

The parties would plan to confer at that time and submit a proposed schedule to govern any further proceedings.

The parties' disagreement on scheduling pertains largely to timing. The parties thus set forth below their respective positions on the schedule to resolve the merits of this action.

Plaintiffs' position: Plaintiffs' position is that this case should proceed to summary judgment and that very little discovery is needed. Plaintiffs anticipate their fact discovery being limited to an interrogatory or document request asking Defendants to identify evidence they intend to use at summary judgment that they did not already rely on at the preliminary injunction stage. In light of the Defendants' position that they will employ one or more expert witnesses, Plaintiffs propose the following schedule:

- Deadline for Defendants' Expert Report: September 10, 2021
- Deadline for Plaintiffs' Rebuttal Report: October 11, 2021
- Deadline for completing discovery: November 12, 2021
- Deadline for filing cross-motions for summary judgment: November 19, 2021
- Deadline for filing responses to cross-motions for summary judgment: December 16, 2021

Defendants' position: On July 12, 2021, Defendants filed a motion to stay proceedings in this case. ECF No. 51. As explained therein, Defendants believe that, in light of a class certified in the U.S. District Court for the Northern District of Texas to challenge Section 1005 of the American Rescue Plan Act ("ARPA") that would encompass and bind Plaintiffs here, proceedings in this case should be stayed altogether, *see generally id.*, and there is thus no need for a scheduling order at this time. In the event the Court disagrees, Defendants propose the following schedule to govern resolution of the merits of this case:

- Defendants' Expert Report – December 17, 2021¹
- Plaintiffs' Rebuttal Expert Report – January 28, 2022
- Defendants' Expert Report in Reply – February 25, 2022
- Expert Depositions Complete by – March 18, 2022
- Simultaneous cross-motions for summary judgment – April 15, 2022
- Simultaneous response briefs – May 6, 2022

Plaintiffs challenge, and seek to permanently enjoin on a universal basis, a significant and recent Congressional initiative to redress the lingering consequences of a long history of discrimination against socially disadvantaged farmers and ranchers. Given the significance of a final judgment evaluating the constitutionality of an Act of Congress, Defendants believe that a period of several months is needed to develop an adequate and complete record to inform the Court's final judgment. Defendants anticipate relying on expert testimony to address the claims in this case, and it will take substantial time for Defendants 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. If Plaintiffs are permitted limited fact discovery beyond expert witnesses, Defendants request the same opportunity.

¹ Plaintiffs have indicated that they may not file an opening expert report, and Defendants' proposed schedule is based on that indication. If Plaintiffs do submit an opening expert report, Defendants would propose that the parties file concurrent opening expert reports on December 17, 2021, concurrent rebuttal reports on January 28, 2022, with no replies necessary. The remainder of Defendants' proposed schedule would thus be moved up by approximately one month.

Defendants are mindful of the Court's desire to resolve this matter on an expedited basis, and have condensed the proposed timeline considerably in comparison to similar litigation. *Compare, e.g.,* Scheduling Order, *Ultima Servs. v. USDA*, No. 2:20-cv-41, ECF No. 34 (E.D. Tenn. Apr. 9, 2021) (allowing nine months between answer and expert disclosures in Fifth Amendment challenge to government contracting program). But there are already three preliminary injunctions of the challenged policy in place. And, as this Court has recognized, those injunctions “maintain the status quo,” as is their primary aim, such that Plaintiffs’ interests are protected in the meantime. ECF No. 49 at 4; *see also id.* at 7. Defendants respectfully submit that the schedule that Plaintiffs have proposed is inadequate to the needs of this case and that such expedition is not warranted in this case—especially where the parties have already engaged in two rounds of expedited briefing and three preliminary injunctions are in effect.

Defendants’ proposed schedule is also necessary to allow Defendants to develop the record for decision on a timeline that accounts for the other cases challenging Section 1005 that undersigned counsel are litigating. As explained in Defendants’ motion for a stay, Defendants are currently litigating similar claims in eleven other courts. *See* ECF No. 51 at 4. Although Defendants have moved, or plan to move, for stays in all but the first-filed case in which a class has been certified, *i.e., Miller v. Vilsack*, No. 21-595 (N.D. Tex.), if the Court denies Defendants’ stay motion, such that this schedule is relevant, Defendants will be litigating the merits in at least two different courts (if not more). The court in *Wynn v. Vilsack*, entered a scheduling order (prior to Defendants’ pending motion for a stay of proceedings there) much closer to that proposed by Defendants. *See* ECF No. 43, No. 3:21-cv-514 (M.D. Fla. July 8, 2021). And Defendants anticipate proposing a schedule along the lines of that proposed herein in a joint report due in *Miller* this Friday, July 16, 2021. *See* ECF No. 66 (ordering the parties to meet and confer and

submit a joint report by July 16, 2021, informing the Court how this case will proceed). Given Defendants' and undersigned counsel's competing obligations in those cases, and to allow those cases to proceed somewhat apace (to the extent *Wynn* proceeds at all), Defendants submit that the timeline they have proposed is warranted.

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Respectfully submitted,
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