Movants brought their claims individually, Defendant argues this should be the *only* case in which the constitutionality of Section 1005 is considered.

One court has already rejected that argument. *See Holman v. Vilsack*, No. 1:21-cv-01085, 2021 WL 3354169 (W.D. Tenn. Aug. 2, 2021). And even though other district courts have granted the government's motions to stay challenges to Section 1005, those courts did not necessarily agree that the issue should only be considered in a single case. Instead, they granted stays primarily to

avoid interfering with this Court's class certification decision. Almost all of them will reconsider the stays if this Court grants Movants' request to opt out.[1]

This Court should grant Movants' request. Defendant argues, contrary to Fifth Circuit precedent, that no opt-out is possible or that it must be limited to "hybrid" classes involving individualized damages. Not so. The Court retains discretion to allow opt-out whenever it will "protect the interests of the absent class members." *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. 1981). And here, Movants have strong justification for opting out, including their assertion of distinct claims, request for distinct relief, and divergent litigation strategy. Moreover, constitutional considerations favor granting Movants' request to opt out.

Defendant next argues that even if the Court has discretion to permit opt-out, it would be "inefficient" to allow this case and Movants' challenges to proceed. But that proves too much, as those same supposed inefficiencies exist whenever multiple cases seek to enjoin a nationwide program. Yet courts do not routinely shut down such challenges, leaving it to a single judge to sort out the law. And allowing multiple courts to consider an important constitutional question does not become more "inefficient" simply because one of the cases is styled as a class action.

Even if Defendant's opt-out arguments had merit, Movants have alternatively requested amendment of the class certification. That is not even arguably prohibited by Rule 23 or the cases Defendant cites, and he does not argue otherwise. At bottom, Defendant asserts a policy position that even though Section 1005 created a nationwide debt relief program affecting thousands of farmers across the country, the federal government should only be required to defend it in a single

[1] *See* Mot. 5 (citing stay decisions); *see also* Opinion & Order at 6, *Dunlap v. Vilsack*, No. 2:21-cv-00942-SU, ECF No. 42 (D. Ore. Sept. 21, 2021). Although the *Wynn* court has not ruled on the government's stay request, it denied the government's motion to administratively stay the case, allowing discovery to continue. *See* Order, *Wynn*, ECF No. 50 (M.D. Fla. July 27, 2021).

court. This Court should reject that position and allow Movants to proceed in their chosen forums.

I. Movants Should Be Permitted to Opt Out of the Certified Classes

In the Fifth Circuit, courts have discretion to allow opt-out from a (b)(2) class whenever it is "desirable to protect the interests of the absent class members." *Penson*, 634 F.2d at 994. Defendant cites decisions from other jurisdictions that purportedly take a stricter approach, Opp. 9 (citing cases from the Third, Fourth, Sixth, and Eighth Circuits), but those are not binding on this Court.[2] Likewise, district court decisions granting stays in other Section 1005 challenges have no bearing on whether this Court can grant an opt-out. Movants are not attempting to "re-litigate" those stays, *see* Opp. 1, and any discussion in those cases of the availability of opt-out in this case is both non-binding and dicta. It is entirely proper for Movants to seek an independent discretionary decision from this Court allowing them to opt out, which would resolve the primary reason the other courts granted stays: reluctance to interfere with this Court's class certification decision.[3]

Defendant erroneously claims that the Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), "abrogated" the Fifth Circuit's opt-out rule. Opp. 10. *Wal-Mart* did nothing of the kind. The question before the Court in *Wal-Mart* was whether individualized claims for monetary relief may be certified under (b)(2); it concluded that they may not. 564 U.S. at 360. Although the majority opinion also noted that "[t]he Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out," *id.* at 362, that was simply a recognition that the text of Rule 23

[2] Defendant also cites 1970s-era Fifth Circuit cases that he claims "held that class members are not permitted to opt out of a (b)(2) class." Opp. 9. But the cited language either is dicta, does not prohibit discretionary opt-out, or was superseded by the Fifth Circuit holding in *Penson*.

[3] Defendant repeatedly calls (b)(2) classes "mandatory" as if the term itself precludes opt-out. But "mandatory" simply means there is no "*automatic* right to notice or opt out of the class." *Cates v. Cooper Tire & Rubber Co.*, 253 F.R.D. 422, 431 (N.D. Ohio 2008) (emphasis added). It does not mean courts lack *discretion* to allow opt-out. *See* 2 Newberg on Class Actions § 4:36 (5th ed. 2021) ("Rule 23(c) . . . makes notice (and opt out) discretionary for (b)(1) and (b)(2) classes. For this reason, (b)(2) class actions . . . are often referred to as 'mandatory' class actions.").

requires notice and opt out for (b)(3) classes but not for (b)(1) or (b)(2) classes. *See* Fed. R. Civ. P. 23(c)(2). The Court did not say that district courts *lack discretion* to allow opt out for those classes. And cases after *Wal-Mart* continue to recognize opt-out discretion as to (b)(2) classes. *E.g.*, *Serna v. Transp. Workers Union of Am., AFL-CIO*, No. 3:13-CV-2469-N, 2014 WL 7721824, at *11 (N.D. Tex. Dec. 3, 2014) (granting opt-out for a (b)(2) class); *Sourovelis v. City of Philadelphia*, 320 F.R.D. 12, 30 n.11 (E.D. Pa. 2017) (noting that the Fifth Circuit holds "that a district court has the discretion under Rule 23 to grant opt-out rights in a Rule 23(b)(2) class action").[4]

Defendant next incorrectly claims that the Court's opt-out discretion extends only to "hybrid" classes with individualized monetary claims. Opp. 10–11. To the contrary, courts consider a variety of factors in deciding whether to allow opt-out, including whether there are "antagonistic interests"—which obviously may exist regardless of whether there are unique monetary claims. *Penson*, 634 F.2d at 994. To be sure, opt-out is most often granted for individual monetary claims; after all, that is the context in which unique interests are most likely to incentivize opt-out. *See* 3 Newberg on Class Actions § 9:51 (5th ed. 2021) (stating that cases allowing (b)(2) opt-out "tend to be those that involve individualized monetary damages"). But that the cases "tend to" involve individualized damages does not foreclose other, equally valid reasons for granting an opt-out—and in fact implies that such reasons exist.

Here, Movants have ample justification to seek an opt out, for at least three reasons. ***First***, Movants retained counsel and filed their challenges contemporaneous with this case (and as to Mr.

[4] *See also, e.g.*, *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 370–71 (7th Cir. 2012); *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 137 (E.D.N.Y. 2020); *Tellis v. LeBlanc*, No. 18-CV-0541, 2019 WL 1103420, at *6 n.4 (W.D. La. Mar. 8, 2019); *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534, 562 (C.D. Cal. 2012).

Wynn, before this case had a Plaintiff with standing to challenge Section 1005—a proposition Defendant does not dispute). They have raised distinct claims, including an APA claim, and seek different relief, including nominal damages. *See* Mot. 7–8. Defendant downplays nominal damages as unimportant, Opp. 15–16, but the Supreme Court recently rejected "the flawed premise that nominal damages are purely symbolic, a mere judicial token that provides no actual benefit to the plaintiff." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021). Nominal damages are real damages that "affect the behavior of the defendant towards the plaintiff" and "independently provide redress." *Id.* (alteration omitted). Binding Movants to this class action would deny them the chance to seek this valuable form of relief.[5]

Second, although Plaintiffs have eschewed fact discovery, Movants view it as essential to definitively disproving the notion that a racially discriminatory debt relief program is justified based on outdated evidence of past racial discrimination, especially when Congress has already made extensive remedial efforts. Defendant argues that the need for fact discovery is "questionable" because Movants brought facial challenges. Opp. 16. But the government's attempt to justify Section 1005 as a necessary response to ongoing effects of past racial discrimination requires factual investigation. Denying an opt-out to Mr. Wynn would be especially prejudicial, as he is in the middle of discovery and has already received thousands of pages of documents regarding Defendant's assertion that Section 1005 is justified by a history of discrimination.

It is no answer to say that Movants could "raise their concerns with class counsel" or "file an amicus brief." Opp. 16; *see also id.* at 18 (claiming that "various procedural mechanisms" would

[5] Defendant's claim that Plaintiffs seek the same relief as Movants, Opp. 16 n.8, is untrue as to nominal damages and unclear as to Movants' alternative remedy of striking Section 1005's racial classification, *see* Mot. 8 n.6. Plaintiffs have never expressly requested that remedy; instead, they suggest that briefing on remedy should await a decision on summary judgment. ECF No. 83 at 2.

allow Movants to "make their voices heard"). Class counsel has elected to forgo fact discovery entirely and has no obligation to listen to Movants regarding litigation strategy. Participation as an amicus would grant Movants neither the right to conduct discovery nor the ability to appeal any unfavorable decision. And although Movants could perhaps seek to conduct discovery as intervenors, that would require amending the Court's scheduling order, and Defendant likely would oppose Movants' attempt to participate as separate parties to this case. Defendant's proposed "procedural mechanisms" are an insufficient alternative to opt-out.

Third, contrary to Defendant's false assertion, Opp. 13, 14, Movants *do* dispute that class counsel will adequately represent Movants' interests. *See* Mot. 12 ("[W]here Movants have elected to bring unique claims with separate counsel, such representation is inadequate as to them."). Movants do not suggest that class counsel are unable to provide adequate representation generally to the thousands of affected farmers and ranchers who have not brought their own challenges to Section 1005. But Movants have brought different claims, sought different relief, and are pursuing a divergent litigation strategy—including seeking fact discovery. That significant divergence rebuts the assumption of cohesiveness and is a sufficient basis for allowing opt-out.

Given Movants' strong justification for opting out of the certified classes, Defendant's opposition boils down to a claim that allowing opt-out would lack "efficiency" and have "little practical value or effect." Opp. 12. But pursuing their chosen claims, in their chosen forums, with their chosen counsel is of immense practical value for Movants. And Defendant's efficiency argument proves too much, as the same "inefficiencies" are present whenever a single statute is challenged in multiple cases. Percolation of an important constitutional issue among the district courts—especially those in different Circuits—is a virtue and not a vice; one that Defendant himself has touted in this very case. *See* Mot. 10–11. Nothing required Plaintiffs to file their claim

as a (b)(2) class action, and if they had proceeded as individuals—or if Defendant's strenuous opposition to class certification had been successful—he would have to defend multiple "inefficient" challenges to the same statute in multiple courts.[6] Yet courts do not routinely halt all other cases in such circumstances.[7] Here, the fact that Plaintiffs styled their case as a class action does not create any additional inefficiencies that must be especially avoided. And any concerns about conflicting judgments as to Movants would be eliminated if they are permitted to opt out.

In the end, the government wants to have its cake and eat it too. It wants to implement a multi-billion dollar federal program with nationwide effect on thousands of farmers across the country, yet avoid having to defend that program in more than a single court. The disingenuousness of that position is shown by the fact that the government seeks to restrict not only cases that are less far along than this one, but also Scott Wynn's challenge, which is indisputably further along. *See* Mot. 3–4, 9. There is simply no persuasive reason to require Movants to remain part of the certified classes rather than allowing them to independently pursue their claims.

II. Constitutional Concerns Require That Movants Be Allowed to Opt Out

Defendant's response to the due process concerns that will arise if Movants are denied the opportunity to opt out in this case misses the mark in four respects. ***First***, Defendant argues that adequacy of representation assuages any due process concerns that Movants might have. Opp. 23. But as noted above, although Movants do not dispute that Plaintiffs' counsel will provide adequate

[6] That is not uncommon for the federal government. For example, it recently defended multiple cases presenting essentially identical challenges to the Attorney General's attempt to condition certain grant funding on cooperation with federal immigration enforcement. *See City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *City of Philadelphia v. Att'y Gen. of U.S.*, 916 F.3d 276 (3d Cir. 2019); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *City & Cty. of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020).

[7] The district courts that granted stays were not primarily concerned about efficiency; if so, they would not have agreed to reconsider the stays if Movants are allowed to opt out.

representation to absent class members generally, that representation is inadequate as to Movants, who have chosen to proceed with their own counsel in raising their own arguments. Thus, Defendant's argument fails as to Movants even if this Court accepts adequacy of representation as generally dispositive of absent class members' due process claims. Moreover, there is no reason to stop the due process inquiry on a finding of adequacy of representation alone. After all, Rule 23(a) imposes the adequacy requirement for *every* class, and there is no dispute that individuals have a due process right to opt out of classes certified under Rule 23(b)(3).

Second, Defendant misses the mark in claiming that *DeGier v. McDonald's Corp.*, 76 F.R.D. 125, 126 (N.D. Cal. 1977), involved only a Rule 23(b)(3) class. Opp. 22. The *DeGier* court conditionally certified a class "under Rule 23(b)(2) *and* Rule 23(b)(3)" and provided a constitutional basis for requiring the opportunity to opt out of each. *Id.* (emphasis added). It explicitly held that "equal protection and due process requires the right to opt out of Rule 23(b)(2) classes." *Id.* at 127. And although Defendant does not engage with the court's rationale, its admonishment that absent class members "deserve the right . . . to be represented by counsel of their own choosing" rings true in this case. *Id.*

Third, Defendant provides no sound constitutional basis for why an opt-out right is required in (b)(3) but can be prohibited under (b)(2). Although the Supreme Court in the *Shutts* decision limited its holding to "class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments," 472 U.S. 797, 811 & n.3 (1985), the Court subsequently noted there is a "serious possibility" that the lack of an opt-out right violates due process even where "monetary claims do not predominate." *Wal-Mart*, 564 U.S. at 363. At a minimum, the *Wal-Mart* decision suggests that there is no basis to draw an arbitrary line between class actions where monetary claims predominate and those where they do not. Defendant

proposes to draw an equally arbitrary line: between classes in which members seek individualized monetary relief and those that do not.

Fourth, Movants' request is a modest one. Unlike *Kincade v. General Tire and Rubber Co.*, this is not a case in which most of the *named plaintiffs* are objecting to a *settlement*. Opp. 21 (citing 635 F.2d 501, 506–07 (5th Cir. 1981)). Movants are instead all absent class members, most of whom initiated their own cases raising unique claims before any classes were certified here, and they seek to opt out of class certification, not a final settlement. In such circumstances, binding Movants to the decisions made by the class representatives in this case threatens "the value of litigant autonomy, embodied in the Due Process Clause." Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573, 1613 (2007).

Defendant's response to Movants' First Amendment argument is also inadequate. Defendant makes the perplexing argument that Movants do not have any First Amendment interest that should permit them to opt out because "they simply wish to control the litigation so they can make their preferred arguments." Opp. 24. But the ability to "make their preferred arguments" and raise their particular claims is precisely why the First Amendment *should* allow Movants to opt out. "[A]ssociation for litigation may be the most effective form of political association." *NAACP v. Button*, 371 U.S. 415, 431 (1963). Likewise, the right to eschew association for expressive purposes is similarly protected. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

Those principles fully apply here. Defendant's theory would irrevocably bind Movants to any argument made by Plaintiffs in any future brief. As one example, up until recently, Plaintiffs pursued alternative claims that the term "socially disadvantaged group" must be construed to include "white ethnic groups that have suffered past prejudice and discrimination." First Am. Compl., ECF No. 11, ¶¶ 31–33, and that the term "socially disadvantaged farmer or farmer" must

include all individuals that "have any discernable trace of minority ancestry," *id.* ¶¶ 34–39. And even after those claims were dropped from the Second Amended Complaint, Plaintiffs are still raising claims that Movants have not: that the law in question violates Title VI in addition to the Equal Protection Clause.[8] Thus, although Defendant views *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 475 (5th Cir. 1980), as "plainly inapposite," the case stands for the proposition that class actions do not trump First Amendment rights. *See* Mot. 16. Defendant makes no attempt to show that a decision binding Movants to the class here would satisfy exacting scrutiny. And as Movants pointed out, it plainly would not. *Id.* at 17–18.[9]

III. Alternatively, the Court Should Amend the Class Certification

Defendant does not substantively respond to Movants' alternative request that the Court amend the class certification, asserting only that it should be denied "for the same reasons" as the opt-out request. Opp. 7. But most of the government's opt-out arguments do not apply to this alternative relief. For example, even if opt-out were unavailable for "mandatory" classes, Defendant cannot dispute that this Court has the power to amend the certification order. *See* Fed. R. Civ. P. 23(c)(1)(C). If there is any concern as to the Court's ability to allow Movants to opt out of the classes here, the Court can avoid it by simply amending the class certification order.

CONCLUSION

Movants should be permitted to opt out of the certified classes or, alternatively, the class certification should be amended to remove Movants.

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[8] As to their chosen counsel, Plaintiffs and Movants are also represented by different organizations with different histories and starkly different visions of equality before the law.

[9] Defendant claims that "the Fifth Circuit rejected that argument in *Ayers*." Opp. 24. But the *Ayers* court stated simply that "Appellants provide no authority for the proposition that denying them the right to opt out of a Rule 23(b)(2) class violates the First Amendment." 358 F.3d 356, 376 (5th Cir. 2004). Here, Movants provide ample authority for allowing them to opt out.

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Respectfully submitted:

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**Pro hac vice motions pending*

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 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.

I also certify that I caused the foregoing to be served by U.S. mail on the following movants:

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