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

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

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INTRODUCTION

Movants[1] are farmers or ranchers in various states across the country. Each is a named plaintiff in one of five federal court challenges to Section 1005 of the American Rescue Plan Act of 2021 (ARPA).[2] In their respective cases, Movants allege that they are excluded from debt relief under Section 1005 on the basis of race: specifically, because they are white. They are challenging that race-based exclusion as a violation of both the Fifth Amendment's Due Process Clause and the federal Administrative Procedure Act and seek court orders either eliminating Section 1005's race-based debt relief program or expanding it to all farmers and ranchers, regardless of race.

Now, however, the federal government is trying to use the case before this Court as an excuse to halt Movants' cases. It has filed motions to stay those cases—and every challenge to Section 1005 other than this one—because Movants and the other plaintiffs are members of classes certified by this Court under Rule 23(b)(2). *See* Order, ECF No. 60; *see also* Joint Report, ECF No. 70 at 1 ("Defendants [sic] 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."). Because this Court has certified classes, the government argues, this is the *only* case and the *only* federal district court that should rule on the constitutionality of Section 1005.

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[1] Movants include Scott Wynn, Kathryn Dunlap, James Dunlap, Ryan Kent, Matthew Morton, Joshua Morton, Jarrod McKinney, James Tiegs, Julie Owen, Abraham Jergenson, Cally Jergenson, and Chad Ward.

[2] *See Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla.); *Dunlap v. Vilsack*, 2:21-cv-942 (D. Ore.); *Kent v. Vilsack*, 3:21-cv-540 (S.D. Ill.); *McKinney v. Vilsack*, 2:21-cv-212 (E.D. Tex.); *Tiegs v. Vilsack*, 3:21-cv-147 (D.N.D.). Movants are all represented *pro bono* by attorneys from Pacific Legal Foundation. Other challenges to Section 1005 have been brought on behalf of other farmers, using other counsel. *See Faust v. Vilsack*, 1:21-cv-548 (E.D. Wis.); *Carpenter v. Vilsack*, 21-cv-103-F (D. Wyo.); *Holman v. Vilsack*, 1:21-cv-1085 (W.D. Tenn.); *Joyner v. Vilsack*, 1:21-cv-1089 (W.D. Tenn.); *Rogers v. Vilsack*, 1:21-cv-1779 (D. Colo.); *Nuest v. Vilsack*, 21-cv-1572 (D. Minn.).

Movants oppose the government's stay motions because they believe that they should be allowed to pursue their chosen claims, with their chosen counsel, in their chosen forums. The important issues implicated by Section 1005 would also benefit from scrutiny in multiple courts.

For those same reasons, Movants now ask this Court to either (1) grant them an opt-out from the certified classes or (2) alternatively, amend the class certification order to remove Movants. Such relief is appropriate because Movants assert different claims and have different interests than the named Plaintiffs and because it would promote fairness, not cause undue hardship to any party, and uphold Movants' due process and associational rights. Although the stay motions in Movants' cases should be denied regardless, an order from this Court granting Movants an opt-out or removing them from the certified classes would help assure that they can litigate their claims.

CERTIFICATE OF CONFERENCE (LR 7.1(b))

Between August 30 and September 2, 2021, Movants' attorney Glenn Roper conferred with counsel for the parties. Emily Newton, counsel for Defendant, indicated that the government opposes this Motion because in its view, there is no right or other legal basis to opt out of a Rule 23(b)(2) class where the plaintiff is not seeking individualized monetary damages. Counsel for Plaintiffs, Jonathan Mitchell, indicated that Plaintiffs take no position on this Motion.

BACKGROUND

I. Movants' Challenges to Section 1005

Section 1005 of ARPA distributes debt relief solely on the basis of race.[3] It directs Defendant 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."

[3] References to "Section 1005" or "§ 1005" are to Section 1005 of ARPA, Pub. L. No. 117-2, § 1005, 135 Stat. 4, 12 (enacted Mar. 11, 2021).

§ 1005(a)(2). Whether a farmer or rancher is considered "socially disadvantaged" for purposes of Section 1005 depends on his or her race. 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.[4]

In the months following Section 1005's enactment, farmers across the country, including Movants, brought lawsuits to challenge its constitutionality. *See supra* n.2. Movants each asserted two claims: first, that Section 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause (*e.g., Wynn*, ECF No. 1 ¶¶ 50–61), and second, that Section 1005 cannot be lawfully implemented under the Administrative Procedure Act (*id.* ¶¶ 62–67). Movants named both the Secretary of Agriculture and the Administrator of the Farm Service Agency (FSA) as defendants (*id.* ¶¶ 10–11) and requested declaratory relief, injunctive relief, and nominal damages, (*id.* at 20–21 (Prayer for Relief)). All of Movants' cases other than *Tiegs* were filed before this Court granted Plaintiffs' motion for class certification on July 1, 2021; *Tiegs* was filed just five days later.

Movant Scott Wynn, whose case is pending in the Middle District of Florida, was the first plaintiff in any challenge to Section 1005 to file a Motion for Preliminary Injunction. (*Wynn*, ECF No. 11.) The *Wynn* court was also the first to issue a preliminary injunction against enforcement of Section 1005 (*Wynn*, ECF No. 41), and this Court relied on that analysis in granting Plaintiffs' motion for preliminary injunction in this case. *See* ECF No. 60 at 18. The *Wynn* court subsequently issued a case management and scheduling order (*Wynn*, ECF No. 43), after which the defendants

[4] *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).

answered the complaint (*Wynn*, ECF No. 48), the parties exchanged initial disclosures, and Mr. Wynn served his first round of discovery requests, with responses due September 10.

II. Plaintiffs' Class-Action Challenge to Various USDA Programs, Including Section 1005

The initial complaint in this case was filed on April 26, 2021, and an amended complaint was filed on June 2, 2021. ECF No. 1; ECF No. 11. Both complaints assert three claims. The first is that *all* USDA programs containing racial exclusions—not just Section 1005's debt relief program—violate the Constitution and Title VI of the Civil Rights Act of 1964. ECF No. 11 ¶¶ 26–30. The second, alternative claim is that the term "socially disadvantaged group" must be construed to include "white ethnic groups that have suffered past prejudice and discrimination." *Id.* ¶¶ 31–33. The third claim, also in the alternative, is that the term "socially disadvantaged farmer or farmer" must include all individuals that "have any discernable trace of minority ancestry." *Id.* ¶¶ 34–39. Plaintiffs' amended complaint also sought certification of two Rule 23(b)(2) classes: (1) farmers and ranchers who are excluded from USDA programs interpreting "socially disadvantaged farmer or rancher," and (2) farmers and ranchers encountering racial discrimination on account of Section 1005. *Id.* ¶¶ 40–42.

On July 1, this Court certified Plaintiffs' proposed classes and granted a preliminary injunction against Section 1005. ECF No. 60. In doing so, the Court cited the preliminary injunction opinion in *Wynn*, which had been submitted as supplemental authority. *See id.* at 18–19; *see also* ECF No. 44 (notice of supplemental authority). By the time this Court issued its class certification decision, all Movants except the *Tiegs* plaintiffs had filed their lawsuits, and preliminary injunction motions had been granted in *Wynn* and filed in *McKinney* and *Dunlap*.

III. The Government's Stay Requests

Although the government vigorously opposed class certification in this case, *see* Def.'s Opp. to Class Certif., ECF No. 28, once this Court certified the classes, the government filed motions to stay each of Movants' cases on the basis of the class certification. It filed similar motions in every other challenge to Section 1005 (except this one). *See* ECF No. 70 at 1.

One federal court, in the Western District of Tennessee, denied the government's stay request. *Holman v. Vilsack*, No. 1:21-cv-01085, 2021 WL 3354169 (W.D. Tenn. Aug. 2, 2021). The court concluded that granting a stay would prejudice the plaintiff farmer, who "could well have to wait years before he is able to resume his case." *Id.* at *2. Additionally, the court concluded that the interests of the *Holman* plaintiff "are not completed aligned" with those of Plaintiffs in this case and noted that if the *Holman* plaintiff sought "to opt out of the *Miller* classes," a stay would "leav[e] his interest unrepresented." *Id.*

However, in four other cases, including Movant Jarrod McKinney's, courts have granted the government's requests for a stay.[5] All four courts nonetheless noted that if the plaintiffs "do[ ] not feel that [they are] adequately represented by the class" in this case, they "can opt out of the class, advise the Court and move to lift the stay." *McKinney* at 4; *accord Carpenter* at 6 (concluding that should the plaintiff "seek and be permitted to opt-out" of the certified classes, she "may advise the Court and seek to lift the stay"); *Joyner* at 8 (if plaintiffs "seek and [are] permitted to opt-out of the classes," they can "move to lift the stay for good cause"); *Faust* at 2 ("[I]n the event Plaintiffs do opt out of the class, they can advise the Court and move to lift the stay."). Other than *McKinney*, the motions for stay in Movants' cases have not yet been ruled on.

[5] *See* Order, *McKinney v. Vilsack*, Civil Action No. 2:21-CV-00212-RWS, ECF No. 40 (E.D. Tex. Aug. 30, 2021); Order, *Carpenter v. Vilsack*, 21-cv-103-F, ECF No. 33 (D. Wyo. Aug. 16, 2021); *Joyner v. Vilsack,* No. 1:21-cv-1089, 2021 WL 3699869 (W.D. Tenn. Aug. 19, 2021); Decision & Order, *Faust v. Vilsack*, Case No. 21-C-548, ECF No. 66 (E.D. Wis. Aug. 23, 2021).

ARGUMENT

I. Movants Should Be Granted an Opt-Out from the Certified Classes

A. Legal Standard

Although the Fifth Circuit has held that "a member of a class certified under Rule 23(b)(2) has no absolute right to opt out of the class," it has also made clear that a district court in a Rule 23(b)(2) case, "acting under its Rule 23(d)(2) discretionary power, may require that an opt-out right and notice thereof be given." *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994–95 (5th Cir. 1981); *see also, e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408, 416 (5th Cir. 2004) (referring to "the discretion given a district court to order notice and opt-out rights when certifying a rule 23(b)(2) class"). District courts in this circuit have exercised their discretion to grant notice and opt-out rights to members of Rule 23(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 members of Rule 23(b)(2) class an opportunity to opt out); *Humphrey v. United Way of Tex. Gulf Coast*, No. CIV.A. H-05-0758, 2007 WL 2330933, at *10 (S.D. Tex. Aug. 14, 2007) ("In Rule 23(b)(2) class certifications, a court also has the discretion to order . . . that the class members be afforded the opportunity to opt-out.").

One common reason for allowing Rule 23(b)(2) class members to opt out is so that they can independently pursue unique monetary claims. *See, e.g.*, *Penson*, 634 F.2d at 994 (citing *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978)). But that is not the only reason. *See id.* (noting that opt-outs may be allowed to "ameliorate any 'antagonistic interests' between the class representatives and the absent members") (citing *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979)). Indeed, the rule in this circuit is that a district court may grant an opt-out right to members of a 23(b)(2) class whenever it "believe[s] that such a right is desirable to protect the interests of the absent class members." *Id.*

B. Discussion

This court should allow Movants to opt out of the certified classes so that they can litigate their chosen claims, with their chosen counsel, in their chosen forums. The same factors relied on by other courts that have allowed opt-outs also support allowing Movants to opt out in this case. Additionally, Movants' due process rights and First Amendment right of association require that they be allowed to opt out of the classes here.

1. Movants' claims are sufficiently distinct from Plaintiffs'

Allowing opt-out is appropriate when "the claims of particular class members are unique or sufficiently distinct from the claims of the class." *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997); *see also Keepseagle v. Johanns*, 236 F.R.D. 1, 4 (D.D.C. 2006) (granting opt-outs to movants who "detailed significant ways in which their claims differ from those of the plaintiff class"). That is true here. Movants have from the outset focused exclusively on Section 1005. By contrast, Plaintiffs assert a broad challenge to "numerous" statutes that limit the benefits of federal programs to socially disadvantaged farmers and ranchers. ECF No. 11 ¶¶ 10, 29. Plaintiffs also raise additional claims not asserted by Movants, including a Title VI claim and two alternative claims regarding the alleged social disadvantage of various white ethnic groups and those with "any discernible trace of minority ancestry." ECF No. 11 ¶¶ 27–39. Although this Court limited the certified classes to Plaintiffs' first claim, *see* ECF No. 60 at 10, and a recent filing indicates that Plaintiffs may file a second amended complaint that omits their alternative claims, *see* ECF No. 70 at 2, they have not yet done so. Moreover, the fact that they asserted those alternative claims shows that they take a very different view of the issues than Movants. At a minimum, it reveals key differences in litigation strategy that support allowing Movants to opt out.

In turn, Movants raise unique arguments not presented by Plaintiffs, including a claim under the federal Administrative Procedure Act and a request for nominal damages. *See*

Uzuegbunam v. Preczewski, 141 S. Ct. 792, 796 (2021) (an award of nominal damages can redress past injury and avoid mootness problems).[6] And unlike Plaintiffs, *see* ECF No. 70 at 2, Movants do not believe that it is appropriate to dispense with all fact discovery; in fact, such discovery is underway in *Wynn*. These differences, as to both claims and litigation approach, counsel in favor of allowing Movants to opt out of the certified classes.

2. Allowing Movants to opt out will increase fairness and efficiency and avoid prejudice to Movants

An opt-out is appropriate when it will "facilitate the fair and efficient conduct of the litigation." *Eubanks*, 110 F.3d at 96. That is true here. Allowing Movants to opt out of this class action will prevent what could be years of undue delay in getting their cases resolved. This case is in its early stages. No judgment or settlement has been reached, no dispositive motions have been filed (other than a partial motion to dismiss), the Court has not yet set a briefing schedule, and the parties do not plan on completing summary judgment briefing until at least April 2022. With appeals likely in a case of nationwide importance like this one, Movants may have to wait years if bound to this proceeding that they did not initiate. That would be unfair to Movants, especially when this case may include delays related to issues that Movants did not choose to raise in their respective cases (such as the propriety of class certification). For that very reason, the *Holman* court rejected the government's stay request. *Holman*, 2021 WL 3354169, at *2 (agreeing that "if this matter is stayed, [plaintiff] would have no say whatsoever in the pace at which *Miller* would proceed including whatever extensions of deadlines may be requested or granted by either party, or whether the government may seek [appellate] review").

[6] It is unclear whether Plaintiffs here seek the same alternative forms of relief as Movants: (1) an injunction only as to Section 1005's racial classification, which could render Movants eligible for debt relief; or (2) an injunction prohibiting enforcement of Section 1005 in its entirety. *See, e.g.*, *Wynn* Compl. at 20–21. If Plaintiffs pursue only the second option, that is an additional reason to allow Movants to opt out, so that they can pursue a potential monetary benefit.

Nor have Movants delayed or sat on their rights. To the contrary, they all filed their lawsuits within a few months of Section 1005's enactment. And although this case was nominally the first-filed challenge to Section 1005, *Wynn* was filed prior to the amended complaint in this case;[7] *Kent, Dunlap,* and *McKinney* were filed before this Court granted class certification; and *Tiegs* was filed less than a week after the classes were certified. It is unnecessary and unfair to bind Movants to classes that either did not exist or were newly formed at the time their cases were filed.

The fairness concerns are especially acute for Mr. Wynn. The court in *Wynn* has already set an expedited discovery and briefing schedule, with the goal of "provid[ing] clarity to the large number of socially disadvantaged farmers and ranchers who were expecting relief under Section 1005." Case Mgmt. & Sched. Order, *Wynn*, ECF No. 43 at 2. Even with a period for fact discovery—which has already commenced in *Wynn* but which the parties in this case have elected to forgo—summary judgment briefing in *Wynn* will be completed more than two months before it would be completed under the parties' proposal in this case. *Compare* ECF No. 70 at 3, *with* Case Mgmt. & Sched. Order, *Wynn*, ECF No. 43.[8] It makes little sense to bind Mr. Wynn as a member of the classes here when his case is poised to be fully briefed and submitted before this one.

Fairness concerns are also strong for Mr. McKinney because the court in his case recently granted the government's stay motion, bringing his case to a halt. *McKinney*, ECF No. 40. In doing so, the court noted that if Mr. McKinney "does not feel that he is adequately represented by the class," he "can opt out of the class, advise the Court and move to lift the stay." *Id.* at 4. That is

[7] Given that Mr. Miller has never alleged that he holds a qualifying farm loan, he likely lacked standing to challenge Section 1005 on his own. *See Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768–69 (5th Cir. 2020) (lack of standing by named class representative is a jurisdictional defect). The first amended complaint remedied that defect by adding plaintiffs who do have farm loans, *see* ECF No. 11 ¶¶ 20–23, but not until over two weeks *after* the complaint was filed in *Wynn*.

[8] Under the *Wynn* scheduling order, the close of discovery is December 3, 2021, with summary judgment briefing to be completed in January 2022. *Wynn*, ECF No. 43 at 2.

precisely what he seeks to do here. If this Court grants his request to opt out, Mr. McKinney will be able to pursue his claims in his separate action; otherwise, he will be relegated to the sidelines while this case proceeds.

3. Allowing Movants to opt out will not prejudice other class members or cause undue hardship to the government

An opt-out for Movants will not prejudice any of the other class members. Indeed, the removal of a mere handful of the more than 20,000 farmers who are members of the certified classes would not negatively impact the remaining class members in any way. *See* ECF No. 13 at 2 (estimating that "the nationwide class comprises at least 21,000 farmers"). And since Movants have filed this motion on their own initiative, "affording [Movants] an opportunity to opt out will not be overly burdensome," such as can occur where parties are forced to expend resources to provide opt-out notices to every class member. *Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588, 604 (E.D. Mich. 1996).

Nor will allowing Movants to opt out impose an undue hardship or inequity on the government, for four reasons. ***First***, defending against Movants' lawsuits is hardly an inequity or hardship, especially where, as here, Defendant is represented by the largest legal employer in the country. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) ("[B]eing required to defend a suit, without more, does not constitute a clear case of hardship or inequity.") (quotation marks omitted); *Ctr. for Biological Diversity v. Ross*, 419 F. Supp. 3d 16, 21–22 (D.D.C. 2019) (citing *Lockyer* and noting that its conclusion is "particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before [the Court]") (quotation omitted).

Second, in opposing class certification, Defendant already signaled his preference to litigate multiple cases rather than one case. *See* ECF No. 28. Likewise, by arguing that any

preliminary injunctive relief must be limited to the named Plaintiffs, he necessarily invited multiple cases in various jurisdictions so that all affected farmers and ranchers could pursue their own remedies. *See* Def.'s Resp. in Opp. at 36–38, ECF No. 27 (arguing for a limited injunction so that the important legal questions surrounding Section 1005 could "percolat[e] through the federal courts") (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring)). Of course, Defendant has changed his tune now that the Court has ruled against him on these two issues. But the very fact that he made those arguments demonstrates that the government will not suffer undue prejudice if it is required to litigate Movants' cases in addition to this one.

Third, allowing Movants to opt out would obviate the government's concern—expressed in its stay motions—that it might be subject to inconsistent judgments with respect to Movants (such as if this Court ruled differently than the courts in Movants' cases). If Movants are no longer members of the classes in this case, that is no longer an issue.

Fourth, any burden on Defendant if Movants are allowed to opt out is outweighed by the value of percolation in multiple federal courts of the important constitutional issues raised in this case. *See 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 this Court's 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.").

4. Movants' interests are not completely aligned with Plaintiffs'

Opt-outs are also appropriate when there is the possibility of "antagonistic interests" between the class and those seeking an opt-out. *Penson,* 634 F.2d at 994; *see also Holman*, 2021 WL 3354169, at *2 (denying a stay in part because "the interests of the *Miller* plaintiffs are not completely aligned with Plaintiff's interests"). That potential is present here. Movants have elected

to be represented by a decades-old public interest organization with a long track record of non-partisan advocacy for equality under the law.[9] By contrast, class counsel is a newly formed organization that is as-yet unproven in the area of constitutional litigation.[10] They have litigated the issues in this case differently from Movants; have never communicated with Movants; and purport to represent thousands of unnamed class members, yet believe that giving individualized notice to those members is unnecessary. *See* ECF No. 70 at 4. Although Movants do not generally dispute this Court's conclusion that Plaintiffs and their counsel will adequately represent the interests of absent class members, *see* ECF No. 60 at 12, they respectfully suggest that where Movants have elected to bring unique claims with separate counsel, such representation is inadequate as to them. In other words, Movants should not be tied to the arguments that are asserted, the concessions that are made, and the decision as to whether unfavorable rulings are appealed in this case when they are already represented by their preferred counsel in their own cases.

5. Denying Movants the ability to opt out would violate their due process rights

Rule 23, which governs class actions, was enacted under the authority of the Rules Enabling Act, 28 U.S.C. §§ 2071–77, which provides "pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016) (quoting 28 U.S.C. § 2072(b)). Accordingly, the Supreme Court has carefully monitored the use of class actions under Rule 23 to ensure that due process and other "substantive rights" are not infringed. *See e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (noting

[9] *See* Pacific Legal Foundation, *Equality Before the Law*, https://pacificlegal.org/equality-before-the-law.

[10] *See* America First Legal, *Senior Trump Officials Launch America First Legal*, https://www.aflegal.org/news/senior-trump-officials-launch-america-first-legal-foundation (Apr. 6, 2021).

that the "serious possibility" of a due process violation provided "an additional reason not to read Rule 23(b)(2) to include the [plaintiffs'] monetary claims"). Here, a mandatory class that denies Movants the ability to opt out would abridge their due process rights—and thereby contradict the clear limitation of the Rules Enabling Act.

The rules governing class actions have changed over time.[11] In 1966, Rule 23 was revised to create the 23(b)(2) class device for injunctive or declaratory relief, which is at issue in this case. *See* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657, 658–61 (2011). Since then, various courts have recognized a due process right to opt out from 23(b)(2) classes. For example, *DeGier v. McDonald's Corp.* involved a proposed class of "all female persons" employed by McDonald's "in the San Francisco Region . . . since December 20, 1974, who have been or will be excluded from or denied jobs in management." 76 F.R.D. 125, 126 (N.D. Cal. 1977). The *DeGier* court conditionally certified the class but held that "equal protection and due process requires the right to opt out of Rule 23(b)(2) classes." *Id.* at 127. The Court reasoned that "[t]here can be no logical distinction between denial of access to a trial court and mandatory inclusion in a class action before a trial court" and observed that absent class members have "the right to know that a suit is underway, to choose to withdraw from it if they wish so to do, or to be represented by counsel of their own choosing." *Id.*; *see also Allen v. Isaac*, 100 F.R.D. 373, 377 (N.D. Ill. 1983) (holding

[11] Before 1912, for example, the rules expressly provided that even a *judgment* in a class action could not bind absent class members. *See* Maximilian Grant, Comment, *The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 U. Chi. L. Rev. 239, 243 & n.21 (1996). After several rounds of rule changes in the ensuing decades, the Supreme Court concluded that absent class members can be bound by a judgment pertaining to the class. *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940). However, the Court noted that in some circumstances, binding absent class members could violate their due process rights. *Id.* at 45. The Court identified inadequate representation as one such circumstance but did not elaborate on what else might qualify. *Id.*

that due process rights of class members were best protected by permitting them to opt-out of classes certified under Rule 23(b)(2)).

Although the Supreme Court has never directly addressed the due process implications of mandatory Rule 23(b)(2) classes, its decisions suggest that Movants should be allowed to opt out here. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court explained that due process affords absent class members the right to opt out of classes "concerning claims wholly or predominately for money judgments," but expressed "no view concerning other types of class actions, such as those seeking equitable relief." 472 U.S. 797, 811 & n.3 (1985). However, the Court went further in *Wal-Mart Stores, Inc. v. Dukes*, noting that there is a "serious possibility" that the lack of an opt-out right violates due process even where "monetary claims do not predominate." 564 U.S. at 363; *see also* John M. Husband & Bradford J. Williams, *Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action*, Colo. Law., September 2011, at 53, 58 (noting that *Wal-Mart* "may presage a future class action jurisprudence focused more directly on due process concerns" and perhaps even "augur the eventual invalidation of Rule 23(b)(2) on constitutional grounds"). Even without a conclusive Supreme Court pronouncement on the question, the "serious possibility" of violating Movants' due process rights supports allowing them to opt out.

Nor is it surprising that the Supreme Court recognized this potential threat to due process. As the Court noted in *Shutts*, a "chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs [in the class]." 472 U.S. at 807; *see also Board of Regents v. Roth*, 408 U.S. 564, 569 (1972) (noting that due process requirements protect against "the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."). A mandatory class extinguishes that interest without affording the necessary protections. In most circumstances, an individual's chose in action can only be extinguished after

providing that individual with her day in court. *See* Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. Mich. J.L. Reform 347, 376 (1988) ("[A] chose in action can only ordinarily be extinguished by being dismissed in an individual court action 'for cause, either on its merits or because of some procedural failing properly charged to the filing party.'"). Mandatory class actions represent a remarkable departure from this rule, as they allow an individual's property interest to "be extinguished" without affording that individual the right to present her claims. *Id.* at 376–77; *see also Shutts*, 472 U.S. at 807 ("An adverse judgment . . . may extinguish the chose in action forever through res judicata."). A mandatory class, with no possibility of opting out, even when a request to opt out is made, therefore amounts to an unlawful "deprivation" of protected property interests. *Roth*, 408 U.S. at 569.

Due process is also denied when a mandatory class denies plaintiffs the ability to litigate their claims independently with the counsel that they believe best represents their interests. Such a denial stands in stark contrast to the longstanding "master of the complaint" rule that "a party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). Having brought their own lawsuits challenging Section 1005, Movants must be allowed to opt out of the classes here to ensure that their interests are fully represented—even though the Court has found that absent class members are otherwise "adequately represented" in this action. As discussed above, Plaintiffs and Movants differ on a variety of important features of the litigation, including what claims to raise, what forms of relief to pursue, and whether fact discovery is needed. In this context, 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 Calif. L. Rev. 1573, 1613 (2007).[12]

To avoid infringing Movants' due process rights, the Court should resolve the "prima facie conflict between the dictates of procedural due process and the collectivist goals of the class action procedure" in favor of individual liberty and allow Movants to opt out of the certified classes. *Id.* at 1573.

6. Denying Movants the ability to opt out would violate the First Amendment

Movants also have a First Amendment right to opt out of the certified classes. The Supreme Court has long recognized that "association for litigation may be the most effective form of political association." *NAACP v. Button*, 371 U.S. 415, 431 (1963). The right to eschew association for expressive purposes is similarly protected. *Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"). Government infringement of this freedom "can take a number of forms." *Id.* at 622. The use of the class device is one of them. *See Bernard v. Gulf Oil Co.*, 619 F.2d 459, 475 (5th Cir. 1980) ("We cannot

[12] That autonomy necessarily includes the right to *not* pursue particular claims. The mandatory feature of 23(b)(2) rests on the premise that class members "suffer from a common injury properly addressed by class-wide relief." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998). But that premise is highly questionable in racial discrimination cases. Modern equal protection jurisprudence abhors "unthinking [racial] stereotypes." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989). Yet classes defined primarily by the race of their members incorrectly presume that members of the same racial group necessarily share the same desire for class-wide relief. *See* Redish and Larsen, *supra* at 1573 ("[I]n a civil rights [class] action brought on behalf of African Americans to enforce affirmative action, such famed African American opponents of affirmative action as sociologist Harry Edwards and conservative Republican politician Alan Keyes would necessarily be forced to be included in the class."). Here, Movants declined to pursue a class action or to assert claims similar to Plaintiffs' alternative claims, ECF No. 11 ¶¶ 27–39, precisely because they wish to be treated as individuals without regard to their race or ethnicity.

interpret Rule 23 as authorizing prior restraints without rewriting the First Amendment and the gloss put upon it by the Supreme Court.").

Laws, policies, or procedures that burden individuals' First Amendment right of association must, at a minimum, satisfy exacting scrutiny.[13] "Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Americans for Prosperity*, 141 S. Ct. at 2384. That standard is not satisfied with respect to binding Movants to this class action.

The government may attempt to justify binding Movants to this action on the ground that it promotes efficiency. But that argument fails for three reasons. ***First***, class actions offer no exception to the rule that efficiency is not a determinative concern when it comes to constitutional rights. *See, e.g.*, *INS v Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."). This rule applies even more forcefully in the First Amendment context, where the Court has "reaffirm[ed] simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796–97 (1988). That is true not only for speech, but for the associational rights protected by the First Amendment.

Second, mandatory classes frequently involve "extensive collateral litigation," including on issues such as "whether the class was properly certified," Grant, *supra* at 263. Thus, mandatory

[13] There is some debate about whether the proper standard of review is strict scrutiny or exacting scrutiny. *See Americans for Prosperity v. Bonta*, 141 S. Ct. 2373, 2391–92 (2021) (Alito, J., concurring). The Court need not wade into those uncharted waters because denying Movants the ability to opt out in this case would fail under even the more lenient standard.

class actions may exacerbate the very problem they were designed to avoid and be *less* efficient than separately pursued actions. *See id.*

Third, when the government defends a rule restricting First Amendment freedoms, it must do more than simply "posit the existence of the disease sought to be cured." *Turner Broad. Sys., Inc. v FCC*, 512 U.S. 622, 664 (1994) (plurality op.). Instead, it "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* Courts routinely exercise their discretion to allow opt-outs even in 23(b)(2) classes, *see, e.g., DeGier*, 76 F.R.D. at 126; *Serna*, 2014 WL 7721824, and there is no evidence that their decision to do so undercuts any efficiency interest that the government might assert. Accordingly, Movants' First Amendment associational rights require that they be allowed to opt out.

II. Alternatively, the Court Should Revise the Class Certification to Remove Movants

As an alternative to allowing Movants to opt out, the Court could amend its class certification to exclude Movants. Amending a class is within this Court's discretion, even up to the moment of final judgment. *See* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *In re Initial Pub. Offering Secs. Litig.*, 483 F.3d 70, 73 (2d Cir. 2007) (explaining that district courts retain the discretion to alter or amend a class so long as the decision does not conflict with an appellate ruling). Amending the class certification so as to remove Movants from the classes would be proper for the same reasons discussed above in favor of allowing Movants to opt out.

CONCLUSION

Movants should be allowed to opt out of the certified classes or, alternatively, the class certifications should be revised to remove Movants.

DATED: September 3, 2021.

Respectfully submitted:

PACIFIC LEGAL FOUNDATION

s/ Erin E. Wilcox

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**Pro hac vice motion pending*

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 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.

s/ Erin E. Wilcox
Erin E. Wilcox

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

[PROPOSED] ORDER ON MOTION TO OPT OUT OF CERTIFIED CLASSES OR, IN THE ALTERNATIVE, TO AMEND CLASS CERTIFICATION ORDER

Pending before the Court is a Motion to Opt Out of Certified Classes or, in the Alternative, to Amend Class Certification Order. The Motion was brought by Scott Wynn, Kathryn Dunlap, James Dunlap, Ryan Kent, Matthew Morton, Joshua Morton, Jarrod McKinney, James Tiegs, Julie Owen, Abraham Jergenson, Cally Jergenson, and B. Chad Ward (together, "Movants"), each of whom is a plaintiff in a challenge to Section 1005 of the American Rescue Plan Act of 2021.[1] Having considered the Motion, any Responses, the record in this case, and this Court being fully advised, it is hereby ORDERED:

That the motion is GRANTED. Movants are hereby opted out of the classes that were certified by Order of this Court on July 1, 2021. ECF No. 60.

[1] *See Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla.); *Dunlap v. Vilsack*, 2:21-cv-942 (D. Ore.); *Kent v. Vilsack*, 3:21-cv-540 (S.D. Ill.); *McKinney v. Vilsack*, 2:21-cv-212 (E.D. Tex.); *Tiegs v. Vilsack*, 3:21-cv-147 (D.N.D.).

[OR, IN THE ALTERNATIVE] That the motion is GRANTED. The classes that were certified by Order of this Court on July 1, 2021, ECF No. 60, are hereby amended to remove Movants as class members.

IT IS SO ORDERED.

DATED: _____

_____
REED O'CONNOR
UNITED STATES DISTRICT JUDGE