IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-00318-RM-CBS

DANIELE LEDONNE,

Plaintiff,

v.

DR. BEVERLEE MCCLURE, in her individual capacity and in her official capacity as President of Adams State University, and PAUL GROHOWSKI, in his individual capacity, and in his official capacity as Chief of the Adams State University Police Department,

Defendants.

PLAINTIFF LEDONNE'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION [ECF NO. 2]

I. INTRODUCTION

There are two things that stand out about Defendants' Amended Response to Plaintiff's Motion for Preliminary Injunction ("Response"). [ECF No. 20.] First, if Defendants are taken at their word, they are challenging a forty year-old unambiguous principle articulated by the Colorado Supreme Court: that in Colorado, members of the public have presumptive access to otherwise open areas of Colorado university campuses (public lectures, performances, libraries, etc.) and cannot be banned from those otherwise public spaces without due process—meaning reasonable notice and a hearing. *See Watson v. Bd. of Regents of Univ. of Colo.*, 512 P.2d 1162, 1165 (Colo. 1973).

Second, and perhaps more shocking still, is that despite Defendants' repeated defamatory public claims that Mr. Ledonne engaged in "terrorism,"[1] "harassment,"[2] and has made threats of "violence" to persons on the Adams State University ("ASU") campus,[3] Defendants' Response provides not a scintilla of evidence justifying the No Trespass Order ("Order") and no additional meaningful information at all about what Mr. Ledonne is supposed to have done or said to justify the ban. Defendants defend neither the sufficiency of the notice contained in the ban Order, nor the substantive basis for the Order. So even today, Mr. Ledonne and his counsel have no way of knowing what exactly Ledonne supposedly did to justify the campus ban.

Defendants' primary argument appears to be simply this: Mr. Ledonne is neither a student nor an employee, and so ASU can ban him from the campus where he taught for four years, defame him in the University and broader Alamosa communities, and Mr. Ledonne has no recourse. Defendants make not even the barest effort to justify their conduct; instead, they take the position that, as a matter of law, Mr. Ledonne is entitled to no notice of why he was banned and no meaningful hearing to dispute the action or to clear his name.

Defendants' Response is wrong on almost every point. Mr. Ledonne does have a constitutional right not to be banned from a public Colorado campus without due process. He similarly has the constitutional right not to be publicly defamed in connection with the Order. Qualified immunity is irrelevant to a claim for injunctive relief. The continuing harm to Mr. Ledonne's reputation, and the continuing denial of access to a campus, which is the only

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[1] (Ex. 5 to Verified Compl. (ECF No. 1).)

[2] (*Id.*; *see also* Verified Compl. ¶¶ 62-63.)

[3] (Verified Compl. ¶¶ 62-63.)

significant source of intellectual and cultural stimulation in the San Luis Valley, as well as a significant source of Mr. Ledonne's livelihood, justify preliminary injunctive relief.

II. ARGUMENT

A. Qualified immunity is irrelevant to a claim for injunctive relief

Defendants' first point in their Response is that "Plaintiff's allegations do not overcome the defense of qualified immunity." Response at 5. This argument is irrelevant to a motion for preliminary injunction—which seeks only interim injunctive relief against state officials in their official capacities. As the Response itself points out, "qualified immunity protects government officials from liability for civil damages . . . ." Response at 4 quoting *Weise v. Caspar*, 593 F.3d 1163, 1166 (10th Cir. 2010). In other words, "[a] 'qualified immunity' defense applies in respect to damages actions, but not to injunctive relief." *Morse v. Frederick*, 551 U.S. 393, 432 (2007).

B. Mr. Ledonne will succeed on the merits of his constitutional claim for deprivation of procedural due process.

1. Defendants deprived Mr. Ledonne of a Liberty or Property Interest.

Next, Defendants' attack the validity of the *Watson* holding. Per Defendants' Response, if one is neither student nor employee, there is no due process protection from being banned from a Colorado public university campus for any reason, or no reason at all. Response at 11. This position is in *direct conflict* with the Colorado Supreme Court's holding in *Watson*, which held that, in Colorado, members of the public have a constitutionally protected right, just like students and employees, to be present in otherwise public areas of a Colorado public university campus. *Watson*, 512 P.2d at 1165. Defendants discount *Watson*, suggesting that the Colorado Supreme Court "did not provide any analysis regarding the interest possessed by a member of the general public in accessing a public university campus." Response at 5. Not so.

The *Watson* Court explained in detail that members of the public have similar interests to employees and students because “many University-sponsored functions held outside University class-rooms, are of educational benefit not only to students enrolled at the University, but also to attending members of the public at-large,” and because “a University campus is oftentimes a focal point for the discussion of public questions, cultural events, recreational activities, and general educative functions.” *Watson*, 512 P.2d at 1164-65. Accordingly, when a Colorado university opens its doors to the public, “a non-student's right to access to University functions and facilities, which are open to the public at-large, cannot be permanently denied without due process of law under the Fourteenth Amendment to the United States Constitution.” *Id.* at 1165. Defendants’ argument, if accepted, would effectively repeal forty years of Colorado state policy.

Defendants claim that *Watson*’s subsequent history “does not yield a line of cases relying on it for the proposition that a non-employee and non-student has a constitutionally protected interest in accessing a public university campus.” Response at 5-6. But in Colorado, which is the only location where it matters, *Watson* remains good law. And other courts have cited *Watson* with favor. The Idaho Court of Appeals recently cited *Watson* noting that “[s]everal courts have found infringement of a protected liberty interest where a governmental entity’s order excluded an individual from public property that was otherwise open to the public and thereby interfered with the individual’s exercise of a fundamental right.” *State v. Clark*, No. 43077, 2016 WL 699238, at *3 (Idaho Ct. App. Feb. 26, 2016). *Clark* addressed a plaintiff who was banned for two years from the property of the Idaho Industrial Commission. *Id.* at *1. The plaintiff argued that the exclusion orders “infringed his fundamental right to petition the government for redress of grievances without affording him any process by which he could

challenge the orders." *Id.* at *2. The Court agreed, finding that the banishment violated due process because there were no safeguards against the risk of erroneous deprivation. *Id.* at *5. *Clark* is similar to this case because the Order infringes on Mr. Ledonne's First Amendment right to receive information and ideas without affording him sufficient process to challenge the Order. *See Doe v. City of Albuquerque*, 667 F.3d 1111, 1118 (10th Cir. 2012) (First Amendment protects the right to receive information).

The Alaska Court of Appeals also discussed *Watson* in an opinion deciding whether the University of Alaska properly banned a former student from its campus. *Prentzel v. State*, No. A-1724, 1988 WL 1511365, at *4 (Alaska Ct. App. Jan. 27, 1988) (unpublished). In *Prentzel*, the Court discussed favorably *Watson*'s explanation of how a university campus "is oftentimes a focal point for the discussion of political questions, cultural events, recreational activities, and general educative functions." *Id.* at *3 quoting *Watson*. Ultimately, the Alaska ban order was deemed invalid for being overly broad. *Id.* at *4.

It is true that the question of whether a liberty or property interest exists is ultimately a question of federal law. *Estate v. Wyoming Dept. of Corrs.,* 473 F.3d 1334, 1339 n.3 (10th Cir. 2007). But the genesis of a particular property or liberty interest is usually a function of state law. "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). It follows that regardless of whether a state is *required* to extend certain benefits to its people, after having chosen to do so, the state "may not withdraw that right on grounds of

misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred." *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

Here, the Colorado Supreme Court in *Watson* recognized an important state-created, constitutionally-protected interest. *See Watson*, 512 P.2d at 1165. As a matter of state law, Mr. Ledonne has a right to access portions of Colorado public universities that are otherwise open to the public. Colorado has chosen to extend this benefit to its people and Defendants cannot now withdraw that right absent fundamentally fair procedures.

In arguing that there is no constitutionally protected interest in access to Colorado public university campuses, Defendants' Response relies, unpersuasively, on cases from states outside of Colorado.[4] *See* Response at 7-10. Every case besides *Souders v. Lucero*, 196 F.3d 1040 (9th Cir. 1999) is unpublished and was brought by *pro se* plaintiffs. More important, not one of the states in which those cases arose has articulated the strong state policy, recognized in Colorado, of public access to public university programs and facilities. Absent an established pre-existing state-created right of the public to access public university property, courts in those cases declined to recognize a new constitutionally protected right. But those decisions do not overrule the Colorado Supreme Court's articulation of Colorado policy. *Watson* is on all fours recognizing Mr. Ledonne's constitutionally protected interest in accessing Adams State University's public campus.

[4] Defendants do cite three District of Colorado cases—also unpublished and brought by *pro se* plaintiffs that are irrelevant to the issues in this case because they concern parents' access to *elementary school* property. *See* Response at 6-7. Elementary schools are not generally open to the public, and do not provide the broad educational and cultural functions of a public university recognized in *Watson*.

C. Mr. Ledonne's Due Process rights were also violated when he was defamed by President McClure and Officer Grohowski in connection with the campus ban without any notice or a hearing—the "Stigma-Plus" claim.

Defendants next argue that Mr. Ledonne has no protectable interest in not being defamed by Defendants, presumably because the campus ban (the change in legal status required as part of "stigma-plus" claim) does not (in Defendant's view) constitute a deprivation of a constitutionally protected interest. Response at 11. Defendants are wrong to suggest that a stigma-plus claim requires that a plaintiff suffer a deprivation that is of constitutional magnitude. A stigma-plus claim requires only that a defamatory statement be made in connection with any *adverse* change in *legal status*. *Guttman v. Khalsa*, 669 F.3d 1101, 1125 (10th Cir. 2012).

For example, in *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court examined *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), in which it had previously stated: "Where a person's good name, reputation, honor or integrity is at stake *because of what the government is doing to him*, notice and an opportunity to be heard are essential." *Constantineau*, 400 U.S. at 437 (emphasis added). The plaintiff in *Constantineau* sought to have a Wisconsin statute declared unconstitutional after the police chief–acting on the statute's authority and without hearing or notice to the plaintiff–"caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquors to [the plaintiff] were forbidden for one year." *Id.* at 435.

Paul v. Davis held that the phrase "because of what the government is doing to him" referred to the fact that "the governmental action taken in that case deprived the individual of a right previously held under state law[:] the right to purchase or obtain liquor in common with the rest of the citizenry." *Paul v. Davis*, 424 U.S. at 708. The defendant's conduct in *Constantineau* "significantly altered [the plaintiff's] status *as a matter of state law*, and it was that alteration of

legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." *Paul*, 424 U.S. at 708 (emphasis added). The ban Order has changed Mr. Ledonne's legal status as a matter of state law—he now will be arrested for trespass if he goes on campus—a status different from the "rest of the citizenry."

Another example is *McDonald v. Wise*, 769 F.3d 1202 (10th Cir. 2014). There, the Tenth Circuit held that an at-will employee had no constitutionally-protected property interest in his job at the Denver Mayor's office. *Id.* at 1211-12. Nevertheless, when the employee was fired and the employer made false defamatory public statements without giving the employee a due process hearing, the employee had a viable stigma-plus claim. *Id.* at 1212.

"'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' a protectible [*sic*] liberty interest may be implicated that requires procedural due process in the form of a hearing to clear his name." *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1558 (10th Cir. 1993) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437(1971)). In this case, Mr. Ledonne's good name, reputation, honor and integrity are all at stake because of what the University has done to him—banned him from campus and publicly labeled him a harasser, a terrorist and someone who has threatened violence. Unlike any other member of the public, Mr. Ledonne is subject to arrest if he steps foot on the University campus: a clear change in his legal status. To date, Defendants have not given Mr. Ledonne fair notice of what he has allegedly done, nor given him a public forum[5] to

[5] The Tenth Circuit has explained that when an individual's liberty interest is infringed upon under the stigma-plus doctrine, "he must receive an adequate name-clearing hearing." *McDonald*, 769 F.3d at 1213. A "proper name-clearing hearing" provides the individual "with a public forum to clear his name …." *Id.* at 1214 (quoting *Rosenstein v. City of Dallas, Texas*, 876 F.2d 392, 396 (5th Cir. 1989)).

challenge the allegations and clear his name. Mr. Ledonne has a strong likelihood of succeeding on his stigma-plus claim.

D. Defendants afforded Mr. Ledonne no meaningful process.

Defendants do not dispute that they gave Mr. Ledonne absolutely no pre-deprivation process before implementing the ban—no notice and no hearing. Per the Colorado Supreme Court, Colorado universities should only dispose of a pre-deprivation hearing when a "genuine emergency appears to exist and it is impractical for University officials to grant a prior hearing." *Watson*, 512 P.2d at 1165 ; *see also Guttman*, 669 F.3d at 1114 (a protected property interest entitles one to "some sort of hearing before the government acts to impair that interest," but "in limited cases demanding prompt action" a "substantial assurance that the deprivation is not baseless or unwarranted" and an "important government interest" may justify postponement). This legal rule was incorporated into the ASU Non-Student Policy in place at the time when Mr. Ledonne was banned. *See* Verified Compl. Ex. 4 at 19 [ECF No. 1-4] (explaining that *persona non grata* order could be issued "after reasonable attempt to notify individual of the basis for the order and an opportunity to be heard on the matter"). Defendants have made no attempt to justify the absence of pre-deprivation process.

Next, Defendants try to argue, however hopelessly, that the post-deprivation process afforded to Mr. Ledonne was sufficient. *See* Response at 12. The argument is weak, taking up barely two short paragraphs of the 18-page Response, and cites no authority. On close inspection, the argument fails completely. First, the notice Mr. Ledonne received in the October 14 Order itself, (Verified Compl. Ex. 2) [ECF No. #1-2], contains no information at all about

what Mr. Ledonne was alleged to have done, using only the words "alleged behavior." There was no way for Mr. Ledonne to meaningfully respond.

Defendants then point to a letter dated November 6, 2015 (delivered three weeks after the ban), which Defendants say "provided further information" about Mr. Ledonne's alleged conduct. Response at 12 (citing ECF No. 20-3). The sum total of that additional information provided in the November 6 letter reads can be summarized as follows: certain unnamed employees felt annoyed or harassed by unspecified statements or communications made by Mr. Ledonne which "were perceived as disruptive" or "ominous."(Ex. A1 to Response) [ECF No. 20-3].[6] This "additional" information provides no specificity about what Mr. Ledonne supposedly did or said. The letter claims there were multiple "reports," but the reports are not provided. A "number" of employees allegedly "reported" feeling unsafe but Mr. Ledonne was not told which employees or how many made reports. The "reports" allegedly described "statements" by Mr. Ledonne, but none of the alleged statements are actually provided. In short, this November 6 letter lacks any information that would allow Mr. Ledonne to meaningfully respond. Tellingly, Defendants provide no legal authority to suggest that this skeletal notice is sufficient to comport with due process.

By contrast, the Tenth Circuit has held that, at bare minimum, due process requires notice of the charges and *an explanation of the evidence* supporting those charges. *Powell v. Mikulecky*,

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[6] Compare this unspecified recitation of vague, allegedly ominous statements to the e-mail Mr. Ledonne received from the Adams State University's Board of Trustees in June of 2015, when Ledonne was complimented for the "respectful and constructive tone" of his presentation to the Board of Trustees regarding his employment situation and was specifically encouraged to continue to be part of the University Community and thanked for his contributions. *See* E-mail sent by Arnold Salazar, Chairman of the Board of Trustees, on June 2, 2015 (attached as **Ex. 1**.)

891 F.2d 1454, 1458 (10th Cir. 1989) (employment termination). Here, the original ban Order provided no meaningful notice, and the November 6 letter was no improvement, providing no explanation of the evidence against Mr. Ledonne. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *McDonald*, 769 F.3d at 1212 quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The opportunity to be heard in a meaningful manner means, at minimum, that the "person in jeopardy of serious loss [must be given] notice of the case against him and opportunity to meet it.'" *Mathews*, 424 U.S. at 348. The process given to Mr. Ledonne is in no way constitutionally sufficient.

E. Mr. Ledonne continues to suffer irreparable harm meriting preliminary injunctive relief.

With every passing day, Mr. Ledonne continues to experience harm from the infringement of his constitutional rights.[7] As detailed in the Complaint and Mr. Ledonne's Declaration submitted in support of expedited briefing [ECF No. 16-1] and re-attached again as **Exhibit 2**, the harm to Mr. Ledonne includes (1) being unable to plan his professional life as a videographer because of uncertainty in his being able to visit the primary location for much of his work, (2) being denied access to the most important intellectual and cultural institution in the San Luis Valley, including the ASU Library, faculty lectures, arts shows, and theatrical performances—a denial of the First Amendment freedom to receive information and ideas, and (3) living in a relatively small rural town, having been falsely branded as a terrorist by the President of the town's largest employer—without any means of clearing his name.

[7] Defendants also argue that Mr. Ledonne's short delay in filing suit and seeking injunctive relief is evidence that he is not suffering from irreparable harm. *See* Response at 14. Mr. Ledonne refuted this argument at pages 2-5 of his Reply in Support of Motion for Expedited Briefing Schedule [ECF No. 16], and reincorporates that argument here.

In a supplemental declaration, attached here as **Exhibit 3** ("Ledonne Suppl. Dec."), Mr. Ledonne provides additional evidence of the continuing irreparable community-wide reputational harm he suffers because of the unconstitutional ban order. One example is an open letter written by the entire board of directors of the ASU Foundation, published in Alamosa's newspaper, the *Valley Courier*, where the directors claim to have been "briefed" on the persona non-grata order and pledging their support for that order on "safety" grounds. Everyone in Alamosa who reads the newspaper knows the letter is about Mr. Ledonne. Because of the widespread publicity given to Defendants' false and defamatory statements about Ledonne being a threat to the campus, Mr. Ledonne's clients and others in the community are either fearful of associating with him or fearful of being stigmatized association if they do so. Ledonne Suppl. Dec. ¶¶ h-j.

Confirming the ongoing harm to Mr. Ledonne is a sworn declaration provided by ASU Associate Professor of Psychology, Jeff Elison. ("Elison Dec.," attached as **Exhibit 4**). Professor Elison lives in Alamosa and he has observed and heard the powerful impact that the comments of President McClure and Chief Grohowski have had regarding Mr. Ledonne's reputation. Some members of the community are saying that if Mr. Ledonne comes near them, they will try to have him arrested or they will hurt him physically. Elison Dec. ¶¶ 8-13.

Irreparable injury occurs when a court is "unable to grant an effective monetary remedy" after a trial "because such damages would be inadequate or difficult to ascertain." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1156 (10th Cir. 2001). Defendants argue that reputational injury does not constitute irreparable harm, citing *Hunter v. Hirsig*, 614 Fed. App'x. 960 (10th Cir. 2015) (unpublished). Response at 13. As an unpublished

case, *Hunter* has no precedential value[8] and the case involved only a "cursory" claim of reputational injury. On the other hand, *Dominion Video v. Echostar Satellite* is binding. In *Dominion Video*, "loss of reputation" constituted irreparable harm because "no remedy could repair the damage to [Plaintiff's] reputation and credibility." *Dominion*, 269 F.3d at 1156-57. *See also Kroupa v. Nielsen*, 731 F.3d 813, 820 (8th Cir. 2013) (holding, in a stigma-plus case, that "[B]ecause damage to one's reputation is a harm that cannot be remedied by a later award of money damages, the threat of reputational harm may form the basis for preliminary injunctive relief").

Here, there is nothing cursory about Defendants' repeated public accusations that Mr. Ledonne is a terrorist and potentially violent person when attempting to justify the Order. *See* Verified Compl. ¶¶ 57-65; Exs. 5, 8. Alamosa's small population amplifies the continuing harm to Mr. Ledonne, both personally and professionally. When a small town's University President and the University Police Chief repeatedly call someone violent, threatening, and a terrorist, everyone knows about it. Ledonne Supp. Dec. ¶¶ i-j; Elison Dec. ¶¶ 5, 10-11.

Next, Defendants claim that Mr. Ledonne has failed to provide any examples of how his livelihood is being threatened by the Order. Response at 15-16. That statement is inaccurate. The Mountain Valley Dance Studio's spring recital is being held May 12 through May 14 on the University campus, and Mr. Ledonne has explained that many events he would expect to film occur regularly on the campus. One of Mr. Ledonne's films was pulled from the program of a non-profit organization's fundraiser because of the backlash against Mr. Ledonne. Ledonne

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[8] "Of course, unpublished orders and judgments do not establish binding precedent in our circuit, but they may occasionally be referenced for illustrative purposes." *Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151, 1160 n.5 (10th Cir. 2010).

Suppl. Dec. ¶ j. The assumption that organizations are willing to look past the false accusations of terrorism and proclivity to violence and jump through the hoops required by the University for Mr. Ledonne to access the campus is illogical; these restrictions alone threaten his livelihood.

Lastly, Defendants argue that Mr. Ledonne has failed to provide any specific examples of how "he is being denied educational, intellectual, and cultural programs on campus …." Response at 16. That statement too is inaccurate. *See* Ex. 2, ¶¶ 3-4 (listing upcoming cultural, artistic or intellectual programs Mr. Ledonne would attend if he were not banned from campus); *see also* Elison Decl. ¶¶5-7 (explaining that all major social, cultural, and intellectual events in Alamosa take place on ASU's campus). The Tenth Circuit has solidly upheld the First Amendment right to receive ideas and information. *See City of Albuquerque*, 667 F.3d at 1118 ("The Supreme Court has repeatedly recognized that the First Amendment includes … a right to receive information."). Mr. Ledonne's First Amendment freedoms should not be subject to the whim of the University's administrators. The continuing infringement of Mr. Ledonne's First Amendment rights constitutes ongoing irreparable harm. *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) (the "loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury").

F. The balance of the equities and the public interest favor an injunction here.

In their final argument, Defendants suggest that the University's interest in providing order and safety on campus outweighs Mr. Ledonne's due process rights. *See* Response at 17-18. But Defendants' Response is devoid of even a scintilla of admissible evidence that Mr. Ledonne poses any kind of actual threat to the campus at all. No one has filed any affidavit alleging any impropriety by Mr. Ledonne. There are no police reports. Indeed, Defendants have submitted

no admissible evidence of any kind to justify the ban. Defendants are essentially arguing that University administrators have carte blanche to ban and defame members of the public because it is not in the public interest to give a fair notice and hearing before denying those persons access to the only source of culture in town, and before destroying a person's reputation and livelihood. The Fourteenth Amendment's Due Process Clause is the best refutation of the argument.

III. CONCLUSION

The Court should promptly grant the requested interim relief of enjoining Defendants from enforcing the unconstitutional Order banning Mr. Ledonne from the Adams State University campus.

Dated: March 7, 2016

Respectfully submitted,

s/ N. Reid Neureiter

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AS COOPERATING ATTORNEYS FOR THE ACLU FOUNDATION OF COLORADO

CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on March 7, 2016, I electronically filed the foregoing **REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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