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

SHELBI HINDEL, *et al.*,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 2:15-cv-3061
JON A. HUSTED,	*	
Defendant.	*	

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION

Secretary Husted argues that Plaintiffs need "legislative action; not a court order." Def.'s Opp'n at 2. Plaintiffs, however, have already obtained all of the legislative action they require: Congress passed the Americans with Disabilities Act ("ADA") in 1990, providing Plaintiffs and other individuals with disabilities the right to live in the world on equal footing. In seeking an equal opportunity to vote absentee, Plaintiffs ask this Court to enforce rights legislatively granted to them more than 25 years ago. No further legislative action is needed. Instead, it is time for Secretary Husted to follow Congress's mandate.

Secretary Husted recycles legal arguments that other courts have soundly rejected. It is well established that election officials have not provided individuals with disabilities the equal opportunity guaranteed by the ADA by offering only the mere opportunity to vote some way, somehow, regardless of how inferior the experience is. The law is further settled that the existence of a contrary state law or regulation, even if facially neutral, cannot excuse violations of the ADA, unless there is evidence of harm flowing from the violation of the state law or regulation.

Secretary Husted already understands that Ohio must comply with federal law even when state election law is to the contrary. He concedes in a footnote to his opposition memorandum that his office currently acts contrary to state election law to comply with federal law. Def.'s Opp'n at 4 n.3. He explains that pursuant to the Uniformed and Overseas Civilian Absentee Voting Act of 1986 ("UOCAVA"), 52 U.S.C. §§ 20301-20310, Ohio county boards of elections must deliver uniformed and overseas voters their absentee ballots electronically upon request – a departure from Ohio's requirement that absentee ballots be mailed. Def.'s Opp'n at 4 n.3. He notes, however, that these voters "must first print the ballot and then mark manually before subsequently returning it by mail." *Id.* Although Secretary Husted understands that state law must make way for federal law in allowing UOCAVA voters to receive ballots electronically and then print, mark, and mail them back, he contests Plaintiffs' right under the ADA, another federal law, to receive ballots electronically, mark, and then print, and mail them back. According to Secretary Husted, switching the order in which the ballot is marked and printed renders Plaintiffs' requested relief unreasonable and a fundamental alteration to voting in Ohio and, as such, excuses him from complying with the ADA, while violating Ohio law to print and then mark electronically delivered ballots is acceptable to comply with UOCAVA. Yet he offers no evidence as to why marking a ballot before printing poses any threat to Ohio's elections. Just as Secretary Husted has developed an absentee voting alternative for overseas and military voters pursuant to federal law, he must adopt an absentee voting alternative for voters with disabilities pursuant to federal law.

By failing to contest Plaintiffs' claim regarding the inaccessibility of the voter services' website, Secretary Husted concedes that the website is currently inaccessible to Plaintiffs, in violation of the ADA. Secretary Husted's only response to Plaintiffs' website claim is a

misguided mootness argument that confuses an alleged intention to fix the website, albeit with no assurance that the website will be fixed in time for the November election, with having already made the required fix. Because Secretary Husted concedes that he is currently violating the ADA by maintaining an inaccessible voter services' website, this Court should order him to correct this violation in time for Plaintiffs to use the website in advance of the November 2016 election.

ARGUMENT

I. Plaintiffs require an equal opportunity to participate in mail-in absentee voting.

Recognizing that a paper absentee ballot that must be marked with third-party assistance deprives Plaintiffs of the privacy and independence of their vote, Secretary Husted attempts to obfuscate the issue by asserting that Plaintiffs have a sufficient number of ways to vote privately and independently. Once again, the Secretary asks this Court to adopt the inapposite "in the entirety" standard from the existing facilities regulation, 28 C.F.R. § 35.150, for determining the scope of the program, activity, service, or benefit at stake. Although Plaintiffs previously explained in their opposition to the Secretary's motion for judgment on the pleadings that courts have held that this language applies only to existing facilities, *see* Pls.' Opp'n to J. on Pleadings at 7-8 (citing *Babcock v. Michigan*, 812 F.3d 531, 536 (6th Cir. 2016); *Nat'l Fed. of the Blind v. Lamone*, 813 F.3d 494, 504 (4th Cir. 2016)), the Secretary provides no new authority for why the "in the entirety" framing applies here, nor does he question the soundness of the authority holding it inapplicable.

According to Secretary Husted, the ability to vote privately and independently through regular voting, early voting, and in-person absentee voting is enough for Plaintiffs. Yet by making private and independent mail-in absentee voting available to voters without disabilities, the Secretary has already decided that these alternative voting options are not sufficient. Why

would the Secretary spend funds and require the local boards of elections to spend funds mailing absentee ballots to voters' homes if the option of mail-in absentee voting were purely superfluous? As the Secretary notes on his website, mail-in absentee voting gives Ohio residents "the opportunity to vote in the next election from the convenience of their own homes."[1] Secretary Husted offers no reason why voters with disabilities are not entitled to this same convenience. Indeed, the ADA, through its promise of equal opportunity, requires it. *See Lamone*, 813 F.3d at 503-04 (holding that individuals with disabilities must have an equal opportunity to access Maryland's absentee voting program, despite the availability of several other methods of voting, because Maryland extends the benefit of absentee voting to all other voters).

The convenience of voting from home at any time is particularly important to many voters with disabilities. As Plaintiffs will establish at trial, Plaintiffs Shelbi Hindel and Marianne Denning both rely on others to drive them to their polling locations. When their rides are unavailable, it is much more difficult for them to reach the polls. The same is true for many other voters with disabilities. For example, a recent study analyzing eight election cycles worth of survey data concluded that while individuals with disabilities are significantly less likely to vote in person, they are significantly more likely to vote through a mail-in ballot when given the opportunity to do so. *See* Ex. 1, Peter Miller & Sierra Powell, *Overcoming Voting Obstacles: The Use of Convenience Voting by Voters with Disabilities*, 44(I) Am. Pol. Res. 28, 29-30, 48 (2016).

Although the Secretary argues that Plaintiffs' proposed accessible absentee marking tools

[1] *See Voting Absentee by Mail*, Jon Husted, Ohio Secretary of State, http://www.sos.state.oh.us/SOS/elections/Voters/votingAbsenteeByMail.aspx (last visited Apr. 29, 2016).

fail to offer blind voters "complete independence," because many will still require assistance signing the envelope, *see* Def.'s Opp'n at 13-14, Plaintiffs seek the ability to mark their ballots privately and independently and to maintain the privacy of their ballots, not the ability to complete every minute step of the process totally independently. Furthermore, although Ms. Hindel testified at her deposition that she would need assistance signing her envelope, she also testified that she could independently mail the ballot. *See* Hindel Dep. 35:22-36:9.[2] At trial, Plaintiffs will establish that Ms. Hindel, Ms. Denning, and Ms. Pierce are all capable of independently filling out forms on their computers (which utilizes the same skills required to mark an electronic absentee ballot with any of Plaintiffs' proposed tools), printing documents, stuffing and sealing envelopes, and placing letters in the mail. Therefore, any of Plaintiffs' proposed ballot marking tools would afford Plaintiffs an equal opportunity to mark their ballots privately and independently and to retain the secrecy of their selections.

II. Plaintiffs' proposed accessible absentee marking tools are reasonable.

Secretary Husted does not and cannot contest that all of Plaintiffs' proposed absentee marking tools have been used in previous elections in other states without incident.[3] To bypass this inconvenient fact, he offers a circular argument: it would be unreasonable to implement the proposed tools because none of them has been used before in Ohio. Of course, had any of the

[2] Ms. Hindel's deposition transcript was filed with Defendant's opposition memorandum as Docket Entry 28-4.

[3] Although Prime III has only been used in other states as an in-person voting option, Dr. Juan Gilbert, the creator of Prime III, will testify that the software for in-person and absentee voting is the same. The only difference is that, when voting absentee, the voter uses her own computer, tablet, or smart phone and printer to mark and print the ballot, as opposed to the devices at the polling place.

tools been used in a previous Ohio election, there would be no need for the present lawsuit.[4] Yet as Secretary Husted has already recognized, *see* Mem. in Supp. of Def.'s Mot. for J. on Pleadings at 8-9, Ohio law forbids the use of any of the proposed ballot marking tools in an Ohio election because the U.S. Election Assistance Commission ("EAC") does not certify ballot marking tools, thus preventing these tools from obtaining the EAC certification required under state law.

In a similar vein, the Secretary attempts to distinguish the Fourth Circuit and district court decisions in *National Federation of the Blind v. Lamone*, by noting that the Maryland online ballot marking tool had been designed specifically for use in Maryland and had been used in Maryland previously, before the legislature decided to subject the tool to a certification requirement. *See* Def.'s Opp'n at 16. Because Plaintiffs' proposed tools were not designed specifically for use in Ohio, he argues, it would be unreasonable to adopt them here.

According to the Secretary's logic, installing a wheelchair ramp in a particular building would be unreasonable had it not already been designed for and installed and tested in that specific location, regardless of how many other locations in which wheelchair ramps have been successfully installed and regardless of the evidence that the ramp could similarly be installed successfully in this particular building. To prove reasonableness, a plaintiff need not show that the specific relief requested has already been successfully achieved in the particular circumstance at issue in the lawsuit. It is sufficient to show that the relief is "plausible." *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998).

Here, however, Plaintiffs are prepared to demonstrate much more than plausibility; through the testimony of Dr. Gilbert and John Schmitt, the creator of the Alternate Format Ballot ("AFB"), and a stipulation regarding the Maryland online ballot marking tool, Plaintiffs will

[4] The only exception would be in a case like Maryland's where a tool had been used and then revoked after a change in the law. That is not the situation in Ohio.

prove that any of the proposed ballot marking tools can be implemented successfully throughout Ohio. Although the Secretary inaccurately states that adopting the AFB would require creating a webpage through which voters could access their ballots, Def.'s Opp'n at 9, Mr. Schmitt testified at his deposition that an electronic ballot could be delivered to voters either through a website or through email. Schmitt Dep. 75:6-9.[5] In addition, the Secretary mischaracterizes Mr. Schmitt's deposition testimony about the recommended timeline and scope of implementation. *See* Def.'s Opp'n at 10. Although Mr. Schmitt testified that it is generally easiest to implement with a smaller sample size at first, he continued:

> Sometimes you have to do the whole thing . . . . [I]f you plan it well, if you have the right people involved, you can do all kinds of amazing things to get systems out. This is a relatively easy system and it's not – people compare it to an election system. It's not an election system. All we're doing is taking people's choices and putting them on a piece of paper that they're going to put in an envelope.

Schmitt Dep. 70:9-17. Mr. Schmitt further noted that while he does not currently have staff in Ohio, if Ohio chose to implement the AFB, he could certainly hire someone in Ohio to help coordinate a statewide roll-out of the AFB. *Id.* 49:19-50:4.

The Secretary has no evidence to rebut Plaintiffs' showing of reasonableness. Neither Jack Cobb, the Secretary's expert, nor Deputy Assistant Secretary of State Matthew Damschroder has ever evaluated any ballot marking tools.

Plaintiffs will establish that statewide implementation of one or more ballot marking tools by the first day of absentee voting, October 12, 2016, is feasible and will introduce no additional risks to the integrity of the Ohio election. To the extent that the Court is concerned, however, about the speed or scope of implementation, it of course has the discretion to fashion relief as it

[5] Mr. Schmitt's deposition transcript was filed with Defendant's opposition memorandum as Docket Entry 28-3.

deems appropriate. It is worth noting, however, that the Secretary's complaints about the short potential timeline for implementing a ballot marking tool are purely a function of the Secretary opting not to take any steps to implement an accessible method of absentee voting in advance of or during the pendency of this litigation. Instead, the Secretary has decided to forego any preparation or contingency planning. If there is a rush to implement an accessible absentee marking tool before the November election, the fault lies entirely with the Secretary. Plaintiffs should not have to experience yet another election cycle where their civil rights are violated because of Secretary Husted's dilatory conduct.

III. Plaintiffs' requested relief would not fundamentally alter Ohio elections.

The Secretary once again attempts to raise the affirmative defense of fundamental alteration by arguing that making an accessible method of absentee voting available to Plaintiffs would fundamentally alter "the structure of Ohio's voting laws." Def.'s Opp'n at 17. Yet compliance with the ADA may require reasonable modifications of state laws, so long as those modifications do not constitute fundamental alterations to "the nature of a service, program, or activity." 28 C.F.R. § 35.130(b)(7); 28 C.F.R. § 35.164; *see also Mary Jo C. v. New York State and 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"). Secretary Husted can offer no evidence that making any of Plaintiffs' proposed marking tools available would fundamentally alter the nature of voting or elections in Ohio: Plaintiffs could receive their ballots by email (just as UOCAVA voters may receive their ballots via email), they would still mark their ballots in absentia and return the ballots by mail, and the county boards of elections would tabulate the ballots the same way they currently tabulate electronically-delivered UOCAVA ballots. There is no evidence that allowing Plaintiffs to mark their ballots on their

computers rather than by hand would work any fundamental alteration to Ohio elections.

Nevertheless, even taken at face value, the Secretary's alleged concerns amount to little. The Secretary claims that "mandated implementation would necessarily alter a county's ability to make an unimpeded determination" with respect to the selection of voting equipment. Def.'s Opp'n at 17. Yet no decision by a county board of elections is completely "unimpeded." Secretary Husted does not contest Plaintiffs' assertion in their memorandum in support of permanent injunction that he issues binding directives to the county boards of elections and has the authority to remove members of the boards who refuse to comply. *See* Pl's Mem. in Supp. of Perm. Inj. at 8. Thus, ordering the requested relief would not work a substantial change to authority over elections. There is also no reason why Secretary Husted could not offer county boards of elections a choice of implementing whichever accessible absentee ballot marking tool they prefer.

Notably, Secretary Husted has failed to explain why allowing county boards of elections to retain this allegedly "unimpeded" discretion is critical to voting in Ohio. As appellate courts throughout the country have held, it is not enough to claim conflict with a law; defendants must prove why ordering plaintiffs' requested relief would result in tangible harm beyond the contravention of a state law or regulation. *See Lamone*, 813 F.3d at 508-09; *Mary Jo C.*, 707 F.3d at 163; *Barber ex rel. Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1232-33 (10th Cir. 2009); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996); *Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 277 (7th Cir. 1995). Here, no such evidence of likely harm exists.

Secretary Husted next raises Ohio's guaranty and bonding requirement as another legal provision that would be contravened should Plaintiffs prevail. The Secretary explains that this requirement is designed to hold election equipment vendors responsible should something go

wrong during an election. Def.'s Opp'n at 18. Once again, however, mere conflict with a state law does not rise to the level of fundamental alteration. *See Mary Jo C.*, 707 F.3d at 160. Furthermore, Secretary Husted has no evidence that any of Plaintiffs' proposed ballot marking tools are likely to malfunction — they certainly have not done so when used in other states' elections. Even if they did malfunction though, the worst case scenario would be that Plaintiffs would be left with the same options for voting currently available to them; no one would lose a method of voting that now exists. At all events, given the extended time period for absentee voting, most technical issues could be resolved before the close of the election. Secretary Husted is free to contract with programming consultants or utilize his in-house technology team to ensure that any software malfunctions are quickly resolved. The mere potential that the proposed technology will not work is not an excuse to withhold it when it represents the only method of providing Plaintiffs an equal opportunity to vote absentee by mail privately and independently.

IV. Because the voter services website remains inaccessible, Plaintiffs' website claim is not moot.

Secretary Husted does not contest that he fails to provide Plaintiffs an equal opportunity to access his voter services website. Because there is no dispute that he is in violation of the ADA, he focuses his argument solely on dodging judicially-ordered relief. The Secretary argues that because he plans to make the website accessible at some unknown future time, Plaintiffs' website claim is now moot. But the Secretary confuses a promise to fix with having actually performed the fix. Only the latter may render a case moot.

Although the Secretary focuses his mootness argument on addressing whether there is a danger of the legal violation reoccurring here, courts do not reach that step until the defendant has voluntarily ceased the unlawful conduct in the first place. The cases on which the Secretary

relies all involve cessation of the allegedly unlawful conduct during the pendency of the litigation—not merely a promise to cease at some unidentified later date. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (defendant resigned from corporate boards during pendency of litigation); *Bruder v. Smith*, 215 F. App'x 412. 415-16 (6th Cir. 2007) (defendants provided plaintiff with the due process hearing she sought during the pendency of litigation); *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 522 (6th Cir. 2001) (defendant changed hiring practices and eliminated discriminatory residency requirement during pendency of litigation); *Zeune v. Mohr*, No. 2:14-CV-153, 2015 WL 3544662, at *3 (S.D. Ohio June 4, 2015) (defendants stopped violating plaintiff's rights by releasing him from prison during pendency of litigation); *see also Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (plaintiff was convicted of crime before claim for pretrial bail could be decided). Until the website is fully accessible to Plaintiffs, something the Secretary cannot even promise will happen by November, let alone during the pendency of this litigation, Plaintiffs continue to be deprived of their civil rights, thereby creating a live case or controversy and rendering any discussion of mootness premature.

The timeline of Secretary Husted's attempts to fix his website demonstrates that his promises to do so should not be equated with having completed the work of fixing the website. Days before filing his opposition memorandum, Secretary Husted finally issued a Request for Proposals ("RFP") seeking a full assessment of his website and recommendations for remedying it in accordance with the Web Content Accessibility Guidelines ("WCAG") 2.0 level AA standard.[6] This is an encouraging first step that should have occurred in February 2015, when

[6] It should be noted that had Secretary Husted not sought an extension for his opposition memorandum originally due on April 15, the RFP, issued on April 18, would not have been issued in time to rely upon in his memorandum.

the ACLU and Center for Accessible Technology first published a report highlighting barriers to accessing the Secretary's website. *See Access Denied: Barriers to Online Voter Registration for Citizens with Disabilities*.[7] The RFP also could have been issued in September 2015, when employees within the Secretary's office identified WCAG 2.0 level AA as the proper standard for the website to meet. *See* Ex. 2 (Sept. 1, 2015 email exchange between John Pendergast and Parvinder Singh, SOS 005682-5684). Or, the Secretary could have taken this action immediately following the meeting on November 9, 2015, between counsel for Plaintiffs and his office, in which Plaintiffs explained that the website was inaccessible and should be brought into compliance with WCAG 2.0 level AA. The Secretary might have also issued the RFP soon after Plaintiffs filed the present lawsuit in December 2015. Instead, Secretary Husted chose to wait just one week before trial was originally scheduled to begin in this case to embark on the first step towards achieving an accessible website.

Having finally taken this first step, Secretary Husted asks this Court to deny Plaintiffs' requested relief, a fully accessible website by October 1, 2016, as unnecessary and moot. He provides no timeline for when the website will be remediated and no guarantee that it will be done in time for Plaintiffs to access the website for the November 2016 election, but nonetheless insists that the Court should take him at his word that, eventually, the website will be fixed.

Even if Secretary Husted manages to make the website accessible in time for trial in June, this case still will not be moot. "[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013); *see Knox v. SEIU*, 132 S. Ct. 2277, 2287 (2012) ("The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a

[7] *Available at* https://www.aclu.org/report/access-denied-barriers-online-voter-registration-citizens-disabilities.

resumption of the challenged conduct as soon as the case is dismissed."). Although the Secretary argues that there is no reason to assume the website would become inaccessible again after he remediates it, because he is claiming mootness, he "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000).

Unfortunately, without more than a one-time fix, it is highly likely that the Secretary's website would once again become inaccessible to Plaintiffs in short order. As Sharron Rush, Plaintiffs' expert on website accessibility, will testify at trial, without policies and procedures in place to ensure that a remediated website remains accessible, it is all too likely that a website will once again become inaccessible as content changes. Websites are dynamic; a one-time fix can easily be undone the next time new content is added. Ms. Rush will testify that the accessibility of a website quickly deteriorates if proper policies and procedures are not in place to ensure all changes to the website maintain accessibility and are tested before release. Ms. Rush will also explain to the Court that the limited accessibility style guide the Secretary's office currently has in place is wholly inadequate to maintain accessibility. Indeed, Ms. Rush will testify that even after the accessibility of the Secretary's website improved somewhat after it hired Lochbridge to perform some remediation work, the website's accessibility quickly deteriorated shortly after the work was completed. Thus, even if one-time remediation were accomplished by June or November (something the Secretary has not promised he will do), Secretary Husted would not be able to establish his burden of proving that the website will remain accessible without also providing the Court with a detailed plan for maintaining accessibility.

Finally, to the extent the Secretary now argues that it would be impossible to make the

website accessible in time for the November election because of state procurement policies, this is nothing more than a self-inflicted wound. As described above, Secretary Husted has waited more than a year since first being notified of the website barriers to issue the present RFP. Although his office knew that WCAG 2.0 level AA was the appropriate standard to meet, it nonetheless contracted with Lochbridge to remediate only some of the website and only to the lesser WCAG 2.0 level A standard. *Compare* Ex. 2 (Sept. 1, 2015 email exchange between John Pendergast and Parvinder Singh, SOS 005682-5684, identifying WCAG 2.0 level AA as legal requirement), *with* Ex. B to Def.'s Mem. at 6 (Lochbridge's ADA Compliance Remediation Statement of Work, stating that remediation work would set WCAG 2.0 level A as the benchmark).

Given Secretary Husted's failure to act promptly upon learning that his website was inaccessible to individuals with disabilities using screen access software, his complaints about needing more time to fix the website are unpersuasive. Furthermore, it is unclear why, even within the constraints of the state's procurement procedures, his office cannot issue an RFP now asking for a contractor to remedy the website and propose internal policies and procedures for his office to follow to maintain accessibility by October 1. Secretary Husted's decision to issue an RFP asking only for another report on how inaccessible the website is, rather than seeking remediation right away, is perplexing. Given the Secretary's inability to make and keep his website accessible in a timely fashion on his own, this Court should issue an injunction requiring him to take all steps necessary to afford Plaintiffs an equal opportunity access his website in time for the November election.

CONCLUSION

As argued above and in their memorandum in support of permanent injunction, Plaintiffs will prevail on the merits of their claim at trial. In addition, as argued in Plaintiffs' initial

memorandum, the balance of the four factors for issuing a permanent injunction weigh heavily in Plaintiffs' favor. Although Secretary Husted argues that Plaintiffs will not suffer irreparable harm because they have meaningful access to voting in Ohio, as explained above, the case law is clear that without the ability to vote absentee privately and independently, just like all other Ohio voters can, Plaintiffs are deprived an equal opportunity and suffer irreparable harm. Furthermore, an injunction with respect to the voter services' website is necessary here because Secretary Husted has not yet made the website accessible to Plaintiffs and offers no promise to do so in time for the November election. Accordingly, the Court should grant Plaintiffs' Motion for Permanent Injunction and order Secretary Husted to offer Plaintiffs a method of voting absentee privately and independently by October 12, 2016, and a voter services website that offers Plaintiffs all of the same information and the same transactions, with substantially equivalent ease of use, by October 1, 2016, so that Plaintiffs can use both the accessible absentee voting system and the voter services website in advance of the November 8, 2016 general election.[8]

Respectfully submitted,

/s/

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[8] Although Secretary Husted concludes his opposition memorandum by stating that "there are no material facts in dispute that support Plaintiffs' claim for injunctive relief" and asking the Court to "dismiss Plaintiffs' Complaint," *see* Def.'s Opp'n at 25, the Secretary has not moved for summary judgment. Therefore, it would be improper for the Court to deny Plaintiffs' claims at this juncture on grounds that there is allegedly no dispute of material fact.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of May, 2016, a copy of the foregoing Reply Memorandum in Support of Motion for Permanent Injunction was served on all counsel of record via the Court's electronic filing system.

/s/
Jessica P. Weber