

**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.

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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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**Other Authorities**

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Decision & Order, *Faust v. Vilsack*, Case No. 21-C-548, ECF No. 66 (E.D. Wis. Aug. 23, 2021) .....5

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Marcus, David, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657 (2011) .....13

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...

Pacific Legal Foundation, *Equality Before the Law*,  
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Redish, Martin H. & Larsen, Nathan D., *Class Actions, Litigant Autonomy, and  
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Weber, Mark C., *Preclusion and Procedural Due Process in Rule 23(b)(2) Class  
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