IN 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

DEFENDANT'S REPLY REGARDING SCOPE OF PRELIMINARY INJUNCTION

In an order issued July 1, 2021, this Court granted Plaintiffs' motion for a preliminary injunction, as well as Plaintiffs' motion to certify two classes in this matter. ECF No. 60 (July 1 Order). This was the third such injunction issued by a district court. *See* ECF No. 21, *Faust v. Vilsack*, No. 21-548 (E.D. Wis.) (TRO); ECF No. 41, *Wynn v. Vilsack*, No. 21-514 (M.D. Fla.) (preliminary injunction). In response to the prior two court orders, USDA has not been issuing payments under the Section 1005 program. However, as previously noted, USDA has taken certain preparatory administrative steps, with the express approval of these courts, to enable it to make prompt payments if these injunctions are later lifted. *See* Defs.' Notice Re Scope of Prelim. Inj., ECF No. 61. Although USDA did not interpret this Court's order as requiring a different result, USDA filed the recent notice concerning its ongoing actions to ensure the Court and parties were aware of its interpretation and implementation of this Court's order. *See id.*

On July 3, 2021, this Court ordered Plaintiffs to respond to the Government's notice by indicating whether Plaintiffs "are injured in the Government's continued use of race and ethnicity in preparatory steps," and if so, Plaintiffs' proposed remedy. Order, ECF No. 62 (July 3 Order). In response, Plaintiffs indicate that they do not oppose certain preparatory steps related to the Section 1005 program but do oppose others. *See* Pls.' Resp. to Defs.' Notice of July 2, 2021, ECF No. 63. Specifically, Plaintiffs state that they would not object "if the defendants wanted to post material on a USDA website that truthfully describes the content of section 1005 and the fact that it is currently enjoined from enforcement" or "if the USDA attempts to research or determine the racial composition of farmers or ranchers so it can act quickly to implement section 1005's command in the event that all three preliminary injunctions are vacated on appeal." *Id.* at 2. But Plaintiffs argue that it "is not … consistent with law or the Court's preliminary-injunction order" for the Government to "send[] letters to eligible borrowers" based on the use of "racial criteria to determine who will receive the letter." *Id.*

Plaintiffs' opposition to certain preparatory steps (and not others) is not related to their assertions of harm in this lawsuit or their requested preliminary relief. Plaintiffs provide no basis to find that they "are injured in the Government's continued use of race and ethnicity" in any "preparatory steps," July 3 Order 2, such as the mailing of notices to eligible borrowers. The cessation of such conduct is not what Plaintiffs sought in their preliminary injunction motion (or elsewhere). *See* Pls.' Mot. for Prelim. Inj. 1 (seeking a preliminary injunction to "enjoin[] [USDA] from providing loan forgiveness to individuals based on their race or ethnicity"). And such relief would not remedy their alleged injuries. *See id.* at 4-5 (alleging that they will be irreparably harmed "because the entirety of funds Congress that appropriated under section 1005 will be unavailable to them" and the Government's sovereign immunity "makes it impossible for the

plaintiffs to recover damages if these unconstitutional racial preferences wind up excluding them from relief that the defendants grant to others"). To be sure, Plaintiffs based their allegation of irreparable harm in part on their view that an alleged equal protection violation is *per se* irreparable harm. But as the excerpts above show, Plaintiffs have consistently based that alleged equal protection violation on their being excluded from the debt relief under Section 1005, *i.e.*, on USDA making payments to others and not to them. *See id.* at 4-5. Having obtained an order preventing USDA from making payments under Section 1005, Plaintiffs cannot now go further and obtain an order preventing USDA from taking certain preparatory steps where Plaintiffs fail to identify any concrete injury—much less an irreparable one—that they will suffer as a result of those steps.

That Plaintiffs do not suffer any concrete injury by virtue of USDA sending notices to eligible borrowers is underscored by Plaintiffs' position in their Response to the Government's Notice. Plaintiffs do not object to USDA identifying eligible borrowers, including by using their race to do so. *See* Pls.' Resp. 1-2. And Plaintiffs concede that it would be appropriate for USDA to provide truthful information about the Section 1005 program and to take steps so that USDA can act quickly to implement the program in the event the pending injunctions are vacated. *See id.* USDA's notices to eligible borrowers are doing just that: USDA is merely sending notices to eligible borrowers to inform them of their eligibility under the program and allow USDA to collect the information necessary to implement the program quickly and efficiently in the event the current injunctions are vacated. *See* Notice of Funds Availability (NOFA), 86 Fed. Reg. 28329 (May 26, 2021) (defining "[o]ffer notice" and explaining that USDA is sending notices to eligible borrowers to notify them of their indebtedness as of January 1, 2021, obtain their direct deposit payment information, and verify their eligibility and loan information); *see also* Declaration of William Cobb ¶ 13, ECF No. 27-1 (explaining that "[u]nder the provisions of the May 2021 NOFA, eligible

recipients do not need to take any action until receipt of a payment offer letter from FSA" and that "FSA is identifying eligible recipients whose demographic designations in FSA systems qualifies them as socially disadvantaged based on race or ethnicity").[1] Given Plaintiffs' concession that USDA can post a notice about the program on its website, Plaintiffs cannot establish injury based on notices to eligible borrowers that otherwise provide that information. And those notices do not impact Plaintiffs because they have no effect so long as this Court's injunction remains in place. While that is the case, USDA is not making payments under Section 1005, and the notices Plaintiffs object to do not injure them, as evidenced by the fact that Plaintiffs did not seek to enjoin them.

In lieu of demonstrating a concrete injury, Plaintiffs assert that any consideration of race in sending such letters is unconstitutional as a legal matter. But that legal argument, standing alone, does not support jurisdiction; rather, Plaintiffs must demonstrate that they are personally injured by the challenged conduct in a concrete way (and that the injury is redressable by a court order). *See, e.g.*, *TransUnion LLC v. Ramirez*, 2021 WL 2599472, at *8 (U.S. June 25, 2021) (explaining that merely seeking to ensure a defendant's compliance with the law (and, as the case may be, to obtain damages) is not sufficient to establish standing where a plaintiff does not otherwise suffer a concrete personal harm due to the allegedly unlawful conduct); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485–86 (1982) ("[O]bservation of conduct with which one disagrees ... is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms."); *Allen v. Wright*, 468 U.S. 737, 754–55 (1984). And an even greater degree of harm is needed to support a preliminary injunction. *See, e.g., Optimus Steel, LLC v. U.S. Army Corps of Engineers*,

[1] USDA has also made clear on its website that a preliminary injunction has halted it "from making debt relief payments under Section 1005," https://www.farmers.gov/americanrescueplan, and is informing eligible borrowers of that in the notices.

492 F. Supp. 3d 701, 726 (E.D. Tex. 2020) (explaining that losses sufficient to establish standing were not sufficient to establish irreparable harm). Where Plaintiffs have not identified how notifications to eligible borrowers injure them, and their Response indicates that they do not object to substantially similar actions, Plaintiffs have not carried their burden to show—as they must—that they will suffer irreparable harm if USDA continues to take preparatory steps to implement the program, including by sending out such notices. *See* July 1 Order (recognizing that Plaintiffs "must clearly carry the burden of persuasion with respect to all four requirements" to obtain a preliminary injunction) (citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003)).

By contrast, like the courts in *Faust* and *Wynn*, Plaintiffs recognize that enjoining USDA from preparing to issue the debt payments under Section 1005 would harm USDA and the minority farmers who stand to benefit from the program. *See* Pls.' Resp. 1 (not objecting if USDA "attempts to research or determine the racial composition of farmers or ranchers so it can act quickly to implement section 1005's command in the event that all three preliminary injunctions are vacated on appeal"). As the Government explained, Congress enacted Section 1005 as part of a pandemic relief package to provide debt payments on certain USDA direct and guaranteed loans to the minority farmers who have higher rates of delinquency and foreclosures on such loans, *see* Cobb Decl. ¶ 39, such that they are disproportionately on the brink of default and foreclosure. *See* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. 29, ECF No. 27. Recognizing this interest, the courts in *Faust* and *Wynn* entered injunctions limited to enjoining USDA from making debt payments under Section 1005 but explicitly authorized USDA to continue to take preparatory steps to ensure the quick implementation of the program in the event it is found permissible. *See Faust* Order at 8 ("Though Defendants would be enjoined from allocating funds to eligible farmers and ranchers

under a temporary restraining order, they would not be prevented from identifying eligible recipients, mailing notices, accepting and reviewing applications, responding to inquiries and providing guidance regarding the program, and making other determinations."); *Wynn* Order at 49 n.19 (explaining that "[t]he Court's injunction prohibits the distribution of payments, loan assistance, or debt relief, but does not enjoin Defendants from continuing to prepare to effectuate the relief under Section 1005 in the event it is ultimately found to be constitutionally permissible"). The court in *Faust* noted that such a limited injunction "resolves any threat of serious delay" of program implementation. Order at 9.[2]

Such delay is precisely what Plaintiffs' position would cause, and they are not entitled to expand their requested relief now in a way that would not serve to benefit them and would only serve to harm the Government and the minority farmers who stand to benefit from Section 1005. Without a concrete personal injury (much less an irreparable one) based on USDA's issuance of notices to eligible borrowers, and with the balance of harms in favor of the Government, there is no legal basis to expand the injunction to prohibit USDA from taking the preparatory steps necessary to ensure that timely debt relief is provided to minority farmers in the event the current injunctions are vacated. *See* July 1 Order 5 (explaining that "[i]f the movant fails to establish any one of the four prerequisites to injunctive relief, relief will not be granted"). The injunction here should be no broader than that already provided for in *Wynn* (and previously in *Faust*), such that USDA may continue to take preparatory steps to stand ready to issue payments under Section 1005 in the event the current injunctions are lifted. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S.

[2] Indeed, the court in *Faust* today dissolved the temporary restraining order in that case and stayed resolution of the plaintiffs' preliminary injunction motion there because it found that in light of the preliminary injunction entered in *Wynn*, plaintiffs could not establish irreparable harm as is necessary to warrant preliminary relief. *See* Order Staying Pls.' Mot. for a Prelim. Inj., ECF No. 49.

753, 765 (1994) (explaining that injunctions are to be no broader than "necessary to provide complete relief to the plaintiffs").

Dated: July 6, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2021, a copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

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