IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHELBI HINDEL, *et al.*,	:	**Case No. 2:15-cv-3061**
Plaintiffs,	:	**Judge George C. Smith**
v.	:	**Magistrate Judge Kimberly A. Jolson**
JON A. HUSTED, OHIO SECRETARY OF STATE,	:	
Defendant.	:	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PERMANENT INJUNCTION

Defendant Secretary of State Husted concedes that his website continues to violate the Americans with Disabilities Act ("ADA") because it is inaccessible to Plaintiffs and other individuals with disabilities. Yet he asks this Court to forgo an effective remedy for this ongoing violation, and instead countenance his meandering efforts to remediate his website, with no monitoring by the Court or Plaintiffs. Plaintiffs respectfully request that this Court hold the Secretary accountable for this violation and enter their proposed order to ensure that Plaintiffs have equal access to the Secretary's website.

I. ARGUMENT

Secretary Husted makes no effort to convince this Court that his website complies with the ADA. Doc. 48 at 3, 12. Instead, he objects that Plaintiffs' proposed injunction does not allow enough time for him to achieve compliance, goes too far to ensure compliance, and involves Plaintiffs in the compliance process. Because the Secretary's efforts to remediate his website have been inadequate—both in effort and in result—these aspects of Plaintiffs' proposed

injunction are necessary to fulfill the mandates of the ADA.

A. Plaintiffs' proposed injunction is narrowly tailored to address the Secretary's ongoing violation of the ADA.

The Secretary asks this Court for a bare-bones order that simply requires the launch of an ADA-compliant website by mid-2018, as opposed to the specific requirements to ensure initial and ongoing compliance that are contained in Plaintiffs' proposed injunction. This argument ignores Plaintiffs' evidence that those detailed requirements—policies, staff training, and opportunities for feedback from users—are necessary to achieve compliance. *See* Doc. 47-1. It also ignores the Secretary's demonstration over the past eighteen months[1] that he is unable to produce an ADA-compliant website without these requirements. Notably, the Secretary does not allege—let alone meet his burden to prove—that Plaintiffs' proposed remedy would constitute a fundamental alteration or undue burden.[2] *See* 28 C.F.R. § 35.130(b)(7)(i); 28 C.F.R. § 35.150(a)(3).

This Court's authority is not as limited as the Secretary argues. "If local authorities 'fail in their affirmative obligations' under federal law, 'the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.'" *Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 198 (2d Cir. 2014) (affirming broad injunctive relief addressing ongoing accessibility barriers at polling sites) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971)). In light of the ongoing exclusion of Plaintiffs from the Secretary's website, this Court has "not merely the power but the duty to

[1] The Secretary asserts in his opposition memorandum that his office has spent the past eighteen months working to make his website accessible. Doc. 48 at 1, 5.

[2] Section C of the Secretary's argument is titled "The Timing of Plaintiff's Request is Unduly Burdensome,"(Doc. 48 at 14) but the Secretary does not cite 28 C.F.R. § 35.150(a)(3) (establishing an undue burden defense under Title II of the ADA) or argue that the other aspects of Plaintiffs' proposed injunction are subject to an undue burden analysis, so it is unclear whether the Secretary actually intends this argument to invoke the undue burden defense. The Secretary's argument regarding the timeline for compliance is addressed *infra* in section I.B entitled This Court should not allow the Secretary to continue to delay compliance with the ADA.

render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Disabled in Action*, 752 F.3d at 189 (quoting *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987) (internal quotation marks omitted).

The evidence in this case demonstrates that Plaintiffs' broad proposed relief is necessary. As Plaintiffs explained in their Motion for Permanent Injunction, each feature of the proposed injunction is necessary to achieve and sustain compliance. Doc. 47 at 27-30; Doc. 47-1. Plaintiffs' expert Sharron Rush reiterates the importance of these features in her Second Supplemental Declaration, attached as Exhibit 1. Ms. Rush explains that the Secretary's well-intentioned efforts to achieve compliance are inadequate because a new content management system ("CMS") cannot compensate for the lack of accessibility policies, staff training, and cross-team collaboration. Exhibit 1 ¶¶ 6-9. Similarly, Ms. Rush notes that while the hiring of a website accessibility coordinator is a positive development, it will accomplish little if understanding of responsibility for web accessibility is not distributed throughout the office, if accessibility policy is not set and disseminated from top leadership, and if critical mechanisms for sustaining accessibility, such as regular website testing and consideration of accessibility in performance reviews, are not adopted. *Id.* ¶¶ 7-9. Therefore, it is necessary for this Court to order the Secretary to take all of these steps to achieve initial and ongoing compliance.

B. This Court should not allow the Secretary to continue to delay compliance with the ADA.

The Secretary asserts that Plaintiffs' proposed date for remediation of his website—March 3, 2017—is unreasonable because of the bureaucratic constraints on his agency's contracting processes. In support of his request for an additional eighteen months to achieve compliance, he notes that the U.S. Department of Justice has allowed compliance periods of

eighteen months to two years in its settlements with government agencies and in its proposed regulations. *See* Doc. 48 at 16 n.8. Yet the Secretary admits that his office has already spent the past eighteen months attempting to achieve compliance. Giving the Secretary an additional eighteen months would grant him a total of three years to provide Plaintiffs with equal access to his website. This Court should not allow the Secretary to continue dragging his feet, and instead should order compliance within a reasonable time supported by the evidence.

Plaintiffs' Complaint for Declaratory and Injunctive Relief and Attorneys' Fees (Doc. 1) filed in December 2015 requested that the Secretary make his website accessible before the March 2016 primary election. *Id.* at 13 ¶ a. After the Secretary's initial attempts at remediation were unsuccessful, Plaintiffs modified their request in their initial Motion for Permanent Injunction (Doc. 25) to achieve compliance before the November 2016 general election. When the parties' settlement negotiations failed, Plaintiffs again modified their request in their renewed Motion for Permanent Injunction (Doc. 47) to achieve compliance before the May 2017 primary election. Now the Secretary proposes to delay compliance even further, to the November 2018 general election. This Court should not accept such an unreasonable delay of the Plaintiffs' rights.

Although the Secretary asserts this timeline is necessary because of bureaucratic contracting requirements, the timeline of events reflected in the Secretary's filings with this Court demonstrates that the Secretary has allowed extended periods of time to pass between his actions, at times only acting when he must report to the Court on his efforts. For example, the Secretary's initial contractor, Lochbridge/Unicon, completed its assessment of the website on November 16, 2015, but the Secretary did not engage Lochbridge/Unicon for remediation of the website until December 15, 2015, one week after Plaintiffs filed this lawsuit. *See* Doc. 48. at 6-

7. Similarly, although Lochbridge completed its work in early January 2016, and Plaintiffs alerted the Secretary that the site remained inaccessible shortly thereafter, the Secretary waited until April 18, 2016 to post a Request for Proposals (RFP) for a second assessment, only one week before his response to Plaintiffs' Motion for Permanent Injunction was due. *Id.* Most recently, the Secretary waited until the day he filed his response to Plaintiffs' renewed Motion for Permanent Injunction—three months after SSB Bart completed its assessment—to post the new RFP for a contractor to remediate the deficiencies identified by SSB Bart. *Id.* at 9. These long periods of inactivity cannot be attributed solely to bureaucratic contracting requirements;[3] instead, they demonstrate the importance of this Court setting achievable deadlines that are no longer than necessary to spur the Secretary to act diligently to end this ongoing ADA violation.

The Secretary's proposal to extend the time for compliance to mid-2018 is even more concerning because it is not supported by any evidence or opinion from any knowledgeable person suggesting that the Secretary's proposed timeline is necessary to achieve compliance. Presumably, the Secretary's new website accessibility coordinator or any of the contractors with whom the Secretary has worked over the past eighteen months would be well-situated to opine on how long it would take to bring the Secretary's website into compliance with the ADA. Their silence is telling. If the Secretary intends to assert that Plaintiffs' proposed timeline would constitute an undue burden, then he bears the burden of proving so, after considering all resources available to achieve compliance. *See* 28 C.F.R. § 35.150(a)(3). By contrast, Plaintiffs have presented evidence on the steps that are necessary to achieve compliance. Due to the Secretary's continued delays, Plaintiffs' expert now opines that the Secretary can achieve

[3] Furthermore, to the extent these bureaucratic contracting requirements, presumably set by state law or regulation, conflict with honoring Plaintiffs' federally guaranteed civil rights, they must bend to the mandates of federal law. *See Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 160 (2d Cir. 2013) (holding that it would "run counter to the ADA's broad remedial purpose [to] allow[] states to insist that whatever legal requirements they may set are never subject to reasonable modification under Title II of the ADA").

compliance prior to the 2017 general election. Exhibit 1 ¶ 5.[4] Plaintiffs request that this Court order compliance within this reasonable timeframe instead of allowing the Secretary to spend yet another eighteen months (a total of three years) attempting to remediate his website.

C. Plaintiffs' proposed injunction appropriately balances the Secretary's autonomy with the need for oversight.

The Secretary protests the extent of Plaintiffs' involvement in monitoring progress with the injunction, but this involvement is necessary to obviate extensive oversight by the Court or the appointment of a monitor. Ongoing communication between the parties is also intended to prevent re-litigation of these issues as compliance disputes arise; if Plaintiffs have an opportunity to review information from the Secretary and express concerns early in process, the parties are less likely to need the Court's involvement in disputes. Throughout this case, the parties have interacted with professionalism and cordiality, so there is no reason to expect that Plaintiffs' involvement in monitoring progress would be any different.

Courts have entered injunctive relief that allows prevailing plaintiffs to monitor the defendants' compliance, often more extensively than Plaintiffs have proposed in their Order for Permanent Injunction.[5] In *Disabled in Action*, the Second Circuit affirmed the district court's remedial plan ordering the board of elections to designate poll site ADA coordinators to receive training from one of the plaintiffs and later a mutually-selected trainer, to contract with one of the plaintiffs to develop an accessibility checklist, to contract with a mutually-selected expert on accessibility, and to confer with plaintiffs and the expert about implementation of the expert's recommendations. *See Disabled in Action*, 752 F.3d at 195-96. Likewise, the Second Circuit

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[4] In light of Ms. Rush's updated opinion, which is based on the most recent information provided by the Secretary, Plaintiffs propose to modify their proposed Order for Permanent Injunction (Doc. 47-5) to reflect a compliance date of September 8, 2017 (60 days before the November 2017 election).

[5] Notably, the following cited cases exclude consent decrees and other settlement agreements that often involve plaintiffs in monitoring compliance.

affirmed an injunction related to services for individuals with AIDS or HIV-related illnesses that allowed the plaintiffs and their counsel to monitor compliance through on-site inspections. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 271, 291 (2d Cir. 2003). Similarly, a California district court ordered a community college to hire an ADA accessibility expert approved by the plaintiff, who would submit quarterly status reports to the parties, and to notify plaintiffs' counsel of delays in its remediation efforts. *See Huezo v. Los Angeles Cmty. Coll. Dist.*, 672 F. Supp. 2d 1045, 1064, 1067-68 (C.D. Cal. 2008). These cases demonstrate the reasonableness of the level of monitoring proposed by Plaintiffs.

Nor would Plaintiffs' proposed monitoring constitute a takeover of the operations of the Secretary's office, as he alleges. Unlike in the orders cited above, the Secretary would not be required to contract with Plaintiffs or allow Plaintiffs to inspect his office; instead, the Plaintiffs would have opportunities to review the Secretary's actions and provide feedback about the steps the Secretary is taking to achieve compliance. These opportunities for communication between the parties are intended to prevent disputes and reduce the need for Court involvement.

II. CONCLUSION

The Secretary has conceded that after eighteen months of failed remediation efforts, he continues to offer Plaintiffs an inaccessible website in violation of the ADA. Plaintiffs have presented thorough and competent evidence that their proposed Order for Permanent Injunction is tailored to the Secretary's ongoing violations and demonstrated inability to timely achieve compliance. Therefore, Plaintiffs request that this Court grant their Motion for Permanent Injunction and enter their proposed Order for Permanent Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December, 2016, a copy of the foregoing Plaintiffs' Reply in Support of Motion for Permanent Injunction was served on all counsel of record via the Court's electronic filing system.

/s/ Jason C. Boylan
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