IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RYAN KENT, MATTHEW MORTON, and JOSHUA MORTON, Plaintiffs, v. THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; ZACH DUCHENEAUX, in his official capacity as Administrator, Farm Service Agency, Defendants.	Case No. 3:21-cv-00540-NJR

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR STAY

Illinois farmers Ryan Kent, Matthew Morton, and Joshua Morton brought this lawsuit to vindicate their right to equal protection before the law. They challenge Section 1005 of the American Rescue Plan Act of 2021 (ARPA), which directs Defendants—Agriculture Secretary Tom Vilsack and Farm Service Agency Administrator Zach Ducheneaux—to issue debt relief payments 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 outstanding loan amount as of January 1 of this year. Every white farmer and rancher, regardless of circumstances, is categorically ineligible.

Now, Defendants ask this Court to stay all proceedings in this case in deference to a recently certified class action in a Texas federal court. ECF No. 15. But while Defendants frame their motion as a request for a stay, the relief they seek likely would be tantamount to dismissal—a dismissal that would deprive these Illinois plaintiffs of their chosen forum and counsel and would

place them at the mercy of a court hundreds of miles away with no ability to influence the direction of the litigation.

Just last week, a federal court in Tennessee rejected these same Defendants' request to stay another Section 1005 challenge. *Holman v. Vilsack*, No. 1:21-cv-01085, 2021 WL 3354169 (W.D. Tenn. Aug. 2, 2021). As the court explained, granting such a stay would mean that the plaintiff farmer "could well have to wait years before he is able to resume his case." *Id.* at *2. That same threat of delay exists here and is reason enough to deny Defendants' proposed indefinite stay.

Defendants' motion should be denied even if it were not indefinite in scope. The burden is on Defendants to justify a stay, and in deciding stay motions, courts in this Circuit consider factors such as potential prejudice to the non-movant if the case were stayed, undue hardship on the movant if required to proceed, and judicial economy. These factors weigh against a stay here. A stay would prejudice Plaintiffs and deprive them of the right to press their claims and pursue their requested relief with their chosen counsel. By contrast, standard litigation burdens on Defendants do not constitute undue hardship. Nor would there be any substantial benefit to judicial economy by staying Plaintiffs' case. Courts routinely deny similar motions where, as here, there are significant differences in litigation strategy between the two cases and little to be gained by preventing Plaintiffs from pressing their claims in their chosen forum.

BACKGROUND

I. Plaintiffs' Targeted Challenge to Section 1005's Race-Based Debt Relief Program

ARPA was signed into law on March 11, 2021. The omnibus law, largely intended to provide relief from the COVID-19 pandemic, includes a provision—Section 1005—that directs Secretary Vilsack to "provide a payment in an amount up to 120 percent of the outstanding

indebtedness [as of January 1, 2021] of each socially disadvantaged farmer or rancher."[1] Whether a farmer or rancher is considered "socially disadvantaged" for purposes of Section 1005 depends solely on his or her racial group. Farmers and ranchers who are Black, American Indian/Alaskan Native, Hispanic, Asian, and Hawaiian/Pacific Islander are automatically eligible for debt relief under Section 1005, whereas white farmers and ranchers are categorically excluded, regardless of their individual circumstances.[2]

Shortly before its enactment, one senator called Section 1005's racial discrimination "unbelievable" and stated that he didn't know how it "could ever be constitutional."[3] Many farmers agreed. In the months following Section 1005's enactment, farmers across the country brought a dozen lawsuits, including this one, to challenge its constitutionality. *See* ECF No. 15 at 2–3. These farmers—and their varying counsel—have pursued differing strategies and sought different kinds of relief.

This case is the only challenge to Section 1005 that has been brought in this District. Plaintiffs are white farmers who live and operate farms in southern Illinois. Compl. ¶¶ 9–11, ECF No. 1. They filed their Complaint on June 7, 2021, asserting two claims: first, that Section 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause, *id.* ¶¶ 53–64, and second, that Section 1005 cannot be lawfully implemented under the Administrative Procedure Act, *id.* ¶¶ 65–70. Plaintiffs named both the Secretary of Agriculture and the

[1] *American Rescue Plan Act of 2021*, Pub. L. No. 117-2, § 1005(a)(2), 135 Stat. 4, 12 (enacted Mar. 11, 2021).

[2] *See Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA)*, 86 Fed. Reg. 28,329, 28,330 (May 26, 2021).

[3] 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.

Administrator of the Farm Service Agency (FSA) as Defendants, *id.* ¶¶ 12–13, and requested declaratory relief, injunctive relief, and nominal damages, *id.* at 19–20 (Prayer for Relief).

At the time Plaintiffs filed their Complaint, Defendants were preparing to issue payments under Section 1005, which had not yet been enjoined. Three days later, a federal judge in the Eastern District of Wisconsin granted other farmers' motion for a temporary restraining order and enjoined Defendants from making any payments. *Faust v. Vilsack*, No. 21-C-548, 2021 WL 2409729 (E.D. Wis. June 10, 2021). More substantial injunctive relief in the form of a nationwide preliminary injunction did not arrive until June 23. *See Wynn v. Vilsack*, No. 3:21-CV-514-MMH-JRK, 2021 WL 2580678 (M.D. Fla. June 23, 2021).[4] Since the *Wynn* preliminary injunction is not a final judgment *and* is immediately appealable, Plaintiffs pressed on with their case.

About five weeks after Plaintiffs filed their Complaint, Defendants filed the present motion to "stay proceedings in this case until final resolution of the class challenge to Section 1005" in *Miller v. Vilsack*, a case pending in the Northern District of Texas. *See* ECF No. 15 at 2 (citing Order on Class Cert. & PI, *Miller v. Vilsack*, No. 4:21-cv-595, ECF No. 60 (N.D. Tex. July 1, 2021)). Defendants have filed or plan to file similar stay motions in all other challenges to Section 1005. *See id.* at 2 n.1. As noted above, just last week, the United States District Court for the Western District of Tennessee denied one such motion. *Holman*, 2021 WL 3354169.

II. The *Miller* Plaintiffs' Broad Challenge Against Various USDA Programs, Including Section 1005

Miller, the case on which Defendants' stay motion is based, involves a broad challenge to numerous USDA programs, not just Section 1005. *See* Compl., *Miller*, ECF No. 1 (Apr. 26, 2021).

[4] In light of the nationwide protection provided by the *Wynn* injunction, the *Faust* court allowed its TRO to dissolve and held in abeyance the *Faust* plaintiffs' request for a preliminary injunction. *Faust v. Vilsack*, No. 21-C-548, 2021 WL 2806204, at *3 (E.D. Wis. July 6, 2021).

The original *Miller* complaint mentioned 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). It sought relief much broader than an injunction against Section 1005 or its racial classification—instead alleging that *all* USDA programs containing racial classifications are unconstitutional. *Id.* ¶ 19 (asking the court to "declare unconstitutional any statute limiting the benefits of federal programs to 'socially disadvantaged farmers and ranchers'").

The *Miller* complaint includes three claims, with Secretary Vilsack named as the sole defendant. *Id.* ¶ 4. First, it contends that all USDA programs containing racial exclusions violate both the federal Constitution and Title VI of the Civil Rights Act of 1964. *Id.* at 6 (Claim 1). Second, it argues (in the alternative) that the term "socially disadvantaged group" must be construed to include "white ethnic groups that have suffered past prejudice and discrimination," such as "Irish, Italians, Germans, Jews, and eastern Europeans." *Id.* at 7 (Claim 2). Third, it contends (again in the alternative) that the term "socially disadvantaged farmer or rancher" must be construed to include individuals that "have any discernable trace of minority ancestry." *Id.* at 8 (Claim 3).[5]

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 Section 1005, he did not allege

[5] The *Miller* plaintiffs are represented by attorneys at 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." https://www.aflegal.org/about (emphasis omitted). The group, launched in April of this year, 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." *Id.*

(and has never alleged) that he holds any farm loans that would be eligible for debt relief but for his race—a fact that would have doomed his standing to challenge Section 1005, class action or not.[6]

Over a month later, just a few days before Plaintiffs filed their Complaint in this case, Mr. Miller filed an amended complaint—which still sought much broader relief than Plaintiffs' Complaint. *Miller*, ECF No. 11 (June 2, 2021). The amended *Miller* complaint raises the same three claims and seeks the same relief as Mr. Miller's original complaint but adds four plaintiffs who (unlike Mr. Miller) allege that they hold farm loans that would be eligible for debt relief under Section 1005 if they were racial minorities. *Id.* ¶¶ 19–23. The *Miller* plaintiffs also sought to certify two separate classes, only one of which was limited to farmers and ranchers excluded because of their race from Section 1005's debt forgiveness. *See id.* ¶ 42.

Defendant Vilsack vigorously *opposed* class certification in *Miller*. *See* Def.'s Memo in Opp., *Miller*, ECF No. 28 (June 11, 2021). But on July 1—nearly a month after Plaintiffs in this case filed their Complaint—the *Miller* court certified two classes and granted a preliminary injunction against Section 1005. Order, *Miller*, ECF No. 60. As indicated above, the *Miller* court was neither the first nor the only court to grant preliminary relief against Section 1005; rather, it is one of four courts to have done so. *See Wynn*, 2021 WL 2580678 (preliminary injunction); *Faust*, 2021 WL 2409729 (temporary restraining order); *Holman v. Vilsack*, No. 21-1085, 2021 WL 2877915 (W.D. Tenn. July 8, 2021) (preliminary injunction).

In response to the *Miller* court's subsequent request for a proposed discovery plan, the parties declared that they "do not believe factual discovery is necessary for the § 1005

[6] *See Payton v. Cty. of Kane*, 308 F.3d 673, 682 (7th Cir. 2002) (noting that the named plaintiffs in a class action must have standing).

constitutional claim" and proposed that summary judgment briefing be completed in April 2022. Joint Report at 2–3, *Miller*, ECF No. 70 (July 16, 2021) (attached as Exhibit 1).[7]

STANDARD OF DECISION

"[T]he movant bears the burden of proof to show that the Court should exercise its discretion in staying the case." *Cloverleaf Golf Course, Inc. v. FMC Corp.*, No. 11–cv–190–DRH, 2011 WL 2838178, at *2 (S.D. Ill. July 15, 2011). Defendants' burden becomes more substantial where, as here, there is at least a "fair possibility" that Plaintiffs would be harmed by delay. When that is true, "[t]he moving party must make a 'clear case of hardship or inequity in being required to go forward.'" *Tonn & Blank Const., LLC v. Sebelius*, 968 F. Supp. 2d 990, 992 (N.D. Ind. 2013) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). Even then, "[a] stay is not a matter of right, even if irreparable injury might otherwise result" to the moving party. *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quotation omitted). "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." *Landis*, 299 U.S. at 255.

There is no set formula to determine whether a stay should issue. "The interest of all parties must be weighed, and the decision to stay an action is not made lightly." *Abbott Lab'ys v. Matrix Labs., Inc.*, No. 09–cv–1586, 2009 WL 3719214, at *2 (N.D. Ill. Nov. 5, 2009). Although several "factors are useful, mechanical operation of factors is not." *Id.* Relevant considerations may include "(i) whether a stay will unduly prejudice or tactically disadvantage the non-moving party, (ii) whether a stay will simplify the issues in question and streamline the trial, and (iii) whether a stay will reduce the burden of litigation on the parties and on the court." *Id.*; *see also Benge v. Eli*

[7] The *Miller* plaintiffs also indicated that they will "likely" file a second amended complaint at some point that abandons their alternative claims. Ex. 1 at 2.

Lilly & Co., 553 F. Supp. 2d 1049, 1050 (N.D. Ind. 2008) (considering "hardship and inequity to the moving party if the matter is not stayed" and "economy of judicial resources").

ARGUMENT

Defendants raise four arguments, but they are insufficient to justify their requested stay. They argue: (1) a stay would not prejudice Plaintiffs because of the nationwide preliminary injunctions and the pending class action; (2) denying a stay would harm Defendants by forcing them to litigate Section 1005 cases across the country; (3) a stay is in the interest of judicial economy because Plaintiffs are members of the *Miller* class; and (4) this Court should defer to *Miller* rather than permit Plaintiffs to raise their claims separately. As discussed below, these assertions cannot justify a stay that would deprive Plaintiffs of their chosen counsel and forum and would tie their fate to the outcome of a case over which they have no control.

I. A Stay Would Significantly Prejudice Plaintiffs

This is not a typical motion to stay. Defendants do not propose that the parties simply wait for an imminent event to occur before resuming litigation. Instead, they intend to put Plaintiffs' case on hold indefinitely and bind them to litigation in a court hundreds of miles away and over which they have no control. In denying Defendants' nearly identical stay motion in *Holman*, the court pointed to the prejudice that would arise from such a stay. *See* 2021 WL 3354169. It 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 *2 (internal quotation marks omitted). In this case, as in *Holman*, a stay would bind Plaintiffs to not just the legal strategy, but also the pace—no matter how unhurried—at which the *Miller* parties choose to litigate.

Such a prolonged and an indefinite stay would prejudice Plaintiffs, who "could well have to wait years before [they are] able to resume [their] case in this Court." *Id.*; *see also Hy Cite Corp. v. Regal Ware, Inc.*, No. 10-CV-168-WMC, 2010 WL 2079866, at *1 (W.D. Wis. May 19, 2010) ("A district court abuses its discretion when [granting a stay that] is 'immoderate or indefinite.'") (quoting *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997)). The parties in *Miller* will not submit the matter for decision until at least April 2022, and further delay seems likely given that Defendants may yet appeal class certification and have already filed a partial motion to dismiss. *See* ECF No. 15 at 5 n.6, 6 n.7. It is also "likely" that the *Miller* plaintiffs will file a second amended complaint, *see* Ex. 1 at 2, which may once again restart the clock and further cause delay. And with appeals almost certain in a case like this one, final resolution of *Miller* may take several years. *See Garmendiz v. Capio Partners, LLC*, No. 8:17-CV-00987-EAK-AAS, 2017 WL 3208621, at *2 (M.D. Fla. July 26, 2017) ("[T]he potential for either party . . . to request a review by the circuit court *en banc* and/or seek a writ of *certiorari* to the United States Supreme Court will further delay any concrete resolution . . . .").

Defendants say that a stay would not prejudice Plaintiffs because there are nationwide preliminary injunctions in place and Defendants would be bound by any final judgment in *Miller*. ECF No. 15 at 8. But the nationwide injunctions are just that—preliminary. Not only might they be reversed on appeal (Defendants reserve the right to appeal them, *id.* at 6 n.7), but they do not guarantee a favorable final judgment with nationwide effect. And Defendants' assertion that the parties would be bound by a decision in *Miller* actually militates *against* a stay. Even assuming Defendants are correct,[8] a stay would not "simplify the issues in question and streamline the trial"

[8] As noted above, Defendants reserve the right to appeal the *Miller* class certification, ECF No. 15 at 6 n.7, but continuing to contest class certification undermines Defendants' argument that a

in this case, *Abbott Lab'ys*, 2009 WL 3719214, at *2, but would effectively channel all the issues to be conclusively decided by a court in Texas, leaving nothing for this Court to do (according to Defendants' argument) except enter a judgment once *Miller* concludes.

That the *Miller* class nominally includes Plaintiffs does not change this. Indeed, *Holman* rejected Defendants' stay motion precisely because a stay would leave the plaintiff at the mercy of the proceedings in *Miller*. 2021 WL 3354169, at *2. The court recognized that a stay would deprive the plaintiff of control of his litigation, forcing him to accept the litigation strategy of others. It would also deprive the plaintiff of his chosen forum and counsel. *See Pa. Pro. 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); *Clark v. Ill. Cent. R.R. Co.*, No. 05-CV-688-WDS, 2006 WL 8455851, at *1 (S.D. Ill. Jan. 30, 2006) (noting that "[t]he plaintiff's choice of forum is generally entitled to substantial deference" unless the forum "lacks any significant connection to the underlying claim") (quotation omitted). The same is true here: an order staying this case would prejudice Plaintiffs by depriving them of both their chosen counsel and their ability to litigate in their home forum, one with significant connection to their underlying claims.

Depriving Plaintiffs of their chosen counsel in favor of *Miller* would be especially consequential. Plaintiffs are represented by a public interest organization with a long track record of advocating for equality under the law. By contrast, class counsel in *Miller* is closely associated with overtly partisan and unhelpful rhetoric.[9] A stay would thus force Plaintiffs to associate with

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decision in *Miller* will bind Plaintiffs. Likewise, if Plaintiffs successfully opt out of the *Miller* classes, *see infra* n.11, Defendants have no argument that they would be bound by that decision.

[9] *See, e.g.*, *Doing the Bidding of Open Border Radicals, Biden's DOJ Again Issues Another Disastrous Immigration Decision*, https://www.aflegal.org/news/doing-the-bidding-of-open-borders-radicals-bidens-doj-again-issues-another-disastrous-immigration-decision (July 15, 2021)

incompatible counsel when they had chosen their own course well before the *Miller* class was certified. Worse, it would force Plaintiffs to take their chances as unnamed plaintiffs in a case in Texas—led by counsel who have litigated the case differently, do not believe that factual discovery is necessary,[10] have never communicated with Plaintiffs, and purport to represent thousands of unnamed class members, yet believe that giving individualized notice to those members is unnecessary. *See* Ex. 1 at 4. Plaintiffs would have no say in what arguments are asserted, what concessions are made, and whether unfavorable rulings are appealed in *Miller*. Defendants should not be allowed to tie Plaintiffs to the decisions of counsel in that case when they are already represented by their preferred counsel in this one.[11]

II. Defendants Would Not Suffer Undue Hardship from a Stay Denial

Defendants next argue that *they* will be prejudiced if they are required to litigate more than one challenge to Section 1005. Yet they cannot meet their burden of establishing a "clear case of

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(asserting 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").

[10] *See* Ex. 1 at 2. Perhaps this is why the *Miller* plaintiffs, unlike Plaintiffs here, did not name the Administrator of the FSA as a defendant. Because FSA is the entity that provided Plaintiffs' loans and possesses the relevant paperwork, Plaintiffs believe that FSA and its officers could prove to be a valuable source of factual information.

[11] Plaintiffs intend to request to opt out of the *Miller* classes, further undermining Defendants' stay arguments. Defendants' claim that such an opt-out is *never* possible for a Rule 23(b)(2) class is incorrect. *See In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005) ("Several cases suggest that it might not be necessary to convert [a Rule 23(b)(2)] proceeding to Rule 23(b)(3) because adequate notice and an opportunity to opt out could be provided within the context of a Rule 23(b)(2) proceeding."); *Penson v. Terminal Transp. Co., Inc.*, 634 F.2d 989, 994 (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"); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (noting the "serious possibility" of a due process violation if there is no right to opt out of a class). But irrespective of Plaintiffs' ability to directly opt out of the *Miller* class, this Court should deny Defendants' stay motion as prejudicial to Plaintiffs.

hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255. It is hardly unusual that a nationwide federal program has prompted lawsuits across the country. Defending against such challenges is an important part of the Department of Justice's responsibilities. 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). Defendants are not entitled to a stay simply because there are many challenges to a particular federal program.

Nor can a stay be justified based on Defendants' claim that defending against multiple challenges "would drain the courts' and the Government's resources without any apparent benefit to Plaintiffs." ECF No. 15 at 9. Defendants' conclusory assertion that this case will not "benefit" Plaintiffs is simply false. *See supra* at Arg. I. Defendants also provide zero evidentiary support for their contention that this lawsuit has the capacity to "drain the resources" of the United States government. In any event, "being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity.'" *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005). As one district court noted in denying a federal agency's request for a stay, "[t]his is particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before [the Court]." *Ctr. for Biological Diversity v. Ross*, 419 F. Supp. 3d 16, 21–22 (D.D.C. 2019) (quoting *Greenlaw v. United States*, 554 U.S. 237, 244 (2008)). Defendants cannot establish a "clear case" of undue hardship or inequity in defending against Plaintiffs' claims.

Further, Defendants previously opposed both class certification in *Miller* and nationwide injunctive relief in the Section 1005 challenges where preliminary injunctions were sought. By opposing class certification, Defendants signaled their preference to litigate multiple cases rather than one case in what they may have viewed as an unfavorable forum. And by arguing that preliminary injunctive relief must be geographically limited, Defendants necessarily invited multiple cases in various jurisdictions so that all affected farmers and ranchers could pursue their own remedies. *See, e.g.*, Defs.' Opp. to Mot. for Prelim. Inj. at 40, *Wynn*, ECF No. 22 (June 4, 2021) (arguing for a limited injunction so that the important legal questions implicated by Section 1005 could "percolat[e] through the federal courts") (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring)). Defendants have changed their tune now that they have lost on these issues in other courts. But the very fact that they made these arguments demonstrates that they will not suffer undue prejudice by litigating multiple Section 1005 cases. Moreover, now that at least one court has denied the government's request for a stay, *see Holman*, 2021 WL 3354169, granting a stay in this case would not result in a single uniform proceeding. Simply put, Defendants have not clearly shown that any inconvenience to the government would outweigh Plaintiffs' loss of their chosen forum, counsel, and control over litigation.

III. Interests of Judicial Economy Do Not Merit a Stay

Defendants' reliance on principles of judicial economy is equally unavailing. In their view, judicial economy requires this Court to stand aside while *Miller* proceeds, even though there is no guarantee that *Miller* will reach a final judgment before this case. But a stay is not required even in the case of *overlapping class actions* with plaintiffs who are members of multiple classes. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837–38 (7th Cir. 1999). After all, "[p]arallel cases often seek the same relief. There's nothing peculiar about class actions. Sometimes the same plaintiff will file in two courts; sometimes different plaintiffs will seek equivalent relief in the

same court." *Id.* at 838. And in such circumstances, a court *might* stay a later-filed case, but it may also choose to "press forward" and allow the cases to "proceed in parallel." *Id.* The parties in *Miller* have agreed to proceed at a rather leisurely pace, so there is every chance that Plaintiffs here can reach final judgment first.

While there is a general "presumption against having duplicative actions pending simultaneously in different courts," *Kuryakyn Holdings, Inc. v. Just In Time Distrib. Co.*, 693 F. Supp. 2d 897, 901 (W.D. Wis. 2010), the Seventh Circuit does not rigidly follow a "first-filed" rule. *See Blair*, 181 F.3d at 838 (stating that only where it is "clear that the first-filed suit is the superior vehicle" would it "be an abuse of discretion for the court in the second-filed suit to press forward," and holding that "[t]his is not such a case"). In any event, this suit is not "duplicative" of *Miller* because the claims and relief sought are distinct. *See Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir. 1993) (asking whether the "claims, parties, and available relief . . . significantly differ between the two actions") (internal quotation marks omitted). The currently operative complaint in *Miller*: (1) does not assert an APA claim; (2) claims that *all* statutes that limit benefits to socially disadvantaged farmers and ranchers violate Title VI of the Civil Rights Act of 1964 (*Miller*, ECF No. 11 ¶¶ 27–30); (3) asks the court to declare that "socially disadvantaged groups" includes "white ethnic groups that have been subjected to racial and ethnic prejudice" (*id.* ¶ 33); and (4) asks the court to declare that "socially disadvantaged farmers and ranchers" includes any farmer or rancher "with any traceable amount of minority ancestry" (*id.* ¶ 38).[12] Plaintiffs do not press those same claims—and indeed find the *Miller* plaintiffs' alternative

[12] The *Miller* plaintiffs may eventually file another amended complaint revising or abandoning some of these claims, *see* Ex. 1 at 2, but that has not yet occurred.

claims problematic. *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").[13]

Further, while judicial economy is typically thought of as a means to "simplify the issues, streamline trial, or reduce the burden of litigation on the parties and the Court," *United States v. Faris*, No. 17-CV-295-SMY-DGW, 2018 WL 4737212, at *2 (S.D. Ill. Oct. 2, 2018), a stay here would not serve two of those interests. Rather than simplify the issues or streamline trial, a stay would simply outsource the litigation to the Northern District of Texas. As a result, a stay would prevent the question of Section 1005's constitutionality from percolating among the federal courts. As Judge Manion has explained, "[d]ifferent parties litigating the same issues in different forums will likely engage different arguments, leading to diverse analyses and enhancing the likelihood of the strongest arguments coming to the fore." *City of Chicago v. Sessions*, 888 F.3d 272, 297 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part); *see also Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of a stay) (noting that "the airing of competing views . . . aids [the federal courts'] own decisionmaking process"); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("[D]iverse opinions from[] state and federal appellate courts may yield a better informed and more enduring final pronouncement by [the Supreme] Court.").[14] Ultimately, it does not serve

[13] It is also unclear whether the *Miller* plaintiffs seek the alternative forms of relief that Plaintiffs seek here—an injunction prohibiting enforcement of Section 1005 in its entirety *and* one enjoining only its racial classification, which would render Plaintiffs eligible for debt relief. *See* ECF No. 1 at 19–20. The *Miller* complaint (unlike Plaintiffs') plainly does *not* include a request for nominal damages, *see id.* at 17, which would prevent mootness in case Defendants attempt to change the Section 1005 program at the eleventh hour. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

[14] As noted above, Defendants themselves emphasized the importance of "percolation" in opposing a preliminary injunction. *See* Defs.' Opp. to Mot. for Prelim. Inj. at 40, *Wynn*, ECF No. 22 (June 4, 2021).

judicial economy for all other district courts to defer to one particular court simply because a class action has been certified there.

While a stay here would nominally conserve judicial resources, it would do so at the expense of Plaintiffs' chosen forum and counsel and the significant benefit that courts derive from the percolation of difficult legal issues throughout the federal system. And it would permit a later-certified class to preempt even earlier-filed cases, depriving plaintiffs who chose to proceed in a home forum of that right even though no class had been certified when they filed.

IV. Deference to the Pending Class Action Is Not Appropriate

Defendants cite a panoply of out-of-circuit precedent meant to suggest that courts "regularly stay cases pending resolution of related class actions." ECF No. 15 at 9. Unsurprisingly, however, none of these cases is within the Seventh Circuit—likely because *Blair* explicitly says that courts may permit parallel class actions to proceed even where there is overlap between class members. *See* 181 F.3d at 838. And even Defendants' out-of-circuit cases fall woefully short.

The district court in *Taunton Gardens Co. v. Hills*, 557 F.2d 877 (1st Cir. 1977), for instance, was considering a motion for preliminary injunction while a *final judgment* had issued in a concurrent case. *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)). Here, both cases are at an early stage and there is no guarantee that *Miller* will reach final judgment before this case. And in contrast to the immoderate, indefinite 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.[15]

[15] The Second Circuit's unpublished decision in *Mackey v. Board of Education for Arlington Central School District*, 112 F. App'x 89, 91 (2d Cir. 2004), is similarly unhelpful to Defendants. The Second Circuit's opinion provides only cursory analysis, and the government's briefs reveal that the classes including the *Mackey* plaintiffs had been certified in *two* other cases—all before

Defendants' district court cases fare no better. The unreported proceedings in *Jiaming Hu v. U.S. Department of Homeland Security*, No. 4:17-cv-2363, 2018 WL 1251911 (E.D. Mo. Mar. 12, 2018), lagged significantly behind the class action raising the same claims, with a mandamus request in *Hu* being filed over three months after the class complaint was filed in a parallel case. *See Nio v. U.S. Dep't of Homeland Sec.*, 270 F. Supp. 3d 49, 60 (D.D.C. 2017). By contrast, Plaintiffs filed their Complaint within a week of the operative *Miller* complaint and seek to move at a brisk pace. More importantly, unlike Plaintiffs here, the plaintiff in *Hu* did not dispute that his lawsuit was entirely duplicative of the *Nio* class action. *Hu*, 2018 WL 1251911, at *5. Defendants' remaining cases are even further afield and do not justify staying this case. *See Aleman ex rel. Ryder Sys., Inc. v. Sancez*, No. 21-cv-20539, 2021 WL 917969, at *2 (S.D. Fla. Mar. 10, 2021) (not addressing a stay motion); *Richard K. v. United Behav. Health*, No. 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.*).

There is no general rule that this Court must defer to *Miller* just because it is a class action—indeed, such a rule appears contrary to Seventh Circuit precedent. It would also be arbitrary, privileging the first forum to obtain class certification, and would deprive the courts of the benefits of percolation of difficult legal issues in various fora. A stay is not warranted simply on account of the *Miller* class action.

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the plaintiffs filed their complaint. *See* Br. of N.Y. State Ed. Dep't, *Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist.*, No. 03-7860, 2004 WL 3438192 (2d Cir. Mar. 16, 2004). And because both class actions were, like *Mackey*, pending in federal courts in New York, the benefits of percolation were minimal compared to this case.

CONCLUSION

Defendants' motion to stay proceedings should be denied.

DATED: August 13, 2021.

Respectfully submitted,

PACIFIC LEGAL FOUNDATION

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2021, I electronically filed the foregoing document with the Clerk of the Court via the e-filing system, which will cause a copy to be served upon counsel of record.

By: s/ *Glenn E. Roper*
GLENN E. ROPER

Exhibit 1

P. Opp. D. Mot. to Stay, *Kent v. Vilsack*

Court: S.D. Ill. Case No. 3:21-cv-00540-NJR

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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*
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Counsel for Plaintiffs and the Certified Classes