IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

JARROD MCKINNEY,

Plaintiff,

v.

THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture, *et al.*,

Defendants.

No. 2:21-cv-00212-RWS

DEFENDANTS' MOTION TO LIFT STAY AND TO DISMISS FOR LACK OF JURISDICTION

For the reasons stated in the attached memorandum, Defendants Thomas J. Vilsack, in his official capacity as Secretary of Agriculture, and Zach Ducheneaux, in his official capacity as Administrator of the Farm Service Agency (collectively, USDA or Defendants), hereby move to lift the stay of proceedings in this case and to dismiss the complaint for lack of jurisdiction. Counsel for Defendants has conferred with counsel for Plaintiff, who indicate that Plaintiff opposes both the lifting of the stay and the motion to dismiss.

Dated: September 15, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

LESLEY FARBY
Assistant Branch Director
Civil Division, Federal Programs Branch

/s/Michael F. Knapp
MICHAEL F. KNAPP (Cal. Bar No. 314104)
KYLA M. SNOW
ALEXANDER V. SVERDLOV
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch

1100 L Street, NW
Washington, D.C. 20005
Tel: (202) 514-2071 / Fax: (202) 616-8460
michael.f.knapp@usdoj.gov

Counsel for Defendants

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO LIFT STAY AND TO DISMISS FOR LACK OF JURISDICTION

In early 2021, Congress enacted Section 1005 of the American Rescue Plan Act to redress the lingering effects of past racial discrimination in the Department of Agriculture's farm loan programs. Plaintiff Jarrod McKinney challenged the Department's implementation of the law, as did several other plaintiffs in jurisdictions around the country. Several other courts preliminarily enjoined Defendants from disbursing § 1005 funds. Because Congress has now repealed § 1005, Plaintiff's challenge to its implementation is moot. The Court should lift the stay of proceedings and dismiss the complaint.

BACKGROUND

I. Section 1005 of the American Rescue Plan Act

The American Rescue Plan Act (ARPA) provided widespread pandemic relief to the American people. *See* Pub. L. No. 117-2, 135 Stat. 4 (2021). Section 1005 of ARPA appropriated funds to pay up to 120 percent of certain direct or guaranteed USDA farm loans held by a "socially disadvantaged farmer or rancher" (SDFR) and outstanding as of January 1, 2021. *See* ARPA § 1005.

II. Plaintiff's Lawsuit and Related Section 1005 Challenges

Plaintiff holds USDA farm loans that he alleges would have been eligible for debt relief under § 1005 but for the fact that he does not fall within one of the racial or ethnic groups considered "socially disadvantaged." *See* Compl. ¶¶ 4-5, 48. ECF No. 1. He brings a claim under the Constitution, alleging that § 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause, *id.* ¶¶ 6, 52-53, and under the Administrative Procedure Act, similarly alleging that implementing § 1005 violates the equal protection component of the Fifth Amendment, *id.* ¶ 68. As relief, he seeks a declaratory judgment, an injunction, costs and fees, and nominal damages. *Id.* Prayer for Relief.

This case is one of twelve similar equal protection challenges to § 1005 filed in jurisdictions around the country. *See Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex.); *Kent v. Vilsack*, 21-cv-540 (S.D. Ill.); *Faust v. Vilsack*, 1:21-cv-548 (E.D. Wis.); *Carpenter v. Vilsack*, 21-cv-103 (D. Wyo.); *Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla.); *Holman v. Vilsack*, 1:21-cv-1085 (W.D. Tenn.); *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.). In three of the cases, courts entered preliminary injunctions prohibiting USDA from disbursing any § 1005 funds. PI Order, *Wynn*, ECF No. 41; Order on PI & Class Cert., *Miller*, ECF No. 60; PI Order, *Holman*, ECF No. 41.[1]

The *Miller* court certified two classes under Federal Rule of Civil Procedure 23(b)(2). *See Miller* Order on PI & Class Cert., *previously filed at* ECF No. 24-1. The classes both challenged § 1005 on equal protection grounds and sought an injunction preventing the government from implementing racial exclusions or preferences when administering § 1005. *See generally id.* Because the *Miller* classes included Mr. McKinney and advanced the same central claim, the government moved to stay these proceedings

[1] The *Faust* court had entered a temporary restraining order (TRO) that prohibited disbursement of § 1005 funds but dissolved that TRO after this Court issued a preliminary injunction. Order, *Faust*, ECF No. 49.

until the *Miller* proceedings were resolved. Defs.' Mot. to Stay, ECF No. 24. The Court granted the motion and stayed proceedings "pending resolution of the class challenge to § 1005" in *Miller*. *See* Order, ECF No. 40.

III. The Inflation Reduction Act

While the *Miller* litigation continued, Congress passed, and last month the President signed, the Inflation Reduction Act of 2022 (IRA). *See* https://www.congress.gov/117/bills/hr5376/BILLS-117hr5376enr.pdf. In Section 22008 of the IRA, Congress expressly repealed § 1005 of ARPA. *See* IRA § 22008 ("Section 1005 of the American Rescue Plan Act of 2021 (7 U.S.C. 1921 note; Public Law 117-2) is repealed."). Because of the repeal of § 1005, the parties in *Miller* "agree[d] the constitutional challenge to Section 1005 is moot" and jointly stipulated to dismissal of the action. *See Miller*, Joint Stipulation of Dismissal*, filed at* ECF No. 45-1. The *Miller* court subsequently terminated the case. *See Miller*, August 30, 2022 docket entry.[2]

ARGUMENT

The Constitution limits federal courts' jurisdiction to "Cases" and "Controversies." U.S. Const. Art. III, § 2. For a court to adjudicate a case, an "'actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (quoting *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975)). "[I]f in the course of litigation a court finds that it can no longer provide a plaintiff with any effectual relief, the case generally is moot." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021); *see also Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (same). And when a case becomes moot because a court cannot grant effectual relief, there is

[2] Plaintiffs in several other cases have subsequently voluntarily dismissed or agreed to stipulations of dismissal. *See* ECF No. 90, *Wynn*, 3:21-cv-514 (stipulation of dismissal); ECF No. 74, *Kent*, 21-cv-540 (stipulation of dismissal); ECF No. 72, *Faust*, 1:21-cv-548 (stipulation of dismissal); ECF No. 48, *Dunlap*, 2:21-cv-942 (voluntary dismissal); ECF No. 25, *Tiegs*, 3:21-cv-147 (voluntary dismissal); ECF No. 31, *Nuest*, 0:21-cv-1572 (stipulation of dismissal); ECF No. 83, *Holman,* 1:21-cv-1085 (stipulation of dismissal); ECF No. 28, *Joyner*, 1:21-cv-1089 (stipulation of dismissal).

"no longer a 'Case' or 'Controversy' for purposes of Article III" and the case must be dismissed. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

In this suit, Plaintiff alleges that ARPA § 1005 is unconstitutional and seeks relief from the statute's terms. *See* Compl. ¶¶ 53, 68, Prayer for Relief. But Congress has now repealed § 1005, *see* IRA § 22008, and there is accordingly no further relief that this Court can enter. In these circumstances, Plaintiff's claims are moot and the Court now lacks jurisdiction to adjudicate them.

I. The repeal of Section 1005 moots any challenge to that law.

As the Supreme Court and Fifth Circuit have repeatedly held, the repeal of a law, like the IRA's repeal of ARPA § 1005, renders a lawsuit challenging that law moot. *See, e.g.*, *Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 474 (1990); *Kremens v. Bartley,* 431 U.S. 119, 128 (1977); *Diffenderfer v. Cent. Baptist Church,* 404 U.S. 412, 415 (1972); *Amawi v. Paxton*, 956 F.3d 816, 819, 821 (5th Cir. 2020); *Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546, 564 (5th Cir. 2006); *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004). To overcome this presumption of mootness, a plaintiff must show "evidence, or a legitimate reason to believe, that the [government] will reenact the statute or one that is substantially similar." *McCorvey*, 385 F.3d at 489 n.3. "[T]he very process of the enactment" of the repeal, the Fifth Circuit has explained, "combined with the presumption of good faith we afford government actors, overcomes concerns of voluntary cessation." *Amawi*, 956 F.3d at 821.

Here, Congress has repealed § 1005, *see* IRA § 22008, and there is no indication that Congress would reenact that statute if this case is dismissed. *Cf. McCorvey*, 385 F.3d at 849 n.3. The repeal is included as part of a comprehensive bill that Congress had publicly contemplated for over a year, and which Congress tailored to the current circumstances. It would take another Act of Congress to restore the provisions of § 1005 about which Plaintiff complains. Plaintiff therefore cannot meet his burden to show his claims are not moot. *Cf. Amawi*, 956 F.3d at 821 (after repeal of the challenged statute, "it

is remote, and indeed unrealistically speculative, that these defendants will ever again expose the plaintiffs to the claimed injury that prompted this lawsuit").

II. Plaintiff's claim for nominal damages does not prevent mootness.

Plaintiff cannot escape mootness merely by seeking nominal damages in addition to injunctive and declaratory relief. *See* Compl., Prayer for Relief. Although a claim for nominal damages may sometimes keep an otherwise moot suit alive, *see Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021), it cannot and does not do so in this case, for two independent reasons.

First, because there is no applicable waiver of sovereign immunity in this case, the Court lacks jurisdiction to award nominal damages. *See FDIC v. Meyer,* 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). That is true even though Plaintiff has named federal officials in their official capacity as defendants. *See Clark v. Libr. of Cong.*, 750 F.2d 89, 103 (D.C. Cir. 1984) ("Sovereign immunity, however, does bar suits for money damages against officials in their *official* capacity absent a specific waiver by the government."). Plaintiff fails to plead any valid waiver of sovereign immunity as to his damages claim, and Defendants are not aware of one that would apply. *See* Compl. ¶¶ 6-7 (referencing the APA's waiver for suits seeking "relief other than money damages," 5 U.S.C. § 702, and the general remedial authorizations (but not immunity waivers) related to declaratory judgment and other relief, 28 U.S.C. §§ 2201-2202); *cf. Echols v. United States*, 368 F. App'x 595, 597 (5th Cir. 2010) ("A party suing the United States must allege both a basis for the court's jurisdiction and a specific statute containing a waiver of the United States's sovereign immunity from suit." (citations omitted) (citing *Lundeen v. Mineta,* 291 F.3d 300, 304 (5th Cir. 2002))); 5 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1212 (4th ed.) ("[T]he jurisdictional allegations in an original action or a counterclaim against the United States must include a reference to the statute containing an express or implied waiver of the government's immunity from suit." (footnotes omitted)).

District courts therefore lack jurisdiction over claims, such as this one, seeking nominal damages from the United States or its officers sued in their official capacity. *See, e.g.*, *ACLU of Mass. v. U.S. Conf. of Cath. Bishops*, 705 F.3d 44, 53 n.7 (1st Cir. 2013) ("[A] claim for nominal damages is foreclosed by HHS's sovereign immunity."); *Shahi v. U.S. Dep't of State*, 33 F.4th 927, 929–30 (7th Cir. 2022) ("Plaintiffs' request for nominal damages fails for the same reason" as their request for other money damages—"the problem is sovereign immunity."). "Nominal damages are money damages, and if other kinds of money damages are unavailable due to sovereign immunity, then so are nominal damages." *Shahi v. United States Dep't of State*, 572 F. Supp. 3d 470, 481 (N.D. Ill. 2021), *aff'd*, 33 F.4th 927; *W. States Ctr., Inc. v. United States Dep't of Homeland Sec.*, No. 3:20-CV-01175-JR, 2021 WL 1896965, at *1 (D. Or. May 11, 2021) ("[Nominal damages] are not available because of sovereign immunity."); *Leonard v. U.S. Dep't of Def.*, 38 F. Supp. 3d 99, 105 (D.D.C. 2014), *aff'd*, 598 F. App'x 9 (D.C. Cir. 2015) ("[Plaintiffs] may not seek [nominal] damages because the United States has not waived sovereign immunity for monetary relief for unconstitutional acts taken by government employees acting in their official capacities."). Because this Court does not have jurisdiction to award nominal damages, Plaintiff's demand for nominal damages cannot save his claim from mootness.

Second, and wholly apart from the issue of sovereign immunity, Plaintiff cannot claim nominal damages in this case because he was never injured by the implementation of § 1005. Because of the preliminary orders of several courts, USDA never fully implemented that statute. The Supreme Court in *Uzuegbunam* held only that nominal damages "provide the necessary redress for a *completed* violation of a legal right." 141 S. Ct. at 802 (emphasis added); *see also id.* at 802 n.* (emphasizing that nominal damages "are unavailable where a plaintiff has failed to establish a past, completed injury"). As to *prospective* violations of legal rights, the ordinary rule holds: a claim for nominal damages for unrealized conduct does not defeat mootness. *See Uzuegbunam*, 141 S. Ct. at 796 (holding that nominal damages

can "redress a *past* injury" (emphasis added)); *id.* at 798 (distinguishing nominal damages claims related to past injury from nominal damages claims that provide prospective relief).

Here, Plaintiff's claim for nominal damages is unrelated to any past, completed injury. Because implementation of § 1005 was enjoined, Plaintiff never actually experienced such an injury. Plaintiff was never denied any payment under § 1005 because of his race or ethnicity and did not incur any injury for which nominal damages could theoretically be claimed. Because his claim for nominal damages is unrelated to a "past injury" or a "completed injury," *Uzuegbunam*, 141 S. Ct. at 798, 802, it cannot prevent mootness.

III. Plaintiff's claim for costs and fees likewise does not prevent mootness.

It is well established that a claim for costs and fees is ancillary to the litigation and "does not salvage an otherwise moot case." *Curtis v. Taylor*, 625 F.2d 645, 648–49 (5th Cir.), *reh'g denied and opinion modified*, 648 F.2d 946 (5th Cir. 1980); *see also, e.g.*, *Meyers v. CBS Corp.*, No. 15-30528, 2015 WL 13504685, at *1 (5th Cir. Oct. 28, 2015); *Habetz v. La. High Sch. Athletic Ass'n,* 842 F.2d 136, 138 n.5 (5th Cir. 1988) (per curiam). A "fee award is wholly unrelated to the subject matter of the litigation, and bears no relation to the statute whose constitutionality is at issue here." *Diamond v. Charles*, 476 U.S. 54, 70 (1986). Thus, a claim for fees is not the type of "injury with a nexus to the substantive character of the statute or regulation at issue" that "Art. III standing requires." *Id.* Any claim to fees does not prevent mootness.

CONCLUSION

Congress has repealed the law that Plaintiff challenges. Under straightforward principles of mootness, Plaintiff's claims are moot and this Court lacks jurisdiction to adjudicate them. Accordingly, the Court should lift the stay and dismiss this action.

Dated: September 15, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

LESLEY FARBY
Assistant Branch Director
Civil Division, Federal Programs Branch

/s/Michael F. Knapp
MICHAEL F. KNAPP (Cal. Bar No. 314104)
KYLA M. SNOW
ALEXANDER V. SVERDLOV
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20005
Tel: (202) 514-2071 / Fax: (202) 616-8460
michael.f.knapp@usdoj.gov

Counsel for Defendants

LOCAL RULE 7(i) CERTIFICATE OF CONFERENCE

Because this is a combined motion to lift the stay of proceedings and to dismiss, Local Rule 7(h) and 7(i) apply. I hereby certify that on numerous occasions by phone and by email, including by phone on September 14, 2022, I conferred with Wen Fa, counsel for Plaintiff, concerning the relief sought in this motion. Plaintiff opposes this motion, including the motion to lift the stay of the proceedings. The parties could not agree on whether to lift the stay. Counsel for Plaintiff in good faith sought to continue discussions that might terminate this litigation short of motions practice. However, Defendants believe that the stay should be lifted immediately both because Defendants wish to resolve this matter as quickly as possible and also because the terms of the stay—"pending resolution of the class challenge to § 1005 in *Miller v. Vilsack*, No. 4:21-cv-595 (N.D. Tex.)," ECF No. 40 at 5—have been satisfied for over two weeks. Discussions have ended in an impasse, requiring the Court's involvement.

/s/Michael F. Knapp
Michael F. Knapp

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2022, a copy of the foregoing notice was filed electronically via the Court's ECF system, which effects service on counsel of record.

/s/Michael F. Knapp
Michael F. Knapp
Trial Attorney

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FOR THE EASTERN DISTRICT OF TEXAS

JARRODMCKINNEY, 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.	§	Case No. 2:21-cv-00212-RWS

[PROPOSED] ORDER

Defendants' Motion to Lift Stay and Dismiss for Lack of Jurisdiction, ECF No. 46, is GRANTED. The stay of proceedings, ECF No. 40, is TERMINATED. The case is DISMISSED.

SO ORDERED.