

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE HERNANDEZ; KEITH GURGUI;
RASHETA BUNTING; KAREN LUXTON
GOURGEY, ED.D; DISABILITY RIGHTS
NEW YORK; NATIONAL FEDERATION
OF THE BLIND OF NEW YORK STATE,
INC.; AMERICAN COUNCIL OF THE
BLIND OF NEW YORK, INC.; and
CENTER FOR INDEPENDENCE OF THE
DISABLED, NEW YORK,

Plaintiffs,

-against-

THE NEW YORK STATE BOARD OF
ELECTIONS, DOUGLAS A. KELLNER,
Co-Chair and
Commissioner, ANDREW SPANO,
Commissioner, PETER S. KOSINSKI, Co-
Chair and Commissioner, TODD D.
VALENTINE, Co-Executive Director, and
ROBERT A. BREHM, Co-Executive
Director, in their official capacities at the
New York State Board of Elections,
Defendants.

CASE NO: _____

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

**PLAINTIFFS' MOTION FOR A TEMPORARY RESTRATING ORDER AND
PRELIMINARY INJUNCTION**

NOW COME Plaintiffs, JOSE HERNANDEZ, KEITH GURGUI, RASHETA
BUNTING, KAREN LUXTON GOURGEY, ED.D, DISABILITY RIGHTS NEW YORK,
NATIONAL FEDERATION FOR THE BLIND OF NEW YORK, INC., AMERICAN
COUNCIL FOR THE BLIND OF NEW YORK; and CENTER FOR INDEPENDENCE OF
THE DISABLED, NEW YORK (Plaintiffs), by and through undersigned counsel, and hereby
move this Honorable Court for a Temporary Restraining Order and Preliminary Injunction

pursuant to Federal Rule of Civil Procedure 65 in order to prevent irreparable injury to Plaintiffs. Defendants NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS A. KELLNER, Co-Chair and Commissioner, ANDREW SPANO, Commissioner, PETER S. KOSINSKI, Co-Chair and Commissioner, TODD D. VALENTINE, Co-Executive Director, and ROBERT A. BREHM, Co-Executive Director, in their official capacities at the New York State Board of Elections, have refused to make New York State's Absentee Voting program accessible for New York voters with print disabilities, in violation of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, *et seq.* and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.* In support of this motion, Plaintiffs rely on the Complaint, the attached Memorandum of Law, the attached Declarations, and the attached Exhibits.

WHEREFORE, for all the reasons set forth in this Motion, the Complaint, and Memorandum of Law, Declarations, and Exhibits, Plaintiffs hereby request that this Honorable Court order Defendants to immediately implement an absentee ballot that is accessible and completed independently and privately by Plaintiffs and individuals who have print disabilities before the June 23, 2020 Primary Election, to bring Defendants' Absentee Voting program into compliance with Federal Law.

Respectfully submitted,

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**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Plaintiffs,

-against-

THE NEW YORK STATE BOARD OF
ELECTIONS, DOUGLAS A. KELLNER,
Co-Chair and Commissioner, ANDREW
SPANO, Commissioner, PETER S.
KOSINSKI, Co-Chair and Commissioner,
TODD D. VALENTINE, Co-Executive
Director, and ROBERT A. BREHM, Co-
Executive Director, in their official capacities
at the New York State Board of Elections.

Defendants.

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PRELIMINARY STATEMENT

The right to vote is a fundamental tenet of American democracy. “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Harman v. Forssenius*, 380 U.S. 528, 537 (1965).

People with disabilities have traditionally faced numerous barriers to voting, such as access to accessible transportation, inaccessible polling places, inaccessible ballots, and inaccessible voting machines. As a result, their voter turnout has been lower than turnout among voters without disabilities.¹ However, this does not reflect a lack of interest in voting. Voter turnout has increased substantially across the country in recent years, as some barriers to voting have been reduced by increased accessibility of polling places, increased accessibility of voting machines, and increased access to absentee voting for those whose physical disabilities make accessing polling places difficult.

Yet New York’s reliance exclusively on paper absentee ballots has kept one group of people with disabilities—those with vision disabilities and other disabilities that prevent them from reading or using a pen and paper (“print disabilities”)—from participating in absentee and mail-in voting.

Voters with print disabilities either vote in person on Election Day so they can vote privately and independently using accessible voting machines, or are forced to give up their privacy and independence by having others read and mark their ballots at home. This discriminatory and unlawful exclusion from absentee or mail-in voting has continued despite the long history of the Americans with Disabilities Act (“ADA”) and Section 504 of the

¹ L.Schur & D. Kruse, Fact sheet: Disability and Voter Turnout in the 2018 Elections, Rutgers School of Management & Labor Relations, available at <https://smlr.rutgers.edu/sites/default/files/2018disabilityturnout.pdf>.

Rehabilitation Act (“Section 504”). Today, in the midst of the novel coronavirus pandemic, remedying this discrimination has become a matter of life and death. Defendants have acted swiftly and decisively to allow other voters to avoid the risk of contracting the novel coronavirus by voting absentee, but refused to take any meaningful steps to similarly protect those with print disabilities.

New York State is at the epicenter of the novel coronavirus SARS-CoV-2 (“COVID-19”) pandemic in the United States. New York’s rate of COVID-19 infection has been vastly higher than any other state in the country. A significant portion of domestic COVID-19-related deaths have been residents of New York. The Governor has asked most New Yorkers to stay home, and has ordered schools and non-essential businesses to close and hospitals to increase capacity. The Governor has also postponed the Presidential Primary until June 23 and expanded eligibility for the State’s Absentee Voting program, cautioning that “You shouldn’t have to say to a person ‘If you want to exercise your civic duty, you have to endanger your public health and possibly engender others.’” and advising New Yorkers to vote by absentee ballot.² Defendants, however, continue to operate an inaccessible Absentee Voting program that threatens Plaintiffs’ right to vote.

New York State’s Absentee Voting program is inaccessible to Plaintiffs because their disabilities prevent them from reading, marking, and/or signing a ballot with a pen or marker. The New York State Board of Elections (NYS BOE) has refused to modify the Absentee Voting program, even though New York has already delivered ballots electronically for military and

² In a press conference on May 6, 2020, Governor Cuomo made the following statement regarding absentee voting and safety: “I don’t think it’s a good idea to have people go standing on line to vote. You shouldn’t have to say to a person ‘If you want to exercise your civic duty, you have to endanger your public health and possibly engender others.’ [...] To the extent we can do absentee ballots, and make them available to everyone...and make that easy, I think that is the best way. If we have to also have an Election Day where people show up on Election Day, my two cents to people is, please vote by absentee, so you don’t have to show up.”

overseas voters and this process could accommodate Plaintiffs. Military and overseas voters have been provided a ballot by email in a Portable Document Format (PDF). The PDF ballot can easily be made into a fillable form³ to allow a voter with a print disability to privately and independently fill out the ballot using a computer. The Defendants refuse to provide voters with a print disability an accessible PDF ballot. By failing to allow voters to electronically mark their ballots, Defendants put Plaintiffs, some of whom are at a higher risk of serious complications or death due to COVID-19,⁴ in the position of choosing between their fundamental right to a private and independent vote and their personal health and safety.

Plaintiffs seek a temporary restraining order and mandatory preliminary injunction to order Defendants to immediately provide an electronic ballot marking system for the upcoming elections.

STATEMENT OF FACTS

I. The COVID-19 Pandemic and New York Voting

The COVID-19 pandemic has taken an unprecedented toll on New Yorkers, causing widespread illness and death, straining the state's healthcare system, and disrupting most aspects of daily public life. As of May 20, 2020, more than 359,235 people in New York State have been infected with COVID-19, and 28,540 have lost their lives to the contagious disease.⁵ People with disabilities are at a heightened risk of contracting the COVID-19 infection.⁶ This risk is

³ A fillable PDF is an interactive PDF document that allows users to enter answers on the form while viewing it in Adobe Acrobat or Reader.

⁴ Ctrs. for Disease Control and Prevention, People Who Are at Higher Risk for Severe Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited May 7, 2020).

⁵ The New York Times, New York Coronavirus Map and Case Count, <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html> (last visited May 20, 2020).

⁶ See *Coronavirus Disease 2019 (COVID-19): People with Disabilities*, Ctrs. for Disease Control and Prevention ("CDC"), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html> (last visited May 21, 2020).

particularly acute for people who are at high risk of serious complications or death from COVID-19, including older adults, those with immune deficiencies, heart, lung, kidney, or liver disease, diabetes, chronic lung disease, asthma, or obesity.⁷

Social distancing is critical to preventing the spread of COVID-19.⁸ In recognition of the risk of spread of COVID-19, New York's Governor Andrew Cuomo has issued a stay-at-home order through at least June 13 for many regions in the State.⁹ These deadlines are a function of New York law, which limits emergency executive orders to 30 days duration, and they may be extended. N.Y. Exec. Law § 29-a (McKinney).

The Centers for Disease Control and Prevention (CDC) issued specific guidelines for voting during the COVID-19 pandemic. The CDC recommends that states “[e]ncourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.”¹⁰

Since early April 2020, Governor Cuomo has issued a series of executive orders to encourage more people to vote absentee and reduce the risk of COVID-19 transmission at the polls. Exec. Orders 202.23 and 202.26. Governor Cuomo expanded eligibility of the Absentee Voting program to all New Yorkers, allowed online and telephone requests for absentee ballots, and made sure “every New York voter automatically receives a postage-paid application for an absentee ballot because no New Yorker should have to choose between their health and their

⁷ See *Coronavirus Disease 2019 (COVID-19): Groups at Higher Risk for Severe Illness*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last visited May 21, 2020).

⁸ Ctrs. for Disease Control and Prevention, *Social Distancing: Keep Your Distance to Slow the Spread* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 21, 2020).

⁹ <https://www.wkbw.com/news/coronavirus/gov-cuomo-extends-ny-on-pause-to-may-28-state-of-emergency-stay-at-home-orders-to-june-13>, last visited May 21, 2020.

¹⁰ Ctrs. for Disease Control and Prevention, *Recommendations for Election Polling Locations: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last updated March 27, 2020).

right to vote.”¹¹ In addition, the Governor ordered that all absentee voters receive a postage paid return envelope with their absentee ballot for the June 23, 2020 election. Executive Order 202.26.

For voters with print disabilities who cannot use a printed absentee ballot, however, the Governor only ordered local boards of election to provide an accessible voting machine in their offices for early voting. These Ballot Marking Devices (BMDs) are the devices voters with print disabilities usually use at their polling places to privately and independently select their voting option, mark that option on a screen, and print the ballot.¹² Plaintiffs are voters with print disabilities who will only be able to vote privately and independently if they travel to their polling place on Election Day or make an appointment at an otherwise-closed board of elections office prior to Election Day. Under either of these options, plaintiffs must risk COVID-19 infection to vote. To avoid this risk, plaintiffs must either forfeit their right to vote altogether, or ask someone to read and mark their ballot and forfeit their right to vote privately and independently. If they have no one in their home to undertake this task, they must risk COVID-19 infection by inviting someone into their home to assist.

II. Facts Regarding the Individual Witnesses

The Individual Plaintiffs are all qualified persons with print disabilities who are registered to vote, eligible to vote in the June 2020 election, prefer to use an absentee ballot to avoid the risk of COVID-19, and cannot fill out a paper absentee ballot privately and independently due to their print disabilities. *See* Declaration of Jose Hernandez, Declaration of Keith Gurgui, Declaration of Karen Luxton-Gourgey, Ed.D., and Declaration of Rasheta

¹¹ <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-issues-executive-order-make-sure-every-new-yorker>, last visited May 21, 2020.

¹² <https://www.elections.ny.gov/VotingMachines.html>, last visited May 20, 2020.

Bunting. In addition to Individual Plaintiffs, other members of Organizational Plaintiffs are qualified individuals with print disabilities who wish to vote absentee privately and independently, as voters without disabilities are encouraged to do. *See* Declaration of Roger Dennis, Declaration of Raymond Wayne.

A. Jose Hernandez

Jose Hernandez has a disability and uses a wheelchair to ambulate. Hernandez Decl. ¶ 5. He uses a computer independently with a trackball mouse and a voice dictation program that allows him to write emails, complete reports, complete fillable PDF or other forms, or dictate messages. *Id.* ¶ 6. Mr. Hernandez is afraid to go to his physical polling location in the upcoming election because of the health risks of COVID-19. *Id.* ¶ 8. To vote privately and independently, he needs an accessible electronically-delivered absentee ballot for the June 23, 2020 Primary Election and for all subsequent elections in New York State during the pandemic. *Id.* ¶ 9. Without an electronic ballot marking option, the Absentee Voting program is inaccessible to Mr. Hernandez. *Id.* ¶ 7.

B. Keith Gurgui

Keith Gurgui is quadriplegic and uses a wheelchair to ambulate. Gurgui Decl. ¶ 5. He uses a computer independently that he controls with assistive technology, including a voice dictation program that allows him to write emails, complete reports, complete PDF fillable and other forms, or dictate messages. *Id.* ¶ 6. Voting at the polls in the upcoming election is particularly unsafe for Mr. Gurgui because he uses a “sip and puff” attachment controlled by his mouth to mark his ballot on the BMD. *Id.* ¶ 8. Mr. Gurgui requires an accessible electronically-delivered absentee ballot to vote in the June 23, 2020 Primary Election and for all subsequent elections in New York State. *Id.* ¶ 14.

C. Karen Luxton Gourgey, Ed.D

Karen Luxton Gourgey, Ed.D is totally blind and uses a dog and sometimes a cane to navigate when she walks. Gourgey Decl. ¶ 6. She recently retired as Director of the Computer Center for Visually Impaired Persons, formerly of Baruch College, and uses screen reading software called VoiceOver to access her smartphone and Job Access With Speech (“JAWS”) to access her desktop computer, as well as BrailleNote Touch Plus to convert computer displays into Braille. *Id.* ¶ 7. Dr. Gourgey is worried about COVID-19, and does not want to vote in person at her polling place, but cannot see a paper absentee ballot to fill it, and is dependent on her sighted husband to assist her. *Id.* ¶¶ 9-10.

D. Rasheta Bunting

Rasheta Bunting is legally blind and uses a white cane to navigate when she walks. Bunting Decl. ¶ 6. She uses VoiceOver to access her smartphone and JAWS to access her computer. *Id.* ¶ 7. Because of her disability, she cannot fill out a paper absentee ballot privately and independently. *Id.* ¶ 8. She has already contracted COVID-19, which made her very ill, and she is very concerned about getting the virus again if she has to travel to a polling place. *Id.* ¶ 11. Ms. Bunting requires an accessible electronically-delivered absentee ballot to vote in the June 23, 2020 Primary Election and for all subsequent elections in New York State. *Id.* ¶¶ 13-14.

III. Accessible Absentee Ballot Technology

Electronic alternatives to paper ballots exist for voters and are used across the country. New York State already implemented an electronic ballot delivery system pursuant to its responsibility under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301 *et seq.*, as amended by the Military and Overseas Voter Empowerment Act (“MOVE Act”), Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009). New York State residents who are members of the military and overseas were previously

allowed to use absentee voting technology that allows ballots to be received and filled out electronically. *Id.*¹³ The State now implements an inaccessible PDF absentee ballot for overseas voters. However, New York does not allow voters with print disabilities to use the PDF ballots, and does not make them accessible, despite the ease of doing so. See Declaration of Lou Ann Blake, ¶¶ 9-10.

Initially, New York used a system called Scytl Secure Electronic Voting (Scytl).¹⁴ Scytl enables voters to read and mark their ballots on a computer or electronic device, and provides assistive technology options, such as screen reading capability, for blind and low-vision voters. Not only is it possible to receive a ballot electronically, but Scytl also allows for secure online ballot submission.¹⁵ However, New York recently created its own electronic absentee delivery system which sends voters a PDF ballot electronically. *See* Declaration of Christina Asbee, ¶ 12. New York does not permit people with print disabilities to access this electronic absentee delivery system. *Id.* ¶¶ 11-12. Other states, such as Michigan and Nevada, expanded their similar UOCAVA ballot systems to serve people with print disabilities in the short term for upcoming elections. *See* Asbee Decl., Exh. H, *Powell et. al. v. Benson et. al.*, Case 2:20-cv-11023, Temporary Restraining Order issued May 1, 2020 and Approved Consent Decree issued May 19, 2020. Blake Decl. ¶ 5, 6, 8.

Despite already utilizing an electronic ballot to enable overseas service members to vote, Defendants have refused to expand this service to New York State voters with disabilities who require an accessible ballot to vote absentee privately and independently.

¹³ *See also* <https://nysballot.elections.ny.gov/> Last visited May 21, 2020.

¹⁴ <https://www.scytl.com/en/customers/state-of-new-york/>, Last visited May 21, 2020.

¹⁵ <https://www.scytl.com/en/online-voting-technology-security/>, Last visited May 21, 2020.

Other online ballot marking systems are also available to New York State. Prime III,¹⁶ Democracy Live,¹⁷ and Maryland's online ballot marking system¹⁸ are just three examples. All three systems allow voters to access their absentee ballots through their web browser and read and mark their ballots on their computers using assistive technology, such as screen magnification or screen reading software. Voters then either print their ballots and mail them back to their local boards of elections, or return them by email or online, to be counted. Blake Decl. ¶ 19, 21. Prime III and Maryland's online marking tool are available as open source technology, meaning that they can be used by Defendants, or by any other entity, free of charge. These tools have been tested, approved, and successfully used by individuals with print disabilities to vote independently and privately in elections held across the country. *Id.* ¶ 19-21.

However, Defendants do not allow voters with print disabilities to receive absentee ballots electronically, or to use an electronic ballot marking tool when voting by absentee ballot. This means that absentee voters with print disabilities must either ask for assistance, violating the privacy and independence of their vote, or forego absentee voting altogether and vote in-person or not at all.

IV. Defendants Have Not Acted to Make Absentee Ballots Accessible

Prior to the spread of COVID-19, the National Federation of the Blind (NFB) identified the inaccessibility of New York's Absentee Voting program and wrote to Defendants to explain the legal requirements for accessible absentee voting and to request that they make the absentee voting program accessible. Asbee Decl., Exh. A, September 27, 2019 Letter from NFB to

¹⁶ Prime III is used in in state elections in Washington, Oregon, and New Hampshire.

¹⁷ At least 15 states and many local boards of elections across the country have certified the Democracy Live voting system for use in elections. <https://democracylive.com/approvals-reviews-and-certifications/> (last visited May 21, 2020). Democracy Live system has been “[s]elected by the Department of Defense to assist military voting and a member of the Department of Homeland Security sponsored Elections Coordinating Council[.]” <https://democracylive.com/our-company/> (last visited May 21, 2020).

¹⁸ The state of Maryland developed its own online ballot marking system, used successfully since 2014.

Defendants. On April 21, 2020, Plaintiff American Council for the Blind-NY joined in a Complaint to the U.S. Department of Justice (DOJ) about the mail-in absentee voting program Governor Andrew Cuomo authorized for the June 23, 2020 primary election. Asbee Decl., Exh. B, April 21, 2020 Complaint filed by Plaintiffs ACB-NY with the U.S. Department of Justice against Defendants. The complaint explained why paper absentee ballots are inaccessible and requested that the DOJ take immediate action to assist Defendants in developing non-discriminatory voting programs before voters with disabilities are excluded from equal participation in the 2020 election process. *Id.*

Since the onslaught of the COVID-19 pandemic, Plaintiff Disability Rights New York (DRNY) has received numerous complaints from voters and asked Defendants for specific changes to the Absentee Ballot program including implementing an accessible electronic ballot delivery and marking tool. Asbee Decl., Exh. C, May 5, 2020, First Demand Letter from DRNY to Defendants; Asbee Decl. Exh. F, May 15, 2020, Second Demand Letter from DRNY to Defendants. Plaintiff Center for Independence for the Disabled, NY wrote a letter to Defendants and co-published an editorial in the *Times-Leader* pointing out that paper absentee ballots are inaccessible and would likely prevent some voters with disabilities from voting altogether. Asbee Decl., Exh. D, May 14, 2020 Correspondence from CIDNY to Defendants; Asbee Decl., Exh. E, May 14, 2020 Editorial in the *Times-Leader* co-published by CIDNY. Defendants refused to make New York's Absentee Voting program accessible despite Plaintiffs' efforts. Asbee Decl., Exh. G, May 15, 2020, Defendants' Response to DRNY's May 5 and 18 Demand Letters.

ARGUMENT

By refusing to provide an accessible absentee ballot, Defendants deprive Plaintiffs of their right to cast a private and independent vote by absentee ballot, a right which is afforded to New York voters without disabilities. Plaintiffs are therefore entitled to injunctive relief.

“A plaintiff seeking a temporary restraining order must establish that he is likely to succeed on the merits that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Natera, Inc. v. Bio-Reference Labs., Inc.*, 2016 WL 7192106, at *2 (S.D.N.Y. Dec. 10, 2016) (*internal quotes, citation, and alteration omitted*). This Court recognizes that “the standard for an entry of a TRO is the same as for a preliminary injunction.” *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008).

Generally, plaintiffs seeking preliminary relief need only show that there is a fair probability that they will prevail in order to obtain a temporary restraining order. *See Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953) (“To justify a temporary injunction it is not necessary that the plaintiff’s right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.”). For a court to grant a mandatory injunction, such as Plaintiffs seek here, “the movant must show a ‘clear’ or ‘substantial’ likelihood of success” on the merits. *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012) (*citing Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349 (2d Cir. 2003)).

Under either standard, it is not necessary for Plaintiffs to demonstrate that they were excluded entirely from the voting process in order to prevail on the merits. The question, rather, is whether Defendants failed to provide Plaintiffs with “meaningful access” to the Absentee Voting program. Nor must the discrimination take the form of deliberate exclusion or by the creation of new laws or practices that are discriminatory. This Court recently held, “[i]ndividuals may be deprived of meaningful access to public programs if a public entity fails to modify existing practices.” *Martinez v. Cuomo*, No. 20-CV-3338 (VEC), 2020 WL 2393285, at *4 (S.D.N.Y. May 12, 2020). Plaintiffs meet this burden because it is undeniable Defendants maintain an inaccessible Absentee Voting program.

As set forth below, Plaintiffs are likely to succeed on the merits of their disability rights law claims. They will suffer the irreparable harm of being forced to give up their right to vote privately and independently unless they choose to risk infection in a global pandemic. The balance of equities tips in Plaintiffs’ favor because Defendants will suffer little or no cost or difficulty to comply with the law. And the public interest in equal access to voting—“the essence of a democratic society”¹⁹ —is served by the relief they seek.

I. Plaintiffs Have Demonstrated a Likelihood of Success on the Merits

To establish a claim of discrimination under Title II of the ADA, Plaintiffs must demonstrate that (1) they are “qualified individuals” with a disability; (2) the Defendant is subject to the ADA; and (3) Plaintiffs were denied the opportunity to participate equally in or benefit equally from Defendants’ services, programs or activities, by reason of their disability.

¹⁹ *Harman v. Forssenius*, 380 U.S. 528, 537 (1965).

See Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003). The requirements of Section 504, covering recipients of federal financial assistance, are virtually identical. *Id* at 272.²⁰

A. Plaintiffs are Individuals with Disabilities and are Qualified to Vote

It is without question that Plaintiffs are qualified individuals with disabilities. Under the ADA, an individual has a disability if he has a “physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(1)(A-B). Mr. Hernandez is a tetraplegic with limited movement in his hands and Mr. Gurgui is a quadriplegic from the neck down. *See Hernandez Decl.* ¶ 5, *Gurgui Decl.* ¶ 5. Mr. Hernandez and Mr. Gurgui have physical impairments that substantially limit many of their major life activities, including work, ambulation, and communication. Dr. Gourgey is totally blind and Ms. Bunting is legally blind, limiting their ability to see and read print. *See Gourgey Decl.* ¶ 6, *Bunting Decl.* ¶ 6.

The term “qualified individual with a disability” means “an individual with a disability, who with or without reasonable modifications to rules, policies or practices...or the provision of auxiliary aids and services, meets the essential eligibility requirements for ...participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2); *See also* 29 U.S.C. § 794. Plaintiffs are registered voters to a political party holding a contest on June 23, 2020 in New York State. Plaintiffs, therefore, “meet the essential eligibility requirements” for the activity of voting that is provided for by the Defendants on June 23, 2020. *See Brooklyn Ctr. for Indep. of Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 640 (S.D.N.Y. 2013). Plaintiffs are individuals

²⁰ “Claims of disability discrimination under the ADA are held to essentially the identical standard as is applied under Section 504 of the Rehabilitation Act.” *Brown v. Connecticut*, 2010 WL 2220580, at *20 (D. Conn. May 27, 2010) (citing *Henrietta D.*, 331 F.3d at 272). Plaintiffs’ claims are brought pursuant to both Title II of the ADA and Section 504. In the interest of brevity Plaintiffs present their arguments using reference to the ADA with the understanding that the standard is the same under either statute.

with disabilities who, with access to an accessible electronic ballot, would be able to equally participate in and benefit from the Absentee Ballot program.

B. Defendants are a Covered Entity Under the ADA and Section 504

Title II of the ADA covers any “public entity,” meaning “(A) any State or local government; [or] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government.” 42 U.S.C. § 12131(1). Section 504 covers the programs or activities of all recipients of federal financial assistance. 29 U.S.C. § 794(b).

Defendant NYS BOE is an agency created, authorized, and existing under the laws of the State of New York. The NYS BOE, made up of two Co-chairs, two Commissioners, and two Co-Executive Directors, is responsible for managing and supervising elections in New York and ensuring compliance with the requirements of applicable state and federal law, including the ADA and Section 504. The NYS BOE’s six members are appointed by the Governor of New York, the New York State Legislature, and party committees. NY Elec. Law § 3-100(1).

The NYS BOE is authorized to “issue instructions and promulgate rules and regulations relating to the administration of the election process” and to “have jurisdiction of, and be responsible for, the execution and enforcement of ... statutes governing ... elections.” Therefore, the NYS BOE has the responsibility to implement an Absentee Voting program for New York voters. NY Elec. Law §§ 3-102(1) and 3-104(1). The NYS BOE receives federal financial assistance in many forms, including direct grants of assistance to develop, certify and maintain voting technology, and is required to comply with the ADA and Section 504.

Co-Chair and Commissioner Douglas A. Kellner, Co-Chair and Commissioner Peter S. Kosinski, Commissioner Andrew Spano and Co-Executive Directors Todd D. Valentine and Robert A. Brehm, are a “public entity” under Title II when sued in their official capacity.

Henrietta D., 331 F.3d at 288 (holding a state officer sued in his official capacity, under the doctrine of *Ex parte Young*, is a “public entity” subject to liability under the ADA).

C. Defendants Discriminate by Failing to Provide Plaintiffs with an Equal Opportunity to Cast a Private, Independent Vote by Absentee Ballot

Plaintiffs need an accessible ballot to effectively participate in the Absentee Voting program. Without such a ballot, Plaintiffs will be excluded from participating in and denied the benefit of casting a private vote by absentee ballot.

A plaintiff establishes the requisite causal connection for a claim under the ADA when he shows that *but for* his disability he would not have needed a reasonable modification or auxiliary aid and therefore would not have been denied the benefit or access at issue. *See Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307, 340 (E.D.N.Y. 2012) (*citing Henrietta D.*, 331 F.3d at 277). In the instant matter, but for their disabilities, Plaintiffs would not be facing discrimination.

A public entity may not, in providing any aid, benefit, or service, “[d]eny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service[,] [a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others[,]” or “[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others[.]” 28 C.F.R. §§ 35.130(b)(1)(i)-(iii); *accord* 45 C.F.R. § 84.4(b)(1)(ii)-(iii) (Rehabilitation Act). Nor can a public entity employ unnecessary policies, practices, criteria or methods of administration that have the effect or tendency of excluding or discriminating against persons with disabilities. 28 C.F.R. § 35.130(b)(3),(8).

The ADA and Section 504 specifically require covered entities to “take appropriate steps to ensure that communications with applicants, participants, members of the public ... with disabilities are as effective as communications with others.” 28 C.F.R. § 35.160. The applicable regulations are clear that public entities must provide individuals with auxiliary aids and services under the ADA and Section 504:

(b)(1) A public entity **shall furnish appropriate auxiliary aids and services** where necessary to afford individuals with disabilities... an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

(b)(2) ... In determining what types of auxiliary aids and services are necessary, **a public entity shall give primary consideration to the requests of individuals with disabilities.** In order to be effective, auxiliary aids and services must be provided in **accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.**

28 C.F.R. § 35.160 (*emphasis added*); *See also* 29 U.S.C. § 794. Auxiliary aids and services include “accessible electronic and information technology” such as the accessible absentee ballots Plaintiffs seek. 28 C.F.R. § 35.104.

The purpose of the auxiliary aid and service requirement is to ensure that the person with a disability has equal opportunity to benefit and participate in the program. New York State’s paper-only Absentee Voting program does not provide Plaintiffs equal opportunity to vote by absentee ballot privately and independently. *See National Federation of the Blind, et al. v. Lamone, et al.*, 813 F.3d 494 (4th Cir. 2016).

“It is abundantly clear that Defendants are obligated to provide a level of access to their voting program beyond the simple assurance that voters with disabilities are able to cast a ballot in some way, shape, or form.” *United Spinal Ass’n v. Board of Elections in City of New York*, 882 F. Supp. 2d 615, 623 (S.D.N.Y. 2012). Equal access means that voters with disabilities must

be able to vote privately and independently. 28 C.F.R. 35.160(b)(2); *see also* Help America Vote Act of 2002, Pub. L. 107–252 § 301, 116 Stat. 1666, 1704 (*codified as amended at* 52 U.S.C. § 21081); *Disabled in Action v. Board of Elections in the City of New York*, 752 F.3d 189, 199 (2d Cir. 2014) (emphasizing the importance of privacy and independence for voters with disabilities in the context of a public entity’s voting program); *California Council of the Blind v. County of Alameda*, 985 F. Supp. 2d 1229, 1238 (N.D. Cal. 2013) (“[O]ne of the central features of voting, and one of its benefits, is voting privately and independently. ... [U]nder the terms of the ADA or the Rehabilitation Act, the covered entity must provide meaningful access to private and independent voting.”). Indeed, the New York Constitution enshrines the right to a secret ballot. N.Y. Const. art. II, § 7.

The law does not permit Defendants to require that disabled individuals rely upon the kindness, availability, and accuracy of nondisabled third parties to assist them in filling out their absentee ballots. *See, e.g., American Council of the Blind v. Paulson*, 525 F.3d 1256, 1264 (2008) (“While [t]here was a time when disabled people had no choice but to ask for help – to rely on the kindness of strangers[,] ... [i]t can no longer be successfully argued that a blind person has meaningful access to currency if she cannot accurately identify paper money without assistance.”) (*internal quotations omitted*).

Covered entities may avoid the requirement to ensure equally effective communication with people with disabilities only if they can demonstrate that doing so would constitute an undue burden or fundamental alteration of their program, service or activity. Defendants certainly cannot meet that burden here. Accessible absentee voting systems are readily available, some at low or no cost. In fact, Defendants’ previous Scytl system for military and overseas voters was accessible and Defendants’ current voting system for military and overseas voters

could be made accessible and extended to voters with disabilities. Courts addressing similar issues have reached the same conclusion, in the contexts of both in-person and absentee voting. *Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017); *National Federation of the Blind v. Lamone*, , *et al.* 813 F.3d 494 (4th Cir. 2016); Asbee Decl. Exh. H, *Powell et. al. v. Benson et. al.*, Case 2:20-cv-11023, Temporary Restraining Order issued May 1, 2020 and Approved Consent Decree issued May 19, 2020.

But for their disabilities, Plaintiffs would not need an auxiliary aid to access the Absentee Voting program. Defendants' refusal to provide an accessible absentee ballot deprives Plaintiffs of meaningful access to the Absentee Ballot program, and constitutes a violation of the ADA and Section 504.

II. Plaintiffs Will Suffer Irreparable Harm Without Emergency Injunctive Relief

The showing of irreparable harm is the “single most important prerequisite for the issuance of a preliminary injunction.” *People of New York ex rel. Spitzer v. Cty of Delaware*, 82 F. Supp. 2d 12, 16 (N.D.N.Y. 2000) (quoting *Bell & Howell v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983)). “Irreparable harm is an injury that is not remote or speculative but actual and imminent, and ‘for which a monetary award cannot be adequate compensation.’” *Galusha v. New York State Dep’t of Env’tl. Conservation*, 27 F. Supp. 2d 117, 122 (N.D.N.Y. 1998) (quoting *Tom Doherty Assocs. Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995)). The “court must actually consider the injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for that injury.” *Mint, Inc. v. Amad*, 2011 WL 1792570, at *1 (S.D.N.Y. May 9, 2011).

The harm to Plaintiffs absent the requested relief is both imminent and irreparable. The threat of contracting COVID-19 by voting in-person on Election Day or during Early Voting in June pose serious and life threatening consequences to Plaintiffs.²¹ It is discriminatory to require only voters like Plaintiffs to venture to the polls or board of elections offices to vote using the BMD. Plaintiffs are at grave risk to their health and must spend extra time and effort to vote, while others are permitted, and strongly encouraged, to avoid that risk and effort and have full voting access via paper absentee ballot. *See* Gurgui Decl. ¶¶ 10-11, Bunting Decl. ¶¶ 10-11. By depriving Plaintiffs access to an accessible electronic ballot, Defendants force Plaintiffs to make a choice: to prioritize their fundamental right to vote over their health and well-being, or to give up their right to vote privately and independently.

Furthermore, Plaintiffs have demonstrated irreparable harm because they have alleged that because of their disabilities, they are being deprived of a reasonable opportunity to exercise their constitutional right to vote. “[T]he alleged violation of a constitutional right triggers a finding of irreparable injury.” *Connecticut Dep’t of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004).²² The New York Constitution provides the right to vote, including the right to a secret ballot. N.Y. Const. Art. II, § 7. Courts in this circuit have consistently found irreparable

²¹ The threat at polling locations is real - Wisconsin held in-person elections on April 7, 2020, resulting in multi-hour waits to enter poll sites in Milwaukee and Green Bay. Despite outcry and known health risks, Wisconsin leaders refused to make available to all voters its Absentee Voting program. By April 24, health officials in Milwaukee had identified at least 40 positive COVID-19 cases linked to in-person voting on April 7, including at least six voters and one poll worker. 31 Teran Powell, *40 Coronavirus Cases In Milwaukee County Linked To Wisconsin Election, Health Official Says*, WUWM 89.7 Milwaukee’s NPR, Apr. 24 2020, <https://www.wuwm.com/post/40-coronavirus-cases-milwaukee-county-linked-wisconsin-election-health-official-says#stream/0> (last visited May 21, 2020). By April 30, 52 people who voted in-person or worked as poll workers in the April 7 Wisconsin primary had tested positive for COVID-19. Scott Bauer, *52 people who worked or voted in Wisconsin election have COVID-19*, PBS News Hour, Apr. 29, 2020, <https://www.pbs.org/newshour/health/52-people-who-worked-or-voted-in-wisconsin-election-have-covid-19> (last visited May 21, 2020).

²² See also *Statharos v. New York City Taxi & Limousine Comm’n*, 198 F.3d 317, 322 (2d Cir. 1999) (“Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.”); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (clarifying that “it is the alleged violation of a constitutional right that triggers a finding of irreparable harm” and a substantial likelihood of success on the merits of a constitutional violation is not necessary).

injury in matters where voters have alleged violations of their right to vote. *See, e.g., Green Party of New York State v. New York State Bd. of Elections*, 267 F. Supp. 2d 342, 351 (E.D.N.Y. 2003), *modified*, No. 02-CV-6465 (JG), 2003 WL 22170603 (E.D.N.Y. Sept. 18, 2003), and *aff'd*, 389 F.3d 411 (2d Cir. 2004) (“The plaintiffs have satisfied the [irreparable harm] prong of the test by alleging” that aspects of New York’s voter enrollment scheme violated “their First and Fourteenth Amendment rights to express their political beliefs, to associate with one another as a political party, and to equal protection of the law.”); *See also Credico v. New York State Bd. of Elections*, 751 F. Supp. 2d 417, 420 (E.D.N.Y. 2010); *Dillon v. New York State Bd. of Elections*, No. 05 Civ. 4766, 2005 WL 2847465, at *3 (E.D.N.Y. Oct. 31, 2005).

Plaintiffs cannot do their part to further the collective good without access to an electronic ballot. If the Absentee Voting program is inaccessible, there is no remedy at law that can turn back time and give Plaintiffs the ability to cast a private and independent vote. There is no remedy at law that could compensate Plaintiffs if they or their families are unnecessarily exposed to COVID-19 because they were forced to go to the polls to mark their ballot with a BMD or to rely on a third party to read and mark their absentee ballot.

A. The Balance of Hardships Weighs Heavily in Favor of Plaintiffs

“When confronted with a motion for a preliminary injunction, a court ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” *Main St. Baseball, LLC v. Binghamton Mets Baseball Club, Inc.*, 103 F. Supp. 3d 244, 262 (N.D.N.Y. 2015) (*quoting Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). Defendants “cannot assert an equitable interest in perpetuating discriminatory actions.” *Step By Step, Inc. v. City of Ogdensburg*, 176 F.Supp.3d 112, 135 (N.D.N.Y. 2016).

The injuries caused by the challenged barriers in this case are not remote or speculative; they are actual and imminent. The individual Plaintiffs have attested to the injuries caused by the unlawful barriers maintained by Defendants. Further, the organizational Plaintiffs represent thousands of additional New Yorkers who are eligible voters and face the same barriers because they cannot read or mark paper ballots privately and independently. *See, e.g., U.S. Census Bureau (2018) American Community Survey*, https://data.census.gov/cedsci/table?tid=ACSST5Y2018.S1810&y=2018&t=Disability&vintage=2018&hidePreview=true&layer=VT_2018_050_00_PY_D1&cid=S1810_C01_001E&g=0400000US36 (Over 400,000 New Yorkers identify as having a vision disability.) Accordingly, “these figures are too large to ignore, especially in light of the fact that the prospective harm is great and compliance with the ADA, *et al.*, is mandatory. Plaintiffs have shown irreparable harm.” *People of New York ex rel. Spitzer v. County of Delaware*, 82 F. Supp. 2d 12, 17 (N.D.N.Y. 2000).

Granting the preliminary relief Plaintiffs seek will cause no substantial hardship on Defendants because Defendants are already able to deliver electronic ballots to voters and could modify this process to accommodate Plaintiffs.²³ Just as Michigan has recently been required to do, and as Nevada is in the process of doing, Defendants could expand this system to Plaintiffs. Asbee Decl. Exh. H. Defendants, however, refuse to make that option available to voters with disabilities. Even if it were somehow a hardship to expand Defendants’ existing PDF ballot delivery system to new voters or to reestablish its recent online ballot delivery system, there are other online ballot marking technologies readily accessible to the State.

²³ New York State operates an electronic ballot delivery system in accordance with the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20301 *et. seq.* (UOCAVA). Accessible electronic ballots can be sent to voters with print disabilities to allow these voters to use a computer to mark the ballot.

Other states have been able to rapidly implement accessible absentee voting. On April 25, 2020, two blind voters, along with the National Federation of the Blind of Michigan, filed a complaint in Michigan’s Eastern District on the same matter at issue in this case – lack of access to accessible absentee ballots for voters with disabilities. One week later, on May 1, the court issued a Stipulation and Consent Order requiring the Michigan Board of Elections to make its UOCAVA program available and accessible to disabled voters for the May 5, 2020 election. The Michigan BOE had four days to implement this change. The Michigan BOE used its existing PDF technology, and successfully provided the plaintiffs and other voters with disabilities an accessible absentee ballot program for the May 5, 2020 election. On May 19, 2020, the Michigan court approved a consent decree requiring Michigan to adopt an accessible online ballot marking tool in time for its August and November, 2020, elections. Asbee Decl. Exh. H.

Circuit courts have already determined that implementing an online ballot marking tool does not cause fundamental alteration of absentee voting programs. *See Nat’l Federation of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016); *Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017) (ruling that that the implementation of an accessible absentee ballot system does not fundamentally alter a state’s programs or services and does not impose an undue financial or administrative burden on a state).

B. Emergency Injunctive Relief Will Advance the Public’s Interest

“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). “[T]he court must ensure that the ‘public interest would not be disserved’ by the

issuance of a preliminary injunction.” *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010) (quoting *eBay Inc. v. Mercexchange LLC.*, 547 U.S. 388, 391 (2006)).

Congress made clear in enacting the ADA that the public interest lies in the eradication of discrimination against persons with disabilities, declaring that the ADA’s purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” *Tennessee v. Lane*, 541 U.S. 509, 516 (2004) (quoting 42 U.S.C. § 12101(b)(1), (b)(4)). In passing the ADA, Congress found that “discrimination against individuals with disabilities persists in such critical areas as ... voting, and access to public services[.]” 42 U.S.C. § 12101(a)(3). Additionally, “the public has a strong interest in exercising the ‘fundamental political right’ to vote ... The public interest therefore favors permitting as many qualified voters to vote as possible.” *Obama for Am. v. Husted*, 697 F.3d 423, 436-37 (6th Cir. 2012).

If Plaintiffs’ requested relief is granted there will be no negative impact on the public interest, as the public only benefits from more New Yorkers having access to vote and from Defendants complying with the ADA. The requested relief is essential to a functional and fair democratic society. Ensuring Defendants do not violate Plaintiffs’ constitutional civil right to vote though injunctive order is the only way to protect this necessary public interest.

CONCLUSION

Absent preliminary and permanent injunctive relief, Plaintiffs and those similarly situated face the very real prospect of being totally excluded from the voting process, being forced to sacrifice their right to vote privately, or even worse, being put at risk of serious illness or death if forced to vote at the polls instead of by absentee ballot. Accordingly, Plaintiffs respectfully request that this Honorable Court grant their Motion for Preliminary Injunction and order

Defendants make the Absentee Voting system accessible to voters with print disabilities by providing an accessible electronic absentee voting system in time for the June 23, 2020 election.

DATE: May 22, 2020
Brooklyn, NY

By: /S/ Amanda B. Pearlstein

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INC.; AMERICAN COUNCIL OF THE
BLIND OF NEW YORK, INC.; and
CENTER FOR INDEPENDENCE OF THE
DISABLED, NEW YORK,

CASE NO: _____

**DECLARATION OF
CHRISTINA ASBEE**

Plaintiffs,

-against-

DOUGLAS A. KELLNER, Co-Chair and
Commissioner, ANDREW SPANO,
Commissioner, PETER S. KOSINSKI, Co-
Chair and Commissioner, TODD D.
VALENTINE, Co-Executive Director, and
ROBERT A. BREHM, Co-Executive
Director, in their official capacities at the
New York State Board of Elections, and THE
NEW YORK STATE BOARD OF
ELECTIONS

Defendants.

Christina Asbee, Esq., an attorney admitted to practice in New York State and before this Court,
hereby affirms under penalty of perjury:

1. I am co-counsel for Plaintiffs and as such have been working in pursuit of an accessible Absentee Voting program in New York State since March 2020.
2. Plaintiffs have been aware for some time that many voters with disabilities are unable to vote privately and independently using paper absentee ballots, and have raised these concerns repeatedly with Defendants.

3. On or about September 27, 2019, the National Federation for the Blind submitted a letter to Defendants reminding them that the ADA and Section 504 require implementation of an accessible absentee ballot-marking system to ensure that voters with disabilities have an equal opportunity to cast their ballots privately and independently, and provided information on accessible systems that are available. *Exhibit A*. Defendants did not respond to this letter.
4. On April 21, 2020, the American Council of the Blind, Plaintiff American Council of the Blind of New York, the National Center on Independent Living, New York Association on Independent Living, Ian Foley, and Kerri Regan filed a Complaint with the U.S. Department of Justice (DOJ) about the mail-in absentee voting program Governor Andrew Cuomo authorized for the June 23, 2020 primary election via Executive Order 202.15. The complaint explained why paper absentee ballots are inaccessible and requested that the DOJ take immediate action to assist Defendants in developing non-discriminatory voting programs before voters with disabilities are excluded from equal participation in the 2020 election process. *Exhibit B*.
5. On April 15, April 21, and May 1, 2020, Disability Rights New York hosted a series of virtual roundtable discussions at which many voters with disabilities expressed their concerns about the accessibility of the absentee ballot.
6. On May 5, 2020, Disability Rights New York wrote to Defendants demanding that they implement an online ballot delivery and marking tool for the absentee ballot program, create a streamlined and consistent protocol for New York voters who need to request additional reasonable accommodations, and ensure that a minimum number of polling places remain open in order to sufficiently accommodate voters who need to vote at the

polling location during early voting or on Election Day. *Exhibit C*. Defendants did not respond to this letter.

7. On May 14, 2020, Center for the Independence of the Disabled, New York wrote to Defendants expressing concern about the inaccessibility of paper absentee ballots, and about the need to take additional measures to ensure that voters with disabilities are not disenfranchised because of the COVID-19 pandemic, and co-published an editorial in the *Times-Leader* pointing out that paper absentee ballots are inaccessible and would likely prevent some voters with disabilities from voting altogether. *Exhibits D and E*.
8. On May 15, 2020, Disability Rights New York again wrote to Defendants to advocate for access to the Absentee Voting program for New Yorkers who are unable to benefit from this program without reasonable modification. *Exhibit F*.
9. On May 19, Defendants responded to DRNY's May 5 and 15, 2020 letters, but could not commit to making an accessible online ballot marking tool available for voters with disabilities who cannot otherwise access the paper absentee ballot. *Exhibit G*.
10. Also on May 19, 2020, the Eastern District of Michigan in *Powell et. al. v. Benson et. al.*, Case 2:20-cv-11023, approved a Consent Decree requiring the Michigan Board of Elections to "take the necessary and timely steps to ensure that it furnishes appropriate auxiliary aids and services where necessary to afford individuals with print disabilities, including Plaintiffs and their members, an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of Michigan's Voting Program." The May 19 Consent Decree followed a prior Temporary Restraining Order issued against the Michigan Board of Elections on May 1, 2020 ordering immediate

implementation of an accessible and fillable electronically delivered absentee ballot.

Exhibit H.

11. On May 20, 2020, I spoke over the phone with Brian L. Quail, Counsel for the New York State Board of Elections (NYS BOE) and Kimberly Galvin, Senior Attorney for the NYS BOE, at which time I asked if the NYS BOE would agree to make an accessible absentee ballot available within three days from now, and Attorney Quail and Attorney Galvin said that is not possible.

12. During this May 20 call, Attorney Quail explained that NYS BOE ended its contract with Scytl, a third-party voting program that previously served New York's military and overseas voters, and now uses an in-house system. The present system can deliver a PDF ballot electronically, but does not provide a voter an accessible ballot. An overseas voter who cannot mark a paper ballot because of a disability cannot vote privately and independently with the current system offered by the NYS BOE.

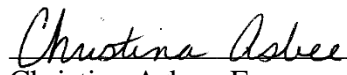
13. Plaintiffs attach the following documents in support of their Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction:

- Exhibit A – September 27, 2019 Letter from NFB to Defendants (Plaintiff Bates)
- Exhibit B – April 21, 2020 Complaint filed by Plaintiffs ACB-NY with the U.S. Department of Justice against Defendants (Plaintiff Bates)
- Exhibit C – May 5, 2020, First Demand Letter from DRNY to Defendants (Plaintiff Bates)
- Exhibit D – May 14, 2020 Correspondence from CIDNY to Defendants (Plaintiff Bates)
- Exhibit E – May 14, 2020 Editorial in the *Times-Leader* co-published by CIDNY (Plaintiff Bates)

- Exhibit F – May 15, 2020, Second Demand Letter from DRNY to Defendants (Plaintiff Bates)
- Exhibit G - May 19, 2020, Defendants’ Response to DRNY’s May 5 and 15 Demand Letters (Plaintiff Bates)
- Exhibit H –*Powell et. al. v. Benson et. al.*, Case 2:20-cv-11023, Temporary Restraining Order issued May 1, 2020 and Approved Consent Decree issued May 19, 2020 (Plaintiff Bates)
- Declaration of Jose Hernandez
- Declaration of Keith Gurgui
- Declaration of Rasheta Bunting
- Declaration of Karen Luxton Gourgey, Ed.D.
- Declaration of Raymond Wayne
- Declaration of Roger Dennis
- Declaration of LouAnn Blake

14. I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

Dated: May 21, 2020



Christina Asbee, Esq.
Co-counsel for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE HERNANDEZ; KEITH GURGUI;
RASHETA BUNTING; KAREN LUXTON
GOURGEY, Ed.D; DISABILITY RIGHTS
NEW YORK; NATIONAL FEDERATION
OF THE BLIND OF NEW YORK STATE,
INC.; AMERICAN COUNCIL OF THE
BLIND OF NEW YORK, INC.; and
CENTER FOR INDEPENDENCE OF THE
DISABLED, NEW YORK,
Plaintiffs,

CASE NO: _____

DECLARATION OF JOSE HERNANDEZ

-against-

THE NEW YORK STATE BOARD OF
ELECTIONS, DOUGLAS A. KELLNER,
Co-Chair and Commissioner, ANDREW
SPANO, Commissioner, PETER S.
KOSINSKI, Co-Chair and Commissioner,
TODD D. VALENTINE, Co-Executive
Director, and ROBERT A. BREHM, Co-
Executive Director, in their official capacities
at the New York State Board of Elections.

Defendants.

I, JOSE HERNANDEZ, declare as follows:

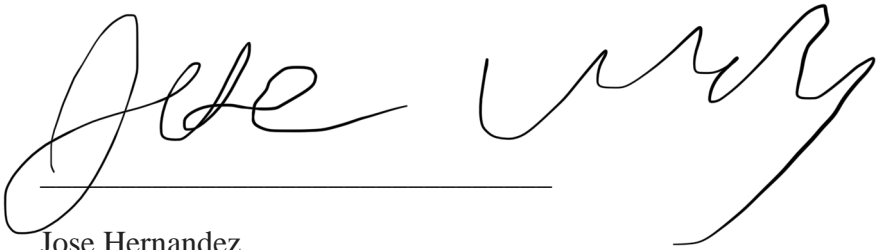
1. I am over 18 years of age and am competent to make this declaration.
2. I reside in the Bronx, New York.
3. I am registered to vote as a Democrat in New York State.
4. I intend to vote in the June 23, 2020 presidential primary and in the congressional primary for my district.

5. I have a C-5 spinal cord injury and am classified as having tetraplegia, with some limited movement in my hands. I use a wheelchair to ambulate.
6. In my daily life, I use a computer to send emails, complete forms, make and receive phone calls, and browse the internet. I am able to use my computer independently by using a trackball mouse and voice dictation program to write emails, complete reports, complete forms, and dictate simple messages.
7. Because of my disability, I am unable to fill out a paper ballot privately and independently.
8. Due to the COVID-19 pandemic, it is very important for me to be able to vote by absentee ballot in the June 23, 2020 election. I personally know a person who died as a result of the pandemic, and I am too afraid for my own life to go out to the Board of Elections to cast my vote using a ballot marking device.
9. I would be able to independently mark my ballot on the computer if an online voting option were made available.
10. I have the necessary equipment available to receive and mark an absentee ballot electronically. With an accessible online ballot marking tool, I could mark my ballot privately and independently using my trackball mouse and other equipment.
11. If I have the option of marking and/or submitting my absentee ballot on the computer, I will be able to vote more privately and independently in the June 23, 2020 elections, which is what I want.
12. I strongly prefer to vote privately and independently, and to do so, require a fully accessible online absentee ballot – this would include both receiving and marking a ballot electronically, and also submitting my marked absentee ballot electronically.

13. It is important for me to vote privately and independently, and marking my ballot online for the June 23, 2020 Primary Election will enable me greater ability to do so.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated May 21, 2020



A handwritten signature in black ink, appearing to read "Jose Hernandez", is written over a horizontal line. To the right of the signature is another handwritten mark, possibly initials or a flourish.

Jose Hernandez

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE HERNANDEZ; KEITH GURGUI;
RASHETA BUNTING; KAREN LUXTON
GOURGEY, Ed.D; DISABILITY RIGHTS
NEW YORK; NATIONAL FEDERATION
OF THE BLIND OF NEW YORK STATE,
INC.; AMERICAN COUNCIL OF THE
BLIND OF NEW YORK, INC.; and
CENTER FOR INDEPENDENCE OF THE
DISABLED, NEW YORK,
Plaintiffs,

CASE NO: _____

DECLARATION OF KEITH GURGUI

-against-

THE NEW YORK STATE BOARD OF
ELECTIONS, THE NEW YORK STATE
BOARD OF ELECTIONS, DOUGLAS A.
KELLNER, Co-Chair and Commissioner,
ANDREW SPANO, Commissioner, PETER
S. KOSINSKI, Co-Chair and Commissioner,
TODD D. VALENTINE, Co-Executive
Director, and ROBERT A. BREHM, Co-
Executive Director, in their official capacities
at the New York State Board of Elections

Defendants.

I, KEITH GURGUI, declare as follows:

1. I am over 18 years of age and am competent to make this declaration.
2. I reside in Lake Katrine, New York, in Ulster County.
3. I am registered to vote as a Democrat in New York State.
4. I intend to vote in the June 23, 2020 presidential primary.
5. I am paralyzed from the neck down (quadriplegia) as the result of a C-4 spinal cord injury I sustained in 2009. I use a motorized wheelchair to ambulate.

6. I use an array of technologies to work, browse the internet, shop and do business online, and use social media. I use a program called Dragon NaturallySpeaking voice recognition software to write content online. I also use a mouse augments software and a Dwell Clicker to navigate the internet and computer programs. These technologies enable me to scroll, drag, and click on content using a special hardware device that tracks reflections from a piece of reflective tape I affixed to my glasses.
7. Because of my disability, I am unable to fill out a paper ballot privately and independently.
8. In past elections, I have voted by going to my local polling location in person and using a “Sip-n-Puff” machine to cast my ballot on an accessible Ballot Marking Device (BMD). A poll worker clamps a device equipped with a disposable plastic straw onto my wheelchair. I then blow into the straw to navigate the screen and cast my vote. The ballot is printed and deposited into a privacy sleeve. I can inspect the ballot to ensure it is correct, and then send it through the scanner for verification with assistance.
9. There have been times when the BMD is not working at the polling location, and I have had to rely on my father to help me fill out a paper ballot. This is not an ideal situation for me because I want to vote privately and independently like other voters can.
10. I cannot vote on June 23, 2020 at the Ulster County Board of Elections because of COVID-19. I am unable to cough because of my disability, and as a result, most kinds of respiratory infections are life-threatening for me. If I contract COVID-19 when I go to vote, I would most likely die. I am taking every possible precaution to avoid potential exposure to the virus.

11. To vote at my local polling location or Board of Elections office, I would risk exposure to COVID-19 not only due to my proximity to other people, but also from putting my mouth on and near the BMD equipment. Absentee voting is my only viable option for participating in the June 23, 2020 election.
12. I strongly prefer to vote absentee using a secure and accessible online ballot marking tool, because it means I will be able to vote privately and independently.
13. To vote using an absentee ballot in its current paper format, I will need to rely on a home care aide or one of my parents to physically fill out, fold, stamp, and mail the ballot. This compromises my right to a private and independent vote.
14. With an accessible online ballot marking tool, I could mark my ballot privately and independently using my mouse augmenter and screen clicker software.
15. I have the necessary equipment available to receive and mark an absentee ballot electronically.
16. If I have the option of marking and/or submitting my absentee ballot on the computer, I will be able to vote more privately and independently in the June 23, 2020 elections, which is what I want.
17. I strongly prefer to vote privately and independently, and to do so, I require a fully accessible online absentee ballot – this would include both receiving and marking a ballot electronically, and also submitting my marked absentee ballot electronically.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated May __21__, 2020



Keith Gurgui

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOSE HERNANDEZ; KEITH GURGUI;
RASHETA BUNTING; KAREN LUXTON
GOURGEY, ED.D.; DISABILITY RIGHTS
NEW YORK; NATIONAL FEDERATION
OF THE BLIND OF NEW YORK STATE,
INC.; AMERICAN COUNCIL OF THE
BLIND OF NEW YORK, INC.; and
CENTER FOR INDEPENDENCE OF THE
DISABLED, NEW YORK,

CASE NO: _____

**DECLARATION OF KAREN LUXTON
GOURGEY, ED.D.**

Plaintiffs,

-against-

THE NEW YORK STATE BOARD OF
ELECTIONS, DOUGLAS A. KELLNER,
Co-Chair and Commissioner, ANDREW
SPANO, Commissioner, PETER S.
KOSINSKI, Co-Chair and Commissioner,
TODD D. VALENTINE, Co-Executive
Director, and ROBERT A. BREHM, Co-
Executive Director, in their official capacities
at the New York State Board of Elections

Defendants.

I, Karen Luxton Gourgey, Ed.D., declare as follows:

1. I am over 18 years of age and am competent to make this declaration.
2. I reside in New York, New York.
3. I am registered to vote as a Democrat in New York State.
4. I intend to vote in the June 23, 2020 presidential primary.
5. I am a dues-paying member of the American Council of the Blind of New York.
6. I am totally blind. I use a guide dog to navigate when I walk. Rarely, I also travel using a white cane.
7. I recently retired as Director of the Computer Center for Visually Impaired People, formerly of Baruch College. I use VoiceOver to access my smartphone and Job Access

With Speech to access my desktop computer; both these programs convert the information display from these electronics into sound. I also use BrailleNote Touch Plus to convert computer displays into Braille.

8. I vote in every election at my local polling place using a ballot marking device and a voting machine.
9. Because of the COVID-19 pandemic, I am worried about going to a public polling place to vote in June 2020.
10. Because of my disability, I cannot fill out a paper absentee ballot privately and independently.
11. I will have to ask my husband, who lives with me, to fill out a paper absentee ballot for me.
12. I am not happy about this because I have a right to vote privately and independently.
13. I have the necessary equipment at home to download, fill out, and print an electronic absentee ballot. This would be a better option than depending entirely on my husband to fill out my absentee ballot.
14. I prefer an all-online voting option for absentee voting so I can vote privately and independently.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: May 21, 2020



Karen Luxton Gourgey, Ed.D.

JOSE HERNANDEZ; KEITH GURGUI;
RASHETA BUNTING; KAREN LUXTON
GOURGEY; DISABILITY RIGHTS NEW
YORK; NATIONAL FEDERATION OF
THE BLIND OF NEW YORK; AMERICAN
COUNCIL OF THE BLIND OF NEW
YORK; and CENTER FOR
INDEPENDENCE OF THE DISABLED
NEW YORK,

Plaintiffs,

-against-

THE NEW YORK STATE BOARD OF
ELECTIONS, DOUGLAS A. KELLNER,
Co-Chair and Commissioner, ANDREW
SPANO, Commissioner, PETER S.
KOSINSKI, Co-Chair and Commissioner,
TODD D. VALENTINE, Co-Executive
Director, and ROBERT A. BREHM, Co-
Executive Director, in their official capacities
at the New York State Board of Elections

Defendants.

CASE NO: _____

**DECLARATION OF
RAYMOND WAYNE**

I, Raymond Wayne, declare as follows:

1. I am over 18 years of age and am competent to make this declaration.
2. I reside in Brooklyn, New York.
3. I am registered to vote as a Democrat in New York State.
4. I intend to vote in the June 23, 2020 presidential primary.
5. I am currently out of town assisting my mother with some medical issues. I am unsure if I will be in New York in time for the June 23, 2020 election.

6. I am a dues-paying member of the National Federation of the Blind (NFB), the Secretary of the New York City NFB affiliate, and the Secretary for the National Association of Blind Lawyers (NABL).
7. I am totally blind. I use a cane to navigate when I walk.
8. I use screen reader technology to use my computer, including Job Access With Speech (JAWS). Jaws helps me use the computer by converting text on the computer screen into speech.
9. Because of my disability, I cannot fill out a paper absentee ballot privately and independently.
10. For most of my adult life, I have voted in person at my local polling place and relied either on the accessible voting machine or assistance from poll workers to complete my ballot.
11. If I am in New York in time for the election, and if my local polling place is open, I may vote in person. But if I am either not in town in time for the election or if my local polling place is closed, I would prefer to vote absentee.
12. I do not know if my local polling place will be open during the June 23, 2020 election.
13. Voting privately and independently is important to me. I want to vote by myself without relying on help from another person to mark my ballot and I do not want others to know who I vote for.
14. I care deeply about participating in the democratic process and in making sure that my voice is heard.

15. If I have the option of marking and/or submitting my absentee ballot on the computer, I will be able to vote more privately and independently in the June 23, 2020 elections, which is what I want.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

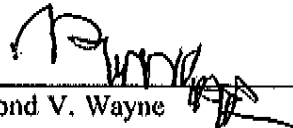
Date: _____

By: _____
Raymond V. Wayne

15. If I have the option of marking and/or submitting my absentee ballot on the computer, I will be able to vote more privately and independently in the June 23, 2020 elections, which is what I want.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: 5/21/2020

By: 
Raymond V. Wayne

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSE HERNANDEZ; KEITH GURGUI; RASHETA BUNTING; KAREN LUXTON GOURGEY, Ed.D; DISABILITY RIGHTS NEW YORK; NATIONAL FEDERATION OF THE BLIND OF NEW YORK STATE, INC.; AMERICAN COUNCIL OF THE BLIND OF NEW YORK, INC.; and CENTER FOR INDEPENDENCE OF THE DISABLED, NEW YORK,

CASE NO: _____

DECLARATION OF ROGER DENNIS

Plaintiffs,

-against-

THE NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS A. KELLNER, Co-Chair and Commissioner, ANDREW SPANO, Commissioner, PETER S. KOSINSKI, Co- Chair and Commissioner, TODD D. VALENTINE, Co-Executive Director, and ROBERT A. BREHM, Co-Executive Director, in their official capacities at the New York State Board of Elections

Defendants.

I, ROGER DENNIS, declare as follows:

1. I am over 18 years of age and am competent to make this declaration.
2. I reside in Rochester, New York.
3. I am registered to vote as a Democrat in New York State.
4. I intend to vote in the June 23, 2020 presidential primary.
5. I am a dues-paying At-Large member of the American Council of the Blind, headquartered in Washington, D.C.
6. I am legally blind. I use a cane to navigate when I walk.

7. I use screen reader technology to use my computer, including Job Access With Speech (JAWS) and Microsoft Narrator. These technologies enable me use the computer by reading the text on the computer screen out loud to me.
8. Because of my disability, I cannot fill out a paper absentee ballot privately and independently.
9. For most of my adult life, I have voted in person and relied on the assistance of my wife to mark my ballot.
10. I do not feel safe voting in person using the ballot marking device due to the COVID-19 pandemic.
11. My wife passed away in November 2018. She was the person I trusted to help me vote.
12. Following my wife's death, I moved into a senior independent living center, where I reside today. Due to the COVID-19 pandemic, the center will not allow visitors into the facility. Right now, my only option for voting by absentee paper ballot is to ask an employee at the front desk to help me mark my paper ballot. I am not comfortable with this option because it compromises the privacy and independence of my vote, but I will do it because it is my only option since a paper absentee ballot is not accessible to me.
13. Voting privately and independently is important to me. I want to vote by myself without relying on help from another person to mark my ballot. It is my right to vote without others knowing who I vote for.
14. I care deeply about participating in the democratic process and in making sure that my voice is heard. I always have.
15. For the June 23, 2020 Primary Election, I have the necessary computer equipment to receive, mark, and print an accessible absentee ballot electronically. I am willing to

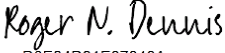
receive the limited assistance I need to sign and send an electronic absentee ballot in the mail to my local Board of Elections office if an all-online option is not available.

16. If I have the option of marking and/or submitting my absentee ballot on the computer, I will be able to vote more privately and independently in the June 23, 2020 elections, which is what I want.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

5/21/2020

Date: _____

DocuSigned by:

D0E34D91E87848A
Roger Dennis

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JOSE HERNANDEZ; KEITH GURGUI;
RASHETA BUNTING; KAREN LUXTON
GOURGEY, ED.D; DISABILITY RIGHTS
NEW YORK; NATIONAL FEDERATION
OF THE BLIND OF NEW YORK STATE,
INC.; AMERICAN COUNCIL OF THE
BLIND OF NEW YORK, INC.; and
CENTER FOR INDEPENDENCE OF THE
DISABLED, NEW YORK,

Plaintiffs,

-against-

CASE NO: 1:20-cv-00829-YK

**DECLARATION OF
LOU ANN BLAKE**

THE NEW YORK STATE BOARD OF
ELECTIONS, DOUGLAS A. KELLNER,
Co-Chair and Commissioner, ANDREW
SPANO, Commissioner, PETER S.
KOSINSKI, Co-Chair and Commissioner,
TODD D. VALENTINE, Co-Executive
Director, and ROBERT A. BREHM, Co-
Executive Director, in their official capacities
at the New York State Board of Elections

Defendants.

DECLARATION OF LOU ANN BLAKE

I, Lou Ann Blake, declare as follows:

1. I am over the age of 18 and am competent to make this declaration.
2. I am legally blind, and I am the Deputy Director of the National Federation of the Blind Blindness Initiatives.
3. In recent weeks, I have worked with the State of Nevada to implement accessible absentee voting tools for blind voters.
4. I am familiar with the systems used by U.S. states and commonwealths, including the State of New York, to facilitate overseas voting for military members, their families, and

U.S. citizens living overseas pursuant to the Uniformed and Overseas Citizens Absentee Voting Act and the Military and Overseas Voter Empowerment Act.

5. On April 29, 2020, I filed a declaration in federal court in Michigan (*Powell v. Benson*, Case 2:20-cv-11023-GAD-MJH) explaining how Michigan could make its overseas military voting system available for blind voters in time for the May 5, 2020 elections in that state. I am happy to further discuss my participation in that litigation upon request.
6. Similar to Michigan, New York could make its overseas military voting system available for voters with print disabilities in time for New York's June 23, 2020 primary election.
7. New York's system for military voting allows members of the military stationed overseas to receive their absentee ballots in an electronic format. If extended to individuals with print disabilities in New York and made accessible and fillable, this system would allow such individuals to use assistive technology software to read and mark their absentee ballots.
8. Based on my discussion with the State of Nevada, that state is planning to expand the services it makes available to overseas members of the military to individuals with disabilities in order to guarantee that such individuals are able to access an absentee ballot and complete their ballot privately and independently. Nevada plans to allow voters with disabilities to receive, mark, sign, and return the ballot electronically. Nevada understands that these steps were necessary to bring that state into compliance with the Americans with Disabilities Act and the Rehabilitation Act.
9. New York could make its overseas military voting system available for blind voters in time for the June 23, 2020 elections, and doing so would allow voters with print disabilities to cast an absentee ballot in a more private, independent manner. The minimal changes necessary would include allowing blind voters to request an accessible ballot and then generating the PDF ballot in an accessible and "fillable" format—something that can be done in a matter of minutes using widely available technology from Adobe.
10. Under New York's current system, military voters may choose to receive absentee ballots electronically, rather than in hard copy. Although New York does not allow military voters to mark their electronic absentee ballots online—they must print the ballots and mark them by hand—those ballots are in PDF format, which can easily be made accessible and fillable using Adobe. Because New York receives federal funding for voting systems, its overseas voting system already is required to be accessible under Section 504 of the Rehabilitation Act.
11. If voters with disabilities in New York were able to request accessible absentee ballots in PDF format—as military members overseas already may do—such that they could read the ballot and mark their selections, that would help ensure voters with print disabilities could vote privately and independently in the June 23, 2020 primary election. Although some states also allow voters with disabilities to sign, and return the ballots


electronically, I understand that New York requires military members to print, sign, and return the ballot by mail.

12. There are thousands of registered voters with print disabilities in New York, and those voters face the threat of being excluded from voting in the June 23, 2020 elections. These voters face the unacceptable choice of: (1) venturing to the polls in-person to cast a vote, and in so doing risking exposure to COVID-19; (2) obtaining assistance in order to complete a paper absentee ballot, thus depriving them of their right to vote privately and independently; or (3) foregoing voting all together.
13. Should it be the pleasure of the Court to order the State of New York to modify its already existing voting system to provide an interim accommodation for voters with print disabilities, the NFB would be willing to assist New York in ensuring the accessibility of their PDF ballots in time for the June 23, 2020 elections.
14. Long before the COVID-19 pandemic, I have been advocating on behalf of NFB for New York to bring its absentee voter system into compliance with the ADA. As an example of our efforts, in September 2019, NFB's president sent a letter to secretaries of state across the country, including Defendant New York State Board of Elections, discussing the need, and the legal requirement, to provide accessible absentee ballots.
15. As a general matter, by using Adobe, making an existing PDF ballot "readable" (for individuals with print disabilities who use screen readers such as Job Access With Speech ("JAWS")) and "fillable" (meaning that bubbles appearing within the PDF can be filled in electronically in order to indicate a selection made by the user) is straightforward.
16. The first step is to make the PDF "fillable." To do that, the individual using Adobe must first open the "Prepare Form" tool in Adobe and click "Start." The program will analyze the document and automatically create "form fields" where it believes the voter will need to mark a selection. The person using Adobe can review the suggested form field locations to ensure their accuracy and choose the type of form field that will appear (textbox, checkbox, button, etc.).
17. Once the "form fields" have been created, the process for making the entire PDF "readable" requires use of the "Accessibility" tool in Adobe. To use this tool, a person need only click the "Accessibility" tool and then select the "reading order" tool. The "reading order" tool is used to select the parts of the document that are to be made "readable" and "tag" these portions of the PDF appropriately. When the portions of the PDF that are to be made "readable" have been marked and tagged, Adobe offers an "Accessibility Check" tool to correct for any potential errors.
18. While making the current PDF ballot for military and overseas voters accessible and available to voters with print disabilities would improve access to absentee voting for people with disabilities in the short term, other options are available to New York in the long term.

19. Based on my work with the Maryland accessible online ballot marking tool, I am familiar with how it works. Using the tool, voters with disabilities can make their voting selections on their computers, review a summary screen showing their selections, and print out the ballot with their selections marked. The ballot marking tool notifies voters if they select too few (“undervoting”) or too many (“overvoting”) options and gives voters an opportunity to correct their ballots accordingly. When the ballot is printed, the ballot marking tool includes a barcode on the printed ballot. I understand that local boards of elections can scan this barcode to generate an absentee ballot that is readable with an optical-scanner.
20. The Maryland accessible online ballot marking tool has been successfully used for absentee voting in Maryland since 2014 and Maryland has made the tool available to other states without cost.
21. Other remote accessible vote-by-mail systems are also approved and in use in other states and counties across the country and meet the needs of voters with print disabilities to vote absentee privately and independently. Examples of these include Prime III, DemocracyLive, Five Cedars Alternate Format Ballot Generator, and the Dominion Voting system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 21, 2020

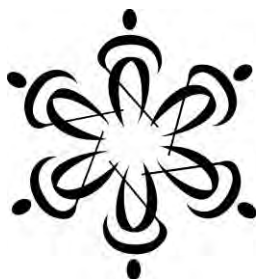


Lou Ann Blake

Exhibit A:

September 27, 2019

Letter from NFB to Defendants



NATIONAL FEDERATION
OF THE BLIND

Live the life you want.

September 27, 2019

Dear Secretary:

The National Federation of the Blind seeks to protect the rights of blind and low-vision voters, both at the polls and when absentee voting. It is vital to our democracy that all citizens are able to exercise the right to cast a secret ballot independently. Unfortunately, the right of many absentee voters with disabilities to mark their ballots privately and independently continues to be denied due to the implementation of inaccessible systems that require them to depend on others to assist them in the ballot-marking process. In advance of the 2020 elections, I am writing to remind you of your obligation, as required by federal law and recent court decisions, to provide voters with print disabilities an accessible way to privately and independently mark an absentee ballot.

Title II of the Americans with Disabilities Act (ADA) requires states to ensure that voters with disabilities are offered an opportunity to vote—whether in person or by absentee ballot—that is equal to the opportunity offered to voters without disabilities. Thus, if all other voters can vote absentee privately and independently, voters with disabilities must be offered the same opportunity. Furthermore, Section 504 of the Rehabilitation Act states that public entities that receive federal financial assistance may not discriminate against people with disabilities in their programs, services, or activities. The law on this issue, particularly in the Fourth Circuit, is quite clear. In *National Federation of the Blind v. Lamone*, the United States Court of Appeals for the Fourth Circuit held that the Maryland State Board of Elections violated Title II of the ADA and Section 504 by providing only a paper absentee ballot that was inaccessible to people with print and dexterity disabilities, while refusing to allow access to a ballot marking tool¹ that would grant them the same opportunity provided to voters without disabilities to mark their absentee ballot independently (see the attached opinion).

The Fourth Circuit explained that the opportunity to mark an absentee ballot privately and independently was a benefit that the Maryland State Board of Elections provided to voters without disabilities but denied voters with disabilities on the basis of their disability. It was of no consequence that Maryland made other methods of voting, like in-person voting, available to voters with disabilities on an equal basis. The right to vote absentee privately and independently was a distinct benefit, and the denial of this opportunity was “precisely the sort of harm the ADA seeks to prevent.” *Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 506 (4th Cir. 2016). The opinion further states “that by effectively requiring disabled individuals to rely on the assistance of

¹ Ballot-marking tools allow voters to mark an electronic version of the absentee ballot on devices such as computers, tablets, or smartphones. No votes are cast electronically; voters must still print and mail in their ballots to have their votes counted.

others to vote absentee, defendants have not provided plaintiffs with meaningful access to Maryland's absentee voting program." *Id.* at 507.

The Fourth Circuit also noted that state law, such as a requirement that voting systems be certified, does not exempt "public entities from making otherwise reasonable modifications to prevent disability discrimination" because the "Constitution's Supremacy Clause establishes that valid federal legislation can pre-empt state laws." *Id.* at 508. The Sixth Circuit in the recent case, *Hindel v. Husted*, also found that certification procedures required by state law could not block enforcement of the ADA when it comes to the right to vote absentee on an equal basis. See *Hindel v. Husted*, 875 F.3d 344, 349 (6th Cir. 2017).

Currently, there are a number of accessible absentee ballot-marking systems available for use in US elections. The Maryland State Board of Elections makes its accessible ballot-marking tool available at no charge. Five Cedars, Democracy Live, Dominion Voting, and Prime III are examples of vendors that can also provide absentee ballot-marking systems. Many of these systems have now met Ohio and California's certification requirements for election technology. Given the requirements of the ADA and Section 504, as well as the wide availability of accessible ballot marking systems, I strongly encourage you to implement such a system for use in the 2020 elections, and all subsequent federal, state, and local elections in which absentee voting is available. The National Federation of the Blind will be monitoring the availability of accessible absentee voting through our 2020 national blind voter survey, and subsequent surveys following each presidential general election.

Voters with disabilities must be considered as you design and plan your absentee voting process. Providing an accessible ballot-marking tool will guarantee that people with disabilities have an opportunity to cast their ballots privately and independently that is equal to the opportunity provided to voters without disabilities, as required by the ADA. The National Federation of the Blind is available as you consider the accessibility of your current absentee voting system. We welcome an opportunity to advise you on the development, or in the procurement process, of an accessible ballot-marking tool.

Please do not hesitate to contact us with questions, or if you need assistance with the implementation of accessible absentee voting.

Sincerely,



Mark A. Riccobono, President
National Federation of the Blind

MAR/lb

Exhibit B:

**April 21, 2020 Complaint filed by
Plaintiffs ACB-NY with the
U.S. Department of Justice against
Defendants**



April 21, 2020

Rebecca Bond, Chief
US Department of Justice
Civil Rights Division
Disability Rights Section
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: Complaint of American Council of the Blind, American Council of the Blind of New York, the National Center on Independent Living, New York Association on Independent Living, Ian Foley, and Kerri Regan

Dear Ms. Bond:

The State of New York is in the process of implementing practices that will illegally and discriminatorily prevent people with disabilities from exercising their fundamental right to cast a private, independent ballot in the upcoming June 23, 2020 primary election. The COVID-19 pandemic is a nationwide public health emergency and the State must take steps to protect the health of its people during all upcoming elections. We applaud the Governor's decision to create a universal absentee voting program to protect the health of all New Yorkers. However, paper absentee ballots do not provide persons with mobility, dexterity, print-reading, or sight impairments the opportunity to cast an independent, private ballot and an alternative, online voting tool is necessary. Even in these difficult times, we cannot abandon the American principal that casting a private, independent vote is a civil right that all eligible individuals should be afforded the opportunity to exercise. While the upcoming election cannot occur in a traditional manner, any changes enacted by a public entity must, and can with available technology, comply with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

This complaint concerns the mail-in absentee voting program Governor Andrew Cuomo authorized for the June 23, 2020 primary election via Executive Order 202.15 on April 9, 2020. Executive Order 202.15 makes it easier for New York voters to vote via absentee ballot. The relevant provisions of that Executive Order state:

Section 8-400 of the Election Law is temporarily suspended and hereby modified to provide that due to the prevalence and community spread of COVID-19, an absentee ballot can be granted based on temporary illness and shall include the potential for contraction of the COVID-19 virus for any election held on or before June 23, 2020.



Solely for any election held on or before June 23, 2020, Section 8-400 of the Election Law is hereby modified to allow for electronic application, with no requirement for in-person signature or appearance to be able to access an absentee ballot.

The purpose of the Executive Order is to make it easier for New Yorkers to vote remotely, thus reducing the risk that COVID-19 will be transmitted at polling places or suppress the vote. Executive Order 202.15 modifies New York Election Law, specifically Section 8-400 which governs absentee voting in the state.¹ Section 8-400 permits certain voters with an excuse specified in the Code, such as being unable to appear personally at the polling place of the election district in which he or she is a qualified voter because of illness or physical disability or being absent from the county of his or her residence, to vote absentee.² Section 8-400 also requires any voter who wishes to vote absentee to submit a paper application for an absentee ballot seven days prior to the election for which the ballot is requested.³

Governor Cuomo's Executive Order 202.15 removes the requirement that the voter must attest to one of the allowable excuses specified in Section 8-400.1 in order to be eligible to vote absentee. Instead, for the June 23, 2020, primary, all voters are eligible to vote absentee, including voters with disabilities. Additionally, Governor Cuomo's Executive Order 202.15 removes the requirement that voters apply for an absentee ballot via a paper application and permits voters to apply for an absentee ballot electronically, without the need to appear in person or provide an in-person signature. As a result of this order, any voter in New York can apply for an absentee ballot electronically, receive a paper ballot, and vote absentee in the June 23, 2020 primary election.

Governor Cuomo's decision to expand absentee voting to all voters is appropriate in light of the COVID-19 public health crisis. No voter should have to risk his or her health, and, potentially, his or her life, to participate in our democracy. Unfortunately, New York State has failed to ensure that there will be an accessible absentee ballot option that allows voters with disabilities to privately and independently receive, complete, and return their ballot from their residences. Section 8-410 requires a voter to mark an absentee ballot on paper ballots and Executive Order 202.15 does not change this requirement.⁴ To complete a paper ballot one is required to, at the

¹ NY Code. §8-400.

² NY Code § 8-400(1).

³ NY Code § 8-400(2)(c).

⁴ NY Code § 8-410. It is also worth noting that this section refers to "ballots prepared for counting by ballot counting machines" as an alternative option to paper ballots. Upon a complete reading of the NY Election Code, it appears that this reference is in regards to voters at nursing facilities where more than 25 individuals have requested absentee ballots, thus invoking NY Code § 8-407, wherein the board of elections in the county or city where the facility is located can bring a portable voting booth to that facility which voters can use to cast a private, independent ballot which is then printed and returned to the board of elections to be counted in the ballot counting machine. NY Code § 8-410.11.



least, read standard text, physically write and/or fill in the ballot choices, seal and certify the ballot via a signature on the envelope, and mail the ballot to the appropriate voting official to be counted.⁵ Each of these requirements is a barrier to accessibility for individuals with disabilities. The requirement to vote via paper ballot violates the ADA and Section 504 of the Rehabilitation Act, compromises the voting rights of voters with disabilities, and undermines our democratic electoral process.

The disability advocacy organizations American Council of the Blind, American Council of the Blind of New York, the National Center on Independent Living, the New York Association on Independent Living, along with Ian Foley and Kerri Regan, as individuals and self-advocates (together “the Complainants”), file this complaint on behalf of their constituents, New York voters with disabilities who will not be able to cast a private, independent ballot in the June 23, 2020 New York primary. It is critical that the Disability Rights Section of the Civil Rights Division of the United States Department of Justice (DRS) take immediate action to address this discrimination and assist covered entities in developing non-discriminatory voting programs before voters with disabilities are excluded from equal participation in the 2020 election process.

The history of widespread discrimination against voters with disabilities is well established. Congress has addressed this discrimination repeatedly through the passage of the Voting Rights Act, the Voting Accessibility for the Elderly and Handicapped Act, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (ADA), the National Voter Registration Act, and the Help America Vote Act, yet, the discrimination and disenfranchisement of voters with disabilities persists.

DRS has a very brief moment in which it can intercede. If DRS fails to act swiftly to clearly and firmly articulate that mail-in voting programs that use only paper ballots violate the ADA and Section 504, there will be no way for individuals with visual impairments and certain manual disabilities to vote privately and independently in the 2020 primary election. We urge you to enforce the obligation of election officials in New York to ensure an accessible balloting option is available to all eligible voters and avoid unnecessary challenges to the integrity of the election.

The Complainants

American Council of the Blind (ACB) is comprised of approximately seventy state chapter and special-interest affiliates representing a diverse range of groups within the blind community, including students, families, teachers, attorneys, governmental employees, entrepreneurs, vending stand operators and members of the LGBTQ community. During its nearly sixty-year history, ACB has become a leader in national, state, local, and even international advocacy efforts. ACB has been a national leader in working to ensure equal access to absentee and vote

⁵ *Nat'l Fedn. of the Blind, Inc. v. Lamone* 813 F.3d 494, 499 (4th Cir. 2016).



by mail balloting for voters with disabilities. ACB has multiple affiliates and many members in New York.

American Council of the Blind of New York (ACBNY) is a state affiliate of The American Council of the Blind. Its purpose is to support and promote the educational, vocational, and social advancement of blind and visually impaired persons to increase the dignity and independence of blind and visually impaired persons, including protecting the right of blind and visually impaired individuals to vote privately and independently.

The National Council on Independent Living (NCIL) is the longest-running national cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents thousands of organizations and individuals including: individuals with disabilities, Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), and other organizations that advocate for the human and civil rights of people with disabilities throughout the United States.

The New York Association on Independent Living (NYAIL) is a statewide, not-for-profit membership association created by and composed of Independent Living Centers across New York State. NYAIL leads statewide Independent Living Center efforts to eliminate physical and attitudinal barriers to all aspects of life and to fight for the civil rights and full independence of all people with disabilities. NYAIL envisions a future where people with disabilities have equal opportunity to live a life free of poverty, segregation, and discrimination.

Ian Foley is a registered voter with a visual impairment from Erie County, New York, who needs an accessible electronic balloting option in order to cast a ballot privately and independently from the safety of his home. He is a member of ACBNY where he is the Legislative Co-chair and he is the President of ACB of Western New York. The absentee voting program created via Executive Order 202.15 will effectively disenfranchise him and his peers and prevent them from casting private, independent ballots in the June 2020 primary. He uses accessible technology, including, screen readers, text to speech software, and accessibility features on his smartphone on a regular basis and would use an accessible electronic ballot marking device or mobile voting application to cast his vote in the June 2020 election if made available to him.

Kerri Regan is a blind registered voter from Nassau County, New York, who needs an accessible electronic balloting option in order to cast a ballot privately and independently from the safety of her home. She has never voted absentee in the past because paper ballots are not accessible for her. She lives alone and cannot complete a paper ballot privately and independently. In the past, she voted at her polling location using the accessible voting machine. It is unclear whether polling locations will be open for the June 23, 2020 primary election and, even if they are, she should not have to risk her health in order to exercise her right to vote privately and independently. She will be unable to vote in June unless she has access to an accessible electronic balloting option. She uses accessible technology, including screen readers, text to speech software and accessibility features on her smartphone on a daily basis and would use an



accessible electronic balloting option or mobile voting application to cast her vote in the June 2020 election if one were made available to her.

Federal Law Prohibits Discrimination Against Individuals in Voting

Federal law prohibits public entities from discriminating against voters with disabilities. Based on New York’s existing regulations governing absentee voting, the state is poised to conduct an election in violation of disability discrimination laws.

Legal Background

The Voting Rights Act of 1965 granted voters with disabilities the affirmative right to have necessary assistance in voting from a person of the voter’s choice.⁶ The Rehabilitation Act of 1973 expanded these rights stating that “no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under” any program or activity that receives Federal financial assistance.⁷ Discrimination against voters with disabilities persisted and, in 1984, Congress passed The Voting Accessibility for the Elderly and Handicapped Act, furthering “the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections.”⁸ The Act requires states to “assure that all polling places for Federal elections are accessible to handicapped and elderly voters.”⁹

Then, in 1990, Congress passed the Americans with Disabilities Act (ADA) upon finding that, although physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, many people with physical or mental disabilities had been precluded from participating in all aspects of our society.¹⁰ Congress recognized that discrimination against individuals with disabilities continued to be a serious and pervasive social problem, and that discrimination against individuals with disabilities persisted in such critical areas as voting.¹¹ Accordingly, Title II of the ADA prohibits public entities from excluding from participation or denying the benefits of the services, programs, or activities of that entity, or subjecting individuals to discrimination by any such entity, on the basis of disability.¹² Voting is a quintessential program or activity of public governments.

Subsequently, Congress enacted the National Voter Registration Act of 1993, which aims, among other things, to increase the historically low registration rates of persons with

⁶ 52 USCS § 10508.

⁷ 29 U.S.C. § 794(a).

⁸ 52 USCS § 20101.

⁹ 52 USCS § 20102(a).

¹⁰ 42 USCS § 12101.

¹¹ *Id.*

¹² 42 U.S.C.S. §12132.



disabilities.¹³ Then, in 2002, recognizing the ongoing need to facilitate accessibility of the electoral process, Congress passed The Help America Vote Act which requires jurisdictions responsible for conducting federal elections to provide at least one accessible voting system for persons with disabilities at each polling place in federal elections.¹⁴ Such accessible voting systems must provide the same opportunity for access and participation, including privacy and independence, which other voters receive.¹⁵

Despite these efforts to remedy the historic discrimination against voters with disabilities, voters with disabilities continue to be excluded from equal participation in elections throughout the country and voters with disabilities have had to resort to litigation to enforce their fundamental right to vote privately and independently. In the 2014 Fourth Circuit decision, *National Federation of the Blind v. Lamone*, the Court held that Maryland's absentee voting program, which utilized paper-only ballots, violated the ADA.¹⁶ Maryland was required under the ADA to certify an accessible electronic absentee ballot as a reasonable accommodation for blind voters who could not use paper ballots privately and independently.¹⁷ Additionally, in the 2017 Sixth Circuit decision, *Hindel, et al. v. Husted*, the Court considered an ADA challenge to Ohio's paper-only absentee ballot.¹⁸ The Court denied Ohio's motion to dismiss, which was based solely on its assertion that an accessible electronic ballot would be a fundamental alteration to the state's voting regulations.¹⁹ Instead, the Court said that the question of whether an electronic balloting option causes a fundamental alteration to state voting regulations is a fact-specific inquiry.²⁰ Subsequently, the parties completed successful settlement negotiations and Ohio certified an electronic ballot option for individuals with disabilities.

New York's Absentee Voting Program Violates Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act

Title II of the ADA and Section 504 of the Rehabilitation Act (Section 504)²¹ prohibit public entities from denying individuals equal access to the benefits of the programs of that entity on the basis of the individual's disability. All individuals with disabilities who are otherwise qualified to receive the benefits of a public entity's program are entitled to equal access to that program. When a public entity refuses to provide a reasonable accommodation that ensures equal

¹³ 52 USCS § 20501.

¹⁴ Pub.L. 107-252. Title I and III of HAVA contain provisions specifically related to access to voting for individuals with disabilities. Title IX also states that use of HAVA funds must comply with the ADA.

¹⁵ 52 USCS §21081(a)(3)(A). It is also worth noting that §21081(a)(3)(B) specifically states that §21081 (a)(3)(A) can be satisfied with the use of one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.

¹⁶ *National Federation of the Blind, et al. v. Lamone, et al.*, 813 F.3d 494 (4th Cir. 2016).

¹⁷ *Id.*

¹⁸ *Hindel v. Husted*, 875 F.3d 344, 345 2017 U.S. App. (6th Cir.).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Only public entities that receive Federal funding are covered entities under Section 504. 29 U.S.C. § 794(a).



access to the benefits of its program that public entity discriminates against individuals with disabilities in violation of Title II of the ADA and Section 504.

A. The New York Board of Elections is a “Public Entity” & Voting is a “Program, Service, or Activity” Under the ADA and Section 504

Title II of the ADA prohibits public entities from excluding from participation or denying the benefits of the services, programs, or activities of that entity, or subjecting individuals to discrimination by any such entity, on the basis of disability.²² The term “public entity” includes “any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government....”²³ Similarly, Section 504 mandates that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁴ Under Section 504, programs or activities receiving Federal financial assistance must make reasonable accommodations in policies, practices, or procedures when such accommodations are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the accommodations would fundamentally alter the nature of the program or activity or result in undue financial and administrative burdens.²⁵ Such federally funded programs and activities may not, in providing aids, benefits, or services, afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.²⁶ Such programs and activities must also provide qualified individuals with disabilities with an aid, benefit, or service that is as effective as that provided to others.²⁷ In New York, the State Board of Elections is responsible for ensuring elections comply with the requirements of applicable state and federal law, including the ADA and Section 504.²⁸

B) Complainants Are or Represent “Qualified Individuals with Disabilities” as defined by the ADA and Section 504.

Under the ADA, an individual with a disability is any individual who has a physical or mental impairment that substantially limits one or more major life activities, individuals who have a record of such impairments, and individuals who are regarded as having such an impairment, whether or not they have the impairment.²⁹ Section 504 states that an individual with a disability

²² 42 U.S.C.S. §12132.

²³ 42 U.S.C. § 12131(1).

²⁴ 29 U.S.C. § 794(a).

²⁵ *Id.*

²⁶ 29 C.F.R. §32.4(b)(ii).

²⁷ 29 C.F.R. §32.4(b)(vii)(2).

²⁸ NY Code. §3-102 and New York State Board of Elections Help America Vote Act, <https://www.elections.ny.gov/HAVA.html> (Last visited April 21, 2020).

²⁹ 42 U.S.C.S. § 12102(1).



is any person who has a physical or mental impairment which substantially limits one of more major life activities including, but not limited to, walking, seeing, or working.³⁰ Blindness, visual disabilities, and manual disabilities impacting an individual's sight, mobility, and/or writing are disabilities that impact an activity of daily living and so individuals with these disabilities are individuals with disabilities as defined in the ADA and Section 504.³¹

Individuals with disabilities who are registered to vote in their state of residence are otherwise qualified to receive the benefits of the voting program of his/her state. The term "otherwise qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.³² Mr. Foley and Ms. Regan are registered to vote in New York. They are frequent voters who view participating in our elections as both a civil right and civic duty. ACB, ACBNY, NCIL, and NYAIL each have members with disabilities who are registered voters. Complainants are entitled to equal access to cast their ballots privately and independently as New York voters without disabilities and any voting program that denies them equal access to the ballot is discriminatory.

C. Absentee Voting Programs That Use Paper-Only Ballots Deny Equal Access to Voters with Disabilities.

Individuals with disabilities, including Complainants and Complainants' members, are denied equal participation in voting when states use paper-only ballots for absentee and mail-in elections. The absentee voting program itself must be accessible or provide voters with disabilities reasonable accommodations to ensure they are not denied the right to cast a private, independent absentee ballot.³³ When states use paper-only ballots for absentee and mail-in elections, the state is providing nondisabled voters with meaningful access to absentee voting, including the ability to vote privately and independently, which is not provided to disabled voters because of their disability. *See National Federation of the Blind, et al. v. Lamone, et al.*, 813 F.3d 494 (4th Cir. 2016).

D. There are Reasonable Accommodations to the New York State Absentee Voting Program That Would Provide Equal Access for Voters with Disabilities

New York is required to implement a reasonable accommodation that can provide equal access to voters with disabilities when the requested accommodation is accessible to voters with

³⁰ 20 C.F.R. §32.2

³¹ 42 USCS § 12102(2). See also *Title II Technical Assistance Manual* available at <https://www.ada.gov/taman2.html#II-3.6100>.

³² 42 U.S.C. § 12131(2).

³³ *National Federation of the Blind, et al. v. Lamone, et al.*, 813 F.3d 494 (4th Cir. 2016) and *Hindel v. Husted*, 875 F.3d 344, 345 2017 U.S. App. (6th Cir.).



disabilities and sufficiently secure while also safeguarding voters' privacy.³⁴ Complainants use screen reading technology, text to speech technology and mobile applications on a daily basis and are eager to use accessible remote voting technology to cast their ballots. Currently, there are several jurisdictions that have certified secure electronic accessible voting systems that enable voters with disabilities to receive, mark, cast, verify, and return their ballots.³⁵ In West Virginia³⁶ and Utah County, Utah,³⁷ voters are permitted to vote using an accessible mobile voting application. The systems used in these jurisdictions are accessible, tested, and secure, and can be implemented in New York.

Conclusion

Complainants request DRS immediately investigate and resolve this complaint of disability discrimination, by issuing an Opinion instructing New York election officials as to what they must do to comply with federal civil rights laws protecting the rights of all voters, including those with disabilities, to cast a private, independent ballot. Guidance is needed as soon as possible, given that the primary election is scheduled for June 23, 2020.

Please contact Margaret Hart, Counsel at Washington Lawyers' Committee for Civil Rights and Urban Affairs, at 202-319-1000 ext. 162 or margaret_hart@washlaw.org with any questions or responses regarding this complaint.

Respectfully,

/s/ Margaret Hart

Maggie Hart, Counsel
Washington Lawyers' Committee for Civil Rights
and Urban Affairs

³⁴ *National Federation of the Blind, et al. v. Lamone*, et al., 813 F.3d 494 (4th Cir. 2016).

³⁵ <https://www.ncsl.org/research/elections-and-campaigns/internet-voting.aspx> (last visited April 15, 2020).

³⁶ West Virginia Code §3-2-2.

³⁷ <https://ssl.utahcounty.gov/dept/clerk/aud/elections/DisabledVoter.html> (last visited April 15, 2020).

Exhibit C:

May 5, 2020,

First Demand Letter from

DRNY to Defendants



DISABILITY RIGHTS NEW YORK



www.drny.org



mail@drny.org



518-432-7861

May 5, 2020

Peter S. Kosinski, Co-Chair
Douglas A. Kellner, Co-Chair
Andrew J. Spano, Commissioner
Todd D. Valentine, Co-Executive Director
Robert A. Brehm, Co-Executive Director
New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207

Dear NYS BOE Officials,

Disability Rights New York (DRNY) is New York's Protection & Advocacy system. We have been working with our governmental partners during this difficult time to ensure that New Yorkers with disabilities have equal access to all programs and services, including the ability to vote.

After examining New York's Absentee Ballot program, we have concluded that it is inaccessible for voters who cannot independently mark a paper ballot. DRNY has held four virtual roundtable discussions with New Yorkers across the State. We received many complaints from voters who will not be able to vote using an absentee ballot under the limitations of the current Absentee Ballot program.

During the COVID-19 pandemic, people with disabilities face serious and heightened risk to their health. We commend Governor Cuomo for expanding access to absentee ballots because of the potential to contract COVID-19 when voting at the polls. We thank him for his leadership in recognizing that this expansion was necessary to ensure voters can cast their ballots during the upcoming elections. However, without changes necessary to make the Absentee Ballot program accessible, certain New Yorkers will not be able to vote privately and independently by absentee ballot.

The Americans with Disabilities Act requires a state's voting program to be accessible to people with disabilities. Voters with disabilities are entitled to equal access to vote on Election Day and during the early voting period, which includes voting by absentee ballot. Now, more than ever,

ALBANY

725 Broadway, Suite 450
Albany, NY 12207-5001

BROOKLYN

25 Chapel St, Suite 1005
Brooklyn, NY 11201

ROCHESTER

44 Exchange Blvd, Suite 110
Rochester, NY 14614



TTY: 518-512-3448

Fax: 518-427-6561

Toll Free: 1-800-993-8982

Page 2 of 2

New York voters with disabilities need the NYS BOE to make the absentee voting program as accessible as it is for voters without disabilities.

We request that prior to the June 23, 2020 Primary Election absentee submission deadline the NYS BOE and all county BOEs:

1. Implement an Online Ballot Marking Tool

New York needs to provide a software program that allows voters with disabilities the auxiliary aid to privately and independently read and mark the absentee ballot, including the ballot's signature requirement. Maryland developed an online ballot marking tool specifically designed to be compatible with screen readers. The program is available to all state Boards of Elections free of charge, and is compatible with ES&S systems. Other substantially similar programs are available that can operate with the Dominion system.

2. Create a Streamlined Reasonable Accommodation Request Process

For those voters who are not able to use the online ballot marking tool, we request that New York develop a streamlined and consistent protocol for voters to request reasonable accommodations.

3. Ensure Access to Poll Sites on Election Days

A minimum number of polling locations must remain open to sufficiently accommodate voters who need to vote at the polling location during early voting or on Election Day. Decisions to limit poll site access must be made in a way that does not exclude voters with disabilities.

I respectfully request that you contact Christina Asbee, Esq. or me by May 11, 2020 to further discuss a resolution of our concerns.

Sincerely,

Timothy A. Clune

Timothy A. Clune, Esq.
Executive Director

cc. Thomas Connolly, Director of Election Operations

ALBANY

725 Broadway, Suite 450
Albany, NY 12207-5001

BROOKLYN

25 Chapel St, Suite 1005
Brooklyn, NY 11201

ROCHESTER

44 Exchange Blvd, Suite 110
Rochester, NY 14614



TTY: 518-512-3448

Fax: 518-427-6561

Toll Free: 1-800-993-8982

Exhibit D:

May 14, 2020

**Correspondence from
CIDNY to Defendants**



CID-NY

Manhattan
841 Broadway
Suite 301
New York, NY 10003
212/674-2300 Tel
212/254-5953 Fax
646/350-2681 VP

Queens
80-02 Kew Gardens Rd
Suite 107
Kew Gardens, NY 11415
646/442-1520 Tel
718/886-0428 Fax
866/948-1064 VP

Center for Independence of the Disabled, NY

May 14, 2020

Todd D. Valentine
Co-Executive Director
NYS Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207-2729

Robert A. Brehm
Co-Executive Director
NYS Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207-2729

INFO@elections.ny.gov

Dear Messrs. Valentine and Brehm,

The recent announcement that all New Yorkers will receive applications for mail-in ballots for the June 23 primary raises concerns about accessibility for voters who are blind, low vision or have physical disabilities. Many voters with disabilities cannot write, mark or sign a paper ballot. We recognize that mail-in ballots are one option to help maintain public health safety during Covid-19; however, we are concerned that some members of the disability community would not be able to vote unless they can access the ballots. This may mean providing online ballots that can be marked online, or other accessible options and/or alternate formats.

Voters with disabilities should not be disenfranchised because of the lack of accessible voting options. Many people who are blind, low-vision, or have other disabilities that prevent them from being able to write, mark and sign a paper ballot, may have internet technology at home enabling them to fill out an online form, but only if the form is accessible to screen readers or sip and puff technology for example. Maryland has developed such an option for their voters, New York should do the same.

Adding to the accessibility issue is the fact that some voters with disabilities may not have the technology to print, sign and scan the form. Further, many people with disabilities do not live near a mail box or post office, so even the act of mailing in their ballot can create a barrier that they cannot overcome as they shelter in place and protect themselves to potential exposure to Covid-19.

Many live alone and do not have a trusted family member or friend who could help them sign or mail a ballot for them. These people may need to vote in person using a BMD or getting help from a polling site worker. Yet, the reductions in polling sites

Page 2/

Re:

may make it impossible for those who have transportation problems or who have to choose between protecting their health and voting at polling sites.

With the passage of the Help America Vote Act, Congress mandated that states must ensure all voters are afforded full and equal access to the ballot box, whether at a polling location or voting remotely. We want to ensure that voters with disabilities in New York City are not disenfranchised because of this situation. We also do not want people with disabilities, many of whom are the most at risk, to be forced to choose between risking their health by going to polling sites and not voting because they cannot use an inaccessible absentee ballot. We look forward to hearing from you and working with you to ensure a safe and accessible primary that complies with voting rights laws.

Sincerely,



Susan M. Dooha, Executive Director
Coordinator



Monica Bartley, Voter Engagement

cc:

The Honorable Andrew M. Cuomo
Governor of New York State
State Capitol Building
Albany, NY 12224
Johnathan.Smith@exec.ny.gov

The Honorable Andrea Stewart-Cousins
Temporary President and Majority Leader of the New York State Senate
State Capitol Building
Albany, NY 12247
scousins@nysenate.gov

The Honorable Carl E. Heastie
Speaker of the New York State Assembly
State Capitol Building
Albany, NY 12248
Speaker@nyassembly.gov

The Honorable Charles D. Lavine
Chair of the Election Law Committee
Legislative Office Bldg. Room 713
Albany, NY 12248

Page 3/

Re:

Lavinec@nyassembly.gov

The Honorable Zellnor Myrie,
Chair of the Committee on Elections
188 State Street,
Legislative Office Bldg. Room 903
Albany, NY 12247
myrie@nysenate.gov

Michael J. Ryan
Executive Director
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New York, NY 10004
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Exhibit E:

May 14, 2020

Editorial in the *Times-Leader*

co-published by CIDNY



[Commentary: Lawmakers, time to get back to work and protect elections](#)

Susan Lerner and Susan M. Dooha May 13, 2020 Updated: May 14, 2020 9:35 a.m.

When the COVID-19 pandemic first ravaged New York in March, many members of the Legislature voted remotely to approve the state budget. Unfortunately, that was the last time our 213 elected representatives served as lawmakers, leaving Gov. Andrew Cuomo to run New York via executive order.

The Senate and Assembly were technically due to resume session as of April 20. This past Wednesday they held, remotely, their first hearing in six weeks. They still haven't voted on any legislation in more than a month. Compare that with the Pennsylvania Legislature or the New York City Council, where lawmakers have been holding full meetings of the body remotely as of two weeks ago.

The Legislature is a coequal branch of government that can't take a back seat to the executive and continue collecting a paycheck when the going gets tough. There's work to be done, including making sure New Yorkers can safely vote June 23 and Nov. 3. We need them to resume session remotely now.

First, we need lawmakers to codify the governor's executive order expanding absentee voting for June, to include November. New Yorkers will be feeling the far-reaching effects of the pandemic long after the worst of it has passed, and our elections need to keep pace. Lawmakers have introduced legislation that will make the executive orders permanent.

Second, we need to keep in-person poll sites and expand early voting. Not everyone will be able to vote absentee, particularly voters with disabilities and those needing language assistance. Participation for voters with disabilities has slightly dipped in the last two presidential primaries and we worry that the trend will only spiral downwards during a pandemic. Lawmakers can pass legislation that will provide voters with disabilities with additional accommodations, such as screen-readable formats, large print or Braille absentee ballots, as well as ballot-marking software, including docu-sign ability to be used at home.

Even states with full vote-by-mail programs like Washington and Colorado maintain in-person options in case someone doesn't get their ballot, or they lose it, spill food on it (yes, that's a common problem) or other unpredictable accidents occur. In order to reduce crowds and vote safely in person, the Legislature should double early voting days from nine to 18 days, increase the hours and locations for early voting and instruct boards of elections to follow Centers for Disease Control sanitary and mass gathering protocols, such as social distancing.

Third, the law should be revised to allow boards of elections to accept ballots postmarked or delivered no later than Election Day, rather than one day before. The virus has disrupted the mail and caused mass delays in the functioning of daily life, but under current law, the board can discard absentee ballots if they aren't postmarked with the correct date. This was a big issue in the Wisconsin primary, where many ballots lacked a dated postmark and so were not counted.

Fourth, voters need to have confidence that their absentee ballot will count. New York has one of the highest absentee ballot rejection rates in the country at 13.6 percent, compared with the national average of 1.4 percent. That's because political opponents squabble over trivial errors in an attempt to game the system. We don't have time for this nonsense anymore. New Yorkers need to trust that the board won't allow absurd objections that have nothing to do with democracy to undermine their vote.

Voters will head to the polls in less than two months. The clock is ticking. New York lawmakers need to go back into session remotely and do their job to protect our elections.

The future of our democracy is at stake.

Susan Lerner is the executive director of Common Cause/NY and Susan M. Dooha is the executive director of Center for Independence of the Disabled, New York.

Exhibit F:

May 15, 2020,

Second Demand Letter from

DRNY to Defendants



DISABILITY RIGHTS NEW YORK



www.drny.org



mail@drny.org



518-432-7861

May 15, 2020

Peter S. Kosinski, Co-Chair
Douglas A. Kellner, Co-Chair
Andrew J. Spano, Commissioner
Todd D. Valentine, Co-Executive Director
Robert A. Brehm, Co-Executive Director
New York State Board of Elections
40 North Pearl Street, Suite 5
Albany, NY 12207

Dear NYS BOE Officials,

I am writing to follow up on a letter I sent to you on May 5, 2020 because I have not received a response from you.

Our constituents still have serious concerns about New York State's Absentee Ballot program. We continue to receive complaints from voters across New York State who are unable to use an absentee ballot to vote privately and independently. We know that these complaints are not new to the New York State Board of Elections (NYS BOE). The NYS BOE has received complaints from the National Federation for the Blind as far back as September 2019 and as recently as April 2020.

The Absentee Ballot program must be accessible to all voters, particularly at a time when Governor Andrew Cuomo has advised New Yorkers to use an absentee ballot because of the COVID-19 pandemic. I am asking for your assistance to resolve this matter. I respectfully request that you contact Christina Asbee, Esq. or me by May 19, 2020.

Thank you for your help.

Sincerely,

Timothy A. Clune

Timothy A. Clune, Esq.
Executive Director

ALBANY

725 Broadway, Suite 450
Albany, NY 12207-5001

BROOKLYN

25 Chapel St, Suite 1005
Brooklyn, NY 11201

ROCHESTER

44 Exchange Blvd, Suite 110
Rochester, NY 14614



TTY: 518-512-3448

Fax: 518-427-6561

Toll Free: 1-800-993-8982

Page **2** of **2**

cc. Thomas Connolly, Director of Election Operations

Enclosures: May 5, 2020 Letter from DRNY
April 27, 2020 National Federation for the Blind Letter to Gov. Cuomo
September 27, 2019 National Federation for the Blind Letter to NYS BOE

ALBANY

725 Broadway, Suite 450
Albany, NY 12207-5001

BROOKLYN

25 Chapel St, Suite 1005
Brooklyn, NY 11201

ROCHESTER

44 Exchange Blvd, Suite 110
Rochester, NY 14614



TTY: **518-512-3448**

Fax: **518-427-6561**

Toll Free: **1-800-993-8982**

Exhibit G:

May 19, 2020,

Defendants' Response to DRNY's

May 5 and 15 Demand Letters



Peter S. Kosinski
Co-Chair

Douglas A. Kellner
Co-Chair

vacant
Commissioner

STATE BOARD OF ELECTIONS

40 NORTH PEARL STREET, 5th FLOOR

ALBANY, N.Y. 12207-2729

Phone: 518/474-8100 Fax: 518/474-1008

www.elections.ny.gov

Andrew J. Spano
Commissioner

Todd D. Valentine
Co-Executive Director

Robert A. Brehm,
Co-Executive Director

May 19, 2020

Timothy A. Clune, Esq.
Disability Rights New York
725 Broadway
Suite 450
Albany, New York 12207

Re: New York's Absentee Ballot Process

Dear Mr. Clune:

The State Board of Elections ("SBOE") is in receipt of your May 5, 2020 letter, and subsequent May 15, 2020 letter, expressing your organization's concerns with New York State's Absentee Ballot process; specifically in relation to voters who are unable to mark a paper ballot independently without the assistance of a ballot marking device ("BMD"). In the May 5th letter, you request that the State Board address the following issues: 1) Implementing an Online Ballot Marking Tool; 2) Creating a Streamlined Reasonable Accommodation Request Process; and 3) Ensuring Access to Poll Sites on Election Days.

Below is a summary of the actions that have been taken, which addresses many of these concerns.

Creating a Streamlined Reasonable Accommodation Request Process

As you may be aware, the Governor's office has issued several Executive Orders in relation to absentee ballots due to COVID-19. Executive Order 202.15 provides that "Section 8-400 of the Election Law is temporarily suspended and hereby modified to provide that due to the prevalence and community spread of COVID-19, an absentee ballot can be granted on temporary illness and shall include the potential for contraction of the COVID-19 virus for any election held on or before June 23, 2020." This order further provides that for the upcoming June 23, 2020 election a voter may request an application ballot through electronic means. This permits voters to apply for an absentee ballot via the internet or e-mail. Similarly, as referenced in Executive Order 202.23, application for an absentee ballot may also be made by telephone. With respect to the return of applications and the return of ballots to the board of elections, the Executive Orders provide for postage paid returns as outlined in Executive Order 202.26. A voter will not need to affix postage to the envelopes and the ballots can be returned via any postal intake – postal drop box, post office or home pick up. These changes in the absentee

procedures make for a more streamlined and accessible process for the request of and return of both the application and the ballot.

Further, Executive Order 202.26 provides that: “(s)ection 8-410 of the Election Law in relation to marking absentee ballots is modified to the extent that for any election held before July 1, 2020, upon transmitting or mailing absentee ballots to voters, the board of elections shall provide and maintain, in its office, a voting system that is accessible for voters wishing to mark their ballot privately and independently, and provided that availability of this service shall be posted on the website of each board of elections(.)” In other words, once absentee ballots are mailed to voters, local boards of elections are required to have a BMD in their office so voters may be able to mark their absentee ballots privately and independently. Or, if the voter goes into the board of elections office, he/she can request a ballot and mark it before they leave the office. This provision is designed to provide a reasonable accommodation to voters who are unable to mark their ballots independently. It provides access to BMDs and provides them in a less dense location away from poll sites and early voting sites in the community, which are typically more crowded. In addition, the voter is not restricted to those days marked specifically for early voting or election day.

Ensuring Access to Poll Sites During Early Voting and Election Day

New York will continue to have in person election day voting and early voting that is fully accessible including ballot marking devices with the full range of accessibility features. While some consolidation of poll sites may occur, such consolidation will be consistent with Election Law 4-104. Further, any relocation of sites must be made with voters with disabilities in mind. Irrespective of any consolidation or relocation, the law is clear that all poll sites must be accessible to voters.

Implementing an Online Ballot Marking Tool

In relation to “at home” ballot marking for voters with disabilities, SBOE is currently working on solutions that are consistent with New York law and that address various security concerns.

In your letter you have specifically referenced voters that have expressed concerns about absentee voting. It would be very helpful to us if you would identify the voters’ specific needs so we can investigate how to specifically meet those needs. We are committed to every New Yorker being able to exercise their right to vote.

In closing, as noted above, the State has taken various actions, and made several accommodations, to ensure that all voters are able to vote independently and privately. We look forward to working with you to address any outstanding issues your organization has.

Very truly yours,



Robert A. Brehm
Co-Executive Director



Todd D. Valentine
Co-Executive Director

Exhibit H:

Powell et. al. v. Benson et. al.,

Case 2:20-cv-11023,

Temporary Restraining Order

issued May 1, 2020 and Approved

Consent Decree issued May 19, 2020

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN**

MICHAEL POWELL, and
FRED WURTZEL,
individually and on behalf of those
similarly situated,

Case No. 20-11023

and,

Hon. Gershwin Drain
Mag. Judge Michael J. Hluchaniuk

THE NATIONAL FEDERATION OF THE
BLIND OF MICHIGAN,

Plaintiffs,

v.

JOCELYN BENSON,
MICHIGAN SECRETARY OF STATE,
in her official capacity, and

JONATHAN BRATER,
MICHIGAN DIRECTOR OF ELECTIONS,
in his official capacity,

Defendants.

**STIPULATION AND CONSENT ORDER RESOLVING PLAINTIFFS’
MOTION FOR TEMPORARY RESTRAINING ORDER [ECF # 16]**

The Parties, by and through undersigned counsel, jointly stipulate to the resolution of Plaintiffs’ Motion for Temporary Restraining Order [ECF # 16] pursuant to the following terms:

1. Defendants will make the State's Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) absentee ballots available to eligible voters in the State of Michigan who provide a declaration that they are blind or otherwise severely disabled, and that such disability would prevent them from being able to independently complete a paper absentee ballot, without traveling to a location accepting in-person registration and voting on May 5, 2020.
2. Any individual eligible for the relief contemplated in paragraph one must by Tuesday May 5, 2020 at 4 P.M. EST submit their application and declaration, which will be made available on the Bureau of Elections website. The application will be authenticated by a Michigan driver's license, a Michigan state personal identification card number, or the last four digits of the voter's social security number.
3. Any individual who submits a declaration requesting the relief contemplated in paragraph one certifies under penalty of perjury that they have a disability and require use of the UOCAVA absentee ballot in order to vote privately and independently. Such certification will be available online in an accessible manner.
4. Eligible disabled voters may submit their application and declaration to the appropriate local clerk by mail or by e-mail, and copy the Michigan Bureau

of Elections. Upon receiving such a request, the clerk will record the voter as having been issued a UOCAVA ballot in the qualified voter file and forward the generated ballot to the Bureau of Elections. The Bureau of Elections will then generate a standard UOCAVA ballot and make the ballot compatible with standard screen reader technology, including Job Access with Speech (JAWS) software, by taking all steps necessary to ensure that the UOCAVA ballot allows for the insertion of tags and fillable objects so that it can be completed independently and privately by the requesting individual using standard, accessible technology, namely a screen reader program. The Bureau of Elections will then forward the accessible ballot to the requesting voter, along with instructions on how to return the ballot—including instructions to put the ballot in an envelope and sign the back of the envelope—and copy the voter's clerk.

5. The voter will return the UOCAVA ballot to the appropriate city or township clerk's office upon completion. Voters will be instructed to sign the back of the envelope containing the ballot. Voters may return their ballot by first-class mail, by hand-delivery to the clerk's office in the voter's jurisdiction, or by calling the local clerk for a pick-up of their ballot within the clerk's jurisdiction before 4 p.m. on May 5, 2020. Voters must request

pick up by 4 p.m., hand deliver by 8 p.m., or postmark the ballot on Tuesday, May 5, 2020.

6. The Michigan Bureau of Elections will ensure that all timely completed and returned UOCAVA ballots are counted in the final tabulation and certification of the May 5, 2020 elections, provided the ballots are received by the clerk by Thursday, May 7, 2020. Voters are encouraged to utilize pick-up or delivery options if they are voting on Tuesday, May 5, 2020.
7. The Court will retain the authority to take all reasonable and necessary action to ensure enforcement of this stipulation, including convening status conferences between the parties on Monday May 4, 2020, Tuesday May 5, 2020, and Friday May 8, 2020.
8. The parties agree that this stipulation applies only to the May 5, 2020 elections and does not resolve Plaintiffs' Motion for Preliminary Injunction [ECF # 2] as to the August and November 2020 elections, as well as all future elections.
9. Defendants shall issue a press release no later than 8 P.M. today, May 1, 2020 informing eligible voters of the voting option contemplated herein. Such release shall be issued in an accessible form and include a copy of this Order. Notice of this option will also be posted on the Bureau of Elections website, along with a copy of this Order no later than 10 a.m., May 2, 2020.

Respectfully submitted,

/s/ Eve Hill

Eve Hill (MD Federal Bar# 19938)
BROWN, GOLDSTEIN & LEVY LLP
120 E. Baltimore St., Ste. 1700
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*Counsel for Plaintiff The
National Federation of the
Blind of Michigan*

/s/ Eric Grill

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Counsel for Plaintiffs Powell and Wurtzel

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN**

MICHAEL POWELL, and
FRED WURTZEL,
individually and on behalf of those
similarly situated,

Case No. 20-11023

and,
Hluchaniuk

Hon. Gershwin Drain
Mag. Judge Michael J.

THE NATIONAL FEDERATION OF THE
BLIND OF MICHIGAN,

Plaintiffs,

v.

JOCELYN BENSON,
MICHIGAN SECRETARY OF STATE,
in her official capacity, and

JONATHAN BRATER,
MICHIGAN DIRECTOR OF ELECTIONS,
in his official capacity,

Defendants.

_____ /

ORDER

WHEREFORE, The Court, having received, read, and considered the stipulation of the parties, and good cause appearing therefrom, adopts the stipulation of the parties in its entirety as its **ORDER** this 1st day of May, 2020.

SO ORDERED.

Dated: May 1, 2020

s/Gershwin A. Drain
Hon. Gershwin A. Drain
U.S. District Court Judge

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN**

MICHAEL POWELL, and
FRED WURTZEL,
individually and on behalf of those
similarly situated,

Case No. 20-11023

and,

Hon. Gershwin A. Drain
Mag. Judge Michael J. Hluchaniuk

THE NATIONAL FEDERATION OF THE
BLIND OF MICHIGAN,

Plaintiffs,

v.

JOCELYN BENSON,
MICHIGAN SECRETARY OF STATE,
in her official capacity, and

JONATHAN BRATER,
MICHIGAN DIRECTOR OF ELECTIONS,
in his official capacity,

Defendants.

CONSENT DECREE

JURISDICTION AND VENUE

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331 and 1343.

Venue is appropriate in this District pursuant to 28 U.S.C. § 1391.

BACKGROUND

1. On April 25, 2020, Plaintiffs, Michael Powell and Fred Wurtzel, individually and on behalf of others similarly situated, and the National Federation of

the Blind of Michigan (“NFBMI”) filed a Complaint and Motion for Preliminary Injunction against Defendants, Michigan Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater (“Defendants”), in their official capacities, alleging that Defendants were violating Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.*, and the Michigan Persons with Disabilities Civil Rights Act, MCL § 37.2301 *et seq.*, by failing to provide an absentee/mail-in voting system that is fully accessible to individuals who are blind or have print disabilities for Elections scheduled for May, August, and November, 2020, and thereafter.

2. Defendants deny the allegations in the Amended Complaint and Motion for Preliminary Injunction and assert that their entry into this Consent Decree does not constitute an admission of liability, wrongdoing, or violation of the ADA, or any other statute, regulation, or provision of any federal or state law.

3. Plaintiffs Powell and Wurtzel are blind individuals who are registered to vote in Michigan, and desire to exercise their right to vote by absentee ballot in an accessible and independent manner.

4. Plaintiff NFBMI is the Michigan affiliate of the National Federation of the Blind, an organization of individuals who are legally blind. The NFBMI is a 501(c)(3) non-profit corporation made up of blind Michiganders and their families and friends. The organization promotes the general welfare of the blind by assisting the blind in their efforts to integrate themselves into society on terms of equality and by removing barriers that result in the denial of opportunity to blind persons in virtually

every sphere of life.

5. Defendant Secretary Benson is the chief election officer of the State of Michigan and has supervisory control over local election officials in the performance of their duties under the Michigan Election Law, MCL 168.1 *et seq.* In this capacity, she oversees Michigan’s absentee voting program and maintains and operates the Secretary of State’s voter information website.

6. Defendant Director Brater is vested with the powers and shall perform the duties of the Secretary of State under the Secretary’s supervision with respect to the supervision and administration of elections laws.

7. This Consent Decree is entered into by Plaintiffs and Defendants (collectively “the Parties”) and resolves the allegations set forth above.

8. The parties agree it is in their collective best interest to resolve this lawsuit on mutually agreeable terms without further litigation. Accordingly, the Parties agree to the entry of this Consent Decree, subject to the approval of this Court, without trial or further adjudication of any issues of fact or law raised in Plaintiffs’ Amended Complaint.

In resolution of this action, the Parties hereby **AGREE** and the Court expressly **APPROVES, ENTERS, AND ORDERS** the following:

I. DEFINITIONS

The following terms shall have the following meanings with respect to this

Agreement. All other terms shall be interpreted according to their plain and ordinary meaning:

1. Unless otherwise provided in this Agreement, technical terms used in this Agreement have the same meaning as provided in the Web Content Accessibility Guidelines (“WCAG”) 2.0 published by the World Wide Web Consortium (“W3C”), available at www.w3.org/TR/WCAG/. The term “WCAG 2.0 AA” as used in this Agreement incorporates the WCAG 2.0 Level A and Level AA Success Criteria. “Accessible Forms” are forms, applications, ballots, or transactions that are electronically fillable and submittable, produce a savable confirmation of submission for users, are provided in an HTML format option, and are compliant with WCAG 2.0 AA.
2. “Print disabilities” are disabilities that interfere with the effective reading, writing, or use of printed material. This definition includes persons who are visually impaired, those with learning disabilities, as well those with a physical disability that interferes with holding and manipulating paper or a pen or pencil.
3. “Conformance” and “conform” have the same meaning as used in WCAG 2.0 AA.
4. “Effective Date” is the date of the last signature on this Agreement.
5. “Voting Program” includes, but is not limited to: (i) the opportunity provided to Michigan residents to vote privately and independently in-person at designated Polling Places or to vote by mail/absentee in lieu of voting in person; (ii) the provision of sample ballots to Michigan residents in advance of Elections; and (iii) the processes for Michigan voters to request, receive, mark and submit ballots.

II. REQUIREMENTS

Pursuant to the terms of this Consent Decree, by June 25, 2020, Defendants will implement the following:

1. Shall not exclude individuals with print disabilities, including Plaintiffs

and their members, from participation in, or deny them the benefits of, the Voting Program's services, programs, or activities, or subject them to discrimination with respect to Michigan's Voting Program, 42 U.S.C. § 12132, unless the individual is otherwise ineligible from participating in the Voting Program under state or federal law.

2. Shall not provide individuals with print disabilities, including Plaintiffs and their members, an unequal opportunity to participate in or benefit from aids, benefits, or services, or provide an aid, benefit, or service that is not as effective in affording equal opportunity to gain the same result or benefit as provided to others with respect to Michigan's Voting Program, 28 C.F.R. § 35.130(b)(1)(ii)-(iii), unless the individual is otherwise ineligible from participating in the Voting Program under state or federal law.
3. Shall take the necessary and timely steps to ensure that it furnishes appropriate auxiliary aids and services where necessary to afford individuals with print disabilities, including Plaintiffs and their members, an equal opportunity to participate in, and enjoy the benefits of, the services, programs, and activities of Michigan's Voting Program, 28 C.F.R. § 35.160(b)(1), unless the individual is otherwise ineligible from participating in the Voting Program under state or federal law. Nothing in this order should be interpreted to require the Defendants to provide software or hardware technical support.
4. **Voting at Polling Places.** Defendants shall continue to ensure that all persons with print disabilities have an opportunity that is equal to the opportunity the State affords to all other persons to vote privately and independently at their designated, local Polling Place, by using an accessible voting machine.
5. **Voting by Mail.** Defendants shall ensure that all persons with print disabilities have an opportunity that is equal to the opportunity Michigan affords to all other persons to vote privately and independently by mail,

subject to the provisions of this paragraph.

- a. So that it may be used for the August 2020 Election, Defendants shall acquire a remote accessible vote-by-mail system (“RAVBM”) that shall allow voters with print disabilities to review and mark vote-by-mail ballots electronically, privately and independently, in accordance with the following:
 - i. At least 15 days before purchasing any RAVBM for the August 2020 election, Defendants shall notify Plaintiffs in writing of which RAVBM they intend to acquire, including identifying information such as the name, model number, and vendor, a summary description of the system and how it achieves accessibility, how accessibility will be monitored and maintained, and how complaints regarding accessibility will be addressed; provided that, if it is impractical to provide 15 days notice prior to purchasing a system for use in the August 2020 Election, Defendants shall notify Plaintiffs as far in advance of the purchase as possible. Defendants and Plaintiffs will commit to seeking a protective order in the event that Defendants need to share draft purchasing and other materials prior to those materials being made public.
 - ii. If unforeseen circumstances beyond the state’s control make it impracticable to acquire a RAVBM in time for the August 2020 Election, Defendants will inform plaintiffs immediately and no later than June 29, of the unforeseen circumstances and their impact on acquisition of the RAVBM. In such an event, Defendants will implement an expansion of the state’s UOCAVA voting system to people with print disabilities, in a manner similar to that described in the Stipulation and Consent Order Resolving Plaintiffs’ Motion for Temporary Restraining Order in this Action dated May 1, 2020, for the August 2020 Election. All other requirements of this Consent Decree that are not impracticable will remain in effect.

- b. Beginning with the August 2020 Election, and in each Election thereafter for the term of this Agreement, unless a change in federal law requires otherwise, Defendants shall, consistent with the time frame for providing absent voter ballots:
 - i. Provide accessible, electronic forms in HTML format through which voters with disabilities can independently request vote-by-mail ballots and certify that they are voters with disabilities. Such certification shall be no more burdensome for voters with disabilities than is required by the laws and regulations that govern RAVBM;
 - ii. Provide a mechanism for voters who certify that they are voters with disabilities and that their disability is unlikely to improve in the foreseeable future to be placed on a Permanent Accessible Absent Voter Application List if their jurisdiction of residence maintains a Permanent Absent Voter Application List and be provided prior to all future elections an electronic application form to apply for ballots that can be marked using the RAVBM, on the same terms and conditions as members of the jurisdiction's Permanent Absent Voter Application List;
 - iii. Notify the public of the availability of the accessible request system and the RAVBM, and post information about the RAVBM in the same locations where Defendants provide information about other means of mail-in/absentee voting, including posting step-by-step instructions for how to use the RAVBM on the Secretary of State Website;
 - iv. Train all county and local Election officials regarding the accessible request and RAVBM through the same methods by which they train county and local Election officials on other voting processes;
 - v. Send or train local or county election officials to send voters with disabilities electronic ballots that can be marked using the RAVBM, along with instructions on how to use the

RAVBM to mark and print their ballots;

- vi. Permit voters with disabilities to use the acquired RAVBM to review and mark their vote-by-mail ballots electronically and to print and return those marked ballots for counting; and
- vii. Train local election officials to accept and tabulate all ballots properly completed using the RAVBM that are received by the time polls close on the day of the election.

6. Reporting. Within 45 days after the August 4, 2020, Primary Election, and within 90 days after the November 3, 2020 Election, Defendants will provide Plaintiffs a report for the preceding Election containing the following information:

- a. The number of individuals with disabilities who requested an accessible ballot;
- b. The number of individuals who accessed the RAVBM; and
- c. Descriptions of any complaints or feedback received from voters with disabilities regarding attempts to use or use of the RAVBM and descriptions of how any complaints were resolved.

III. NOTICE TO PUBLIC

Within 10 days of the Effective Date of this Consent Decree, Defendants shall issue a press release, in accordance with their ordinary procedures for doing so, regarding the Consent Decree, and post a copy of this Consent Decree on the Secretary of State Website, along with a summary of its requirements.

IV. ATTORNEYS' FEES AND COSTS

Within 30 days of the Effective Date of this Agreement, Defendants shall pay \$124,258.25 to the trust account of Nyman Turkish PC for Plaintiffs' attorneys fees and costs. Payment will be sent to Plaintiffs' attorneys at the following address: 20750 Civic Center Drive, Suite 290, Southfield, Michigan 48076.

V. RELEASE

Plaintiffs waive and release any claims against Defendants and their agents, successors, and assigns, including claims for declaratory and injunctive relief and attorneys' fees and costs, that are based on the allegations raised, or which could have been raised, in the complaint or amended complaint.

VI. TERM OF AGREEMENT

The term of this Agreement shall be 30 months from the Effective Date.

VII. NOTICES

Any notice or communication provided under this Agreement shall be made in writing and shall be delivered or sent by way of the U.S. Postal Service, private commercial carrier, hand delivery, facsimile transmission, or electronic mail to the addresses below or to such other addresses as may be specified in writing by any Party:

1. To Plaintiff National Federation of the Blind of Michigan: Eve L. Hill, Brown, Goldstein & Levy LLP, 120 East Baltimore Street, Suite 1700, Baltimore, Maryland 21202, ehill@browngold.com
2. To Plaintiffs Michael Powell and Fred Wurtzel: Jason M. Turkish, Nyman Turkish PC, 20750 Civic Center Drive, Suite 290, Southfield, Michigan 48076. Jason.Turkish@nymanturkish.com
3. To Defendants: Erik A. Grill, Assistant Attorney General, P.O. Box 30736, Lansing, MI 48909. grille@michigan.gov

IN WITNESS WHEREOF, the Parties hereto, intending to be legally bound, have caused this Consent Decree to be executed as of the date set forth below.

SO ORDERED this 19th day of May 2020.

s/Gershwin A. Drain
Hon. Gershwin A. Drain
United States District Judge

The signatories represent that they have the authority to bind the respective Parties identified below to the terms of this Consent Decree.

AGREED AND CONSENTED TO:

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2020 WL 2393285

Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Dennis MARTINEZ, Douglas Nguyen,
James Hallenbeck, Jill Wildberger, and
Disability Rights New York, Plaintiffs,

v.

Andrew CUOMO, in His Official Capacity
as Governor of New York State, Defendant.

20-CV-3338 (VEC)

Signed 05/12/2020

Synopsis

Background: Residents brought suit under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA), claiming that the New York Governor's failure to conduct his daily televised briefings on the corona virus outbreak with an in-frame American Sign Language (ASL) interpreter violated their rights as deaf individuals with only limited English-language skills. Residents moved for preliminary injunction.

[Holding:] The District Court, Valerie E. Caproni, J., held that residents were entitled to preliminary injunction requiring the Governor to conduct these briefings with an in-frame American Sign Language (ASL) interpreter.

Motion granted.

West Headnotes (16)

- [1] **Injunction** ➡ Extraordinary or unusual nature of remedy
Preliminary injunction is an extraordinary remedy that should not be granted routinely.
- [2] **Injunction** ➡ Grounds in general; multiple factors
Plaintiff seeking a preliminary injunction must establish the following: (1) a likelihood of

success on the merits; (2) that plaintiff is likely to suffer irreparable injury in the absence of an injunction; (3) that the balance of hardships tips in the plaintiff's favor; and (4) that an injunction is in public interest.

- [3] **Injunction** ➡ Mandatory preliminary injunctions
Injunction ➡ Likelihood of success on merits
To obtain a mandatory preliminary injunction, one which alters rather than maintains the status quo, movant must demonstrate a clear or substantial likelihood of success on the merits.

- [4] **Civil Rights** ➡ Preliminary Injunction
Residents who, because they were deaf, had limited English-language skills, and lacked access to the internet, were unable to access information that the New York Governor provided on coronavirus outbreak in his televised daily briefings were entitled to preliminary injunction requiring the Governor to conduct these briefings with an in-frame American Sign Language (ASL) interpreter; residents established a likelihood of success on their claims that the Governor's failure to conduct briefings with an in-frame ASL interpreter violated their rights under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA), that their inability to access vital information provided during the briefings was an irreparable harm, that the balance of hardships tipped decidedly in their favor, and that providing an in-frame ASL interpreter would be in public interest. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

- [5] **Civil Rights** ➡ Handicap, Disability, or Illness
Americans with Disabilities Act (ADA) seeks to prevent, not only intentional discrimination against people with disabilities, but also discrimination that results from thoughtlessness and indifference, or in other words, from "benign

neglect.” Americans with Disabilities Act of 1990 §§ 2 et seq., 102(b)(5)(A), 42 U.S.C.A. §§ 12101 et seq., 12112(b)(5)(A).

[6] **Civil Rights** ➡ Discrimination by reason of handicap, disability, or illness

To establish a claim of discrimination in violation of the Rehabilitation Act or in violation of Title II of the Americans with Disabilities Act (ADA), plaintiffs must demonstrate that: (1) they are qualified individuals with disability; (2) the defendant is subject to the relevant act; and (3) they were denied the opportunity to participate equally in, or to benefit equally from, defendant's services, programs or activities by reason of their disability. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[7] **Civil Rights** ➡ Discrimination by reason of handicap, disability, or illness

Public entity discriminates against disabled individual, in violation of the Americans with Disabilities Act (ADA), when it fails to provide meaningful access to its benefits, programs, or services. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[8] **Civil Rights** ➡ Discrimination by reason of handicap, disability, or illness

Public entity may have to make reasonable accommodations in order to fulfill its obligation under the Americans with Disabilities Act (ADA) and under the Rehabilitation Act (RA) to ensure meaningful access to its benefits, programs, or services by disabled individuals. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[9] **Civil Rights** ➡ Discrimination by reason of handicap, disability, or illness

Public entity does not need to employ any and all means to make its services accessible to those with disabilities; the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) require only reasonable modifications that would not fundamentally alter the nature of the service provided or impose an undue financial or administrative burden. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[10] **Civil Rights** ➡ Discrimination by reason of handicap, disability, or illness

Party asserting a discrimination claim under the Rehabilitation Act, or under Title II of the Americans with Disabilities Act (ADA), is not obligated to prove that he has been completely prevented from enjoying a public service, program or activity, but need show only that a public entity has failed to institute reasonable accommodations sufficient to provide him with meaningful access to the service, program or activity. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[11] **Civil Rights** ➡ Discrimination by reason of handicap, disability, or illness

While the accommodations that New York Governor provided to deaf individuals lacking internet access and with limited English-language skills, in order to ensure that they had access to his daily press briefings on the corona virus outbreak, did need not be perfect in order to satisfy his obligations under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA), they still had to ensure that press briefings were readily accessible to such disabled individuals. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[12] **Injunction** ➡ Irreparable injury
Demonstrating “irreparable harm,” of kind required for a grant of preliminary injunction, requires a showing that movant will suffer an actual and imminent injury that cannot be remedied if court waits until the end of trial to resolve the harm.

[13] **Injunction** ➡ Clear, likely, threatened, anticipated, or intended injury
Injunction ➡ Adequacy of remedy at law
In evaluating whether a plaintiff moving for preliminary injunctive relief will otherwise suffer “imminent harm,” court must actually consider the injury which plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the remedies available at law, such as monetary damages, are adequate to compensate for that injury.

[14] **Injunction** ➡ Balancing or weighing hardship or injury
In ruling on motion for preliminary injunction, court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.

[15] **Injunction** ➡ Balancing or weighing hardship or injury
To obtain a preliminary injunction, plaintiffs must establish that the balance of hardships tips in their favor regardless of their likelihood of success.

[16] **Injunction** ➡ Public interest considerations
Court may award preliminary injunctive relief only if the public interest would not be disserved.

OPINION AND ORDER

VALERIE CAPRONI, United States District Judge:

*1 In the middle of the most significant health crisis this country has experienced in decades, this case focuses on a subset of New Yorkers who have been effectively, if unintentionally, excluded from obtaining up-to-date information regarding the crisis from their Governor. Governor Andrew Cuomo's failure to provide in-frame American Sign Language (“ASL”) interpretation during his daily press briefings regarding the COVID-19 pandemic has excluded certain deaf New Yorkers from the benefits of those briefings. Plaintiffs, four deaf individuals and Disability Rights New York (“DRNY”), argue that Cuomo's failure deprives them of effective communication in violation of the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“RA”). Specifically, Plaintiffs argue that although videos of ASL interpretations of Governor Cuomo's briefings are available through a link on the Governor's website, because they lack internet access, they cannot view the videos. Similarly, while some of the channels that broadcast Governor Cuomo's live briefings include closed captioning, Plaintiffs argue that the closed captions do not accommodate them because they cannot read English at all or well enough to understand the information. As a result, Plaintiffs seek a mandatory preliminary injunction to require Governor Cuomo to provide an in-frame ASL interpreter during televised broadcast briefings. The Court GRANTED Plaintiffs' motion for a preliminary injunction on May 11, 2020. Dkt. 18. This opinion explains the Court's rationale.

BACKGROUND

For the past two months, the COVID-19 pandemic has devastated New York City; schools have closed, businesses have closed, and social distancing requirements have been instituted. COVID-19 has disproportionately affected New Yorkers; confirmed COVID-19 cases are four times greater in New York than in any other state, and more than one third of all domestic COVID-19 related deaths have occurred in New York. Complaint (“Compl.”), Dkt. 1 ¶ 2. In the face of such unprecedented uncertainty, danger, and fear, New Yorkers have looked to Governor Cuomo for guidance.

On or about March 1, 2020, Governor Cuomo began holding daily, televised press briefings regarding the COVID-19 outbreak in New York. Compl. ¶ 30. Governor Cuomo's briefings typically last between thirty and sixty minutes and include critical information concerning the health crisis. *Id.* ¶¶ 31, 35. Specifically, the briefings have included information regarding the number of confirmed COVID-19 cases in New York, the closing of schools and non-essential businesses, the stay-at-home order, the availability of testing, social distancing requirements, the requirement to wear a mask, rent suspension, the coordination of local, state, and federal government emergency response systems, and other information about how New Yorkers can stay safe and help limit the spread of the virus. *See id.* ¶ 35. The briefings have also featured government officials from the New York State Department of Health, New York State Division of Budget, and the Army National Guard. *Id.* ¶ 32. On April 13, 2020, Governor Cuomo hosted a multi-state press briefing with the Governors of New Jersey, Delaware, Connecticut, Rhode Island, Pennsylvania, and Massachusetts, during which he announced the "Multi-State Council to Get People Back to Work and Restore the Economy." *Id.* ¶ 47. Local and major news networks, including ABC, CBS, NBC, and Fox, have broadcast Governor Cuomo's briefings live to a national audience. *Id.* ¶ 34. Governor Cuomo's daily briefings have been widely touted as providing reliable and up-to-date information; Cuomo has emerged as a prominent and steady voice in a time of crisis.¹

i. Plaintiffs' Backgrounds

*2 Plaintiffs are four deaf individuals and DRNY, a non-profit organization that advocates on behalf of individuals with disabilities. Plaintiff Dennis Martinez is deaf and his primary language is ASL. *Id.* ¶¶ 50-51. Martinez works as a Deaf Service Advocate at the Harlem Living Center, where he provides up-to-date information regarding the COVID-19 pandemic to deaf clients. *Id.* ¶¶ 51, 55. Martinez is unable to understand Governor Cuomo's live briefings due to the lack of an ASL interpreter.² *Id.* ¶ 54.

Plaintiff Douglas Nguyen is deaf and communicates only through ASL. *Id.* ¶¶ 59-60. Mr. Nguyen cannot read, write, or understand English. *Id.* ¶ 61. Mr. Nguyen does not own a computer and does not have access to the internet. *Id.* ¶ 62. Mr. Nguyen has watched Governor Cuomo's daily briefings on television but cannot understand them because there is no in-frame ASL interpreter. *Id.* ¶ 64.

Plaintiff James Hallenbeck is deaf and his primary language is ASL. *Id.* ¶¶ 67-68. Mr. Hallenbeck is able to understand some written English, but he is not fluent. *Id.* ¶ 68. Mr. Hallenbeck cannot read closed captioning, transcripts, PowerPoint slides, or any other written account of Governor Cuomo's press briefings. Hallenbeck Decl., Dkt. 17-1 ¶ 4. Mr. Hallenbeck does not own a computer and cannot access the Governor's briefings online. Compl. ¶ 71; Hallenbeck Decl., ¶¶ 5-8.

Plaintiff Jill Wildberger is deaf and her primary language is ASL. Compl. ¶¶ 74-75. Ms. Wildberger has a learning disability that makes it difficult for her to read English. *Id.* ¶¶ 76, 78, 79. Ms. Wildberger cannot read closed captioning, transcripts, PowerPoint slides, or any other written account of Governor Cuomo's press briefings. Wildberger Decl., Dkt. 17-1 ¶ 4. Although Ms. Wildberger owns an internet capable smartphone, because of her learning disability, she does not know how to access Governor Cuomo's press briefings online. *Id.* ¶¶ 5-6.

Plaintiff DRNY brings this action on behalf of itself and the four individual Plaintiffs. DRNY states that it has received a growing number of "complaints from deaf New Yorkers who are unable to understand Governor Cuomo's daily briefings due to the lack of in frame televised ASL interpretation." Compl. ¶ 37. DRNY characterizes this suit as the result of "one of the most significant calls to action DRNY has ever experienced." Pls.' Reply, Dkt. 17 at 8.

ii. Governor Cuomo's Current Accommodations

Governor Cuomo states that he is "committed to ensur[ing] that all New Yorkers are promptly and accurately informed about developments related to the COVID-19 pandemic," and argues that he provides multiple means by which deaf individuals can access the information in his briefings. Compl. ¶ 40. For example, the briefings include PowerPoint slides that visually convey much of the information covered, and Cuomo notes that some television stations provide closed captioning of the briefings. Def. Opp., Dkt. 13 at 4-5. Additionally, the Governor's website includes links to live and recorded video presentations of his briefings with an ASL interpreter. *Id.* at 5-6. Unlike the 49 other Governors in this country and New York City Mayor Bill de Blasio, however, Governor Cuomo does not provide an in-frame ASL interpreter in his live televised briefings. Compl. ¶ 36; Pls.' Reply at 9.

*3 Although they acknowledge the accommodations Governor Cuomo has provided to facilitate access to the

daily press briefings for some deaf New Yorkers, Plaintiffs maintain that they are still unable to understand or access the information in the briefings without an in-frame ASL interpreter. Specifically, Plaintiffs argue that they lack internet access necessary to view the ASL interpretations online and that they are unable to read the closed captioning in English. Accordingly, Plaintiffs seek a mandatory preliminary injunction to require Governor Cuomo to provide an in-frame ASL interpreter during his televised briefings.

DISCUSSION

[1] [2] [3] [4] A preliminary injunction is an “extraordinary remedy and should not be routinely granted.” *Patton v. Dole*, 806 F.2d 24, 28 (2d Cir. 1986). A plaintiff seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that the plaintiff is likely to suffer irreparable injury in the absence of an injunction; (3) that the balance of hardships tips in the plaintiff’s favor; and (4) that an injunction is in the public interest. *Capstone Logistics Holdings, Inc. v. Navarrete*, 736 F. App’x 25, 26 (2d Cir. 2018); *North American Soccer League, LLC v. United States Soccer Federation, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). For mandatory injunctions, which “alter rather than maintain the status quo,” such as the one at issue here, “the movant must show a ‘clear’ or ‘substantial’ likelihood of success” on the merits. *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012) (citing *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349 (2d Cir. 2003)).

A. Plaintiffs Have Demonstrated a Clear and Substantial Likelihood of Success on the Merits

[5] Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. The ADA seeks to prevent not only intentional discrimination against people with disabilities, but also discrimination that results from “thoughtlessness and indifference,” or, in other words, from “benign neglect.” *Alexander v. Choate*, 469 U.S. 287, 295, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985); 42 U.S.C. § 12112(b)(5)(A) (defining discrimination to include failing to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability”). As the Second Circuit has explained, “[i]t is not enough to open the

door for the handicapped; a ramp must be built so the door can be reached.” *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982) (internal quotation marks and alterations omitted). Similarly, Section 504 of the RA prohibits “programs and activities receiving federal financial assistance from excluding, denying benefits to, or discriminating against ‘otherwise qualified’ disabled individuals.” *McElwee v. Cnty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012) (quoting 29 U.S.C. § 794(a)). As the “standards adopted by the two statutes are nearly identical,” *id.*, the Court will consider the merits of these claims together.

[6] In order to establish a claim of discrimination under Title II of the ADA or the RA, Plaintiffs must demonstrate that (1) they are “qualified individuals” with a disability; (2) that the Defendant is subject to the pertinent Act; and (3) that Plaintiffs were denied the opportunity to participate equally in or to benefit equally from Defendant’s services, programs or activities, by reason of their disability. *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189, 196-97 (2d Cir. 2014). There is no dispute that Plaintiffs are qualified individuals with a disability or that Defendant is a “public entity” subject to the ADA and RA; the parties’ disagreement lies in whether Plaintiffs have been, and are being, denied the opportunity to benefit equally from Defendant’s press briefings by reason of their deafness.

*4 [7] A public entity discriminates against a disabled individual when it fails to provide “meaningful access” to its benefits, programs, or services. *Disabled in Action*, 752 F.3d at 197; *see also Choate*, 469 U.S. at 301, 105 S.Ct. 712 (holding that the ADA requires not only that people with disabilities be provided with access to public services, but that they “be provided with meaningful access” (emphasis added)); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 (2d Cir. 2003) (explaining that the relevant inquiry is “whether those with disabilities are as a *practical matter able to access* benefits to which they are legally entitled”) (emphasis added). Individuals may be deprived of meaningful access to public programs if a public entity fails to modify existing practices. *Disabled in Action*, 752 F.3d at 197. The ADA’s implementing regulations explicitly prohibit a public entity from denying individuals with disabilities access to its services because its “facilities are inaccessible to or unusable by [such individuals].” 28 C.F.R. § 35.149. Accordingly, public entities must operate programs so that the program, “when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” *Id.* § 35.150(a). In the context of auxiliary aids, a public entity must “take appropriate steps to ensure

that communications with [people] with disabilities are as effective as communications with others,” including, where necessary, the provision of “appropriate auxiliary aids and services.” 28 C.F.R. § 35.160(a)(1), (b)(1). Moreover, the public entity must consider that, “in order to be effective, auxiliary aids and services must be provided in *accessible formats*.” *Id.* (emphasis added).

[8] [9] [10] To ensure meaningful access for disabled individuals, a public entity may have to make reasonable accommodations. *Henrietta D.*, 331 F.3d at 273. The Court notes that a public entity need not “employ any and all means to make” services accessible; the ADA and RA “require[] only reasonable modifications that would not fundamentally alter the nature of the service provided” or “impose an undue financial or administrative burden.” *Tennessee v. Lane*, 541 U.S. 509, 531–32, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004); see also *Henrietta D.*, 331 F.3d at 281. That said, Plaintiffs are not obligated to prove that they have been “completely prevented from enjoying a service, program, or activity.” *Disabled in Action*, 752 F.3d at 198. Instead, Plaintiffs must simply show that the public entity has failed to institute reasonable accommodations sufficient to provide them with “meaningful access” to the services. *Id.* at 199 (citing *Choate*, 469 U.S. at 301, 105 S.Ct. 712); *Henrietta D.*, 331 F.3d at 273.

[11] Here, the primary dispute is whether Governor Cuomo's existing accommodations adequately ensure Plaintiffs' meaningful access to his press briefings. Governor Cuomo argues that they do; he emphasizes that he employs a “multiplicity of ways” to ensure that deaf individuals can access the important information in the briefings.³ The Court disagrees. Although the Court acknowledges that Defendant's accommodations need not be “perfect,” they still must ensure that the press briefings are “readily accessible” to the Plaintiffs in this case. *Disabled in Action*, 752 F.3d at 201 (explaining that although the “BOE is not expected to create poll sites out of whole cloth, it is required to operate its voting program so that when viewed in its entirety, [the program] is readily accessible to ... individuals with disabilities.”) (internal citations omitted); *D'Amico v. New York State Bd. of Law Examiners*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993) (explaining that although the Board “did make some accommodations for plaintiff,” the ADA requires that “an individual analysis [] be made with every request for accommodations and the determination of reasonableness [] be made on a case by case basis.”).

*5 Although Governor Cuomo is providing reasonable accommodations for many deaf New Yorkers, he has failed to make the “reasonable accommodations” necessary to give these Plaintiffs access to his briefings. *D'Amico*, 813 F. Supp. at 221. As noted above, the online ASL interpretations of Governor Cuomo's briefings are *not* readily accessible to Plaintiffs or any other similarly situated deaf New Yorker who lacks internet access.⁴ The live broadcasts with closed captioning, while perhaps accommodating deaf New Yorkers who are fully literate in English, do not accommodate Plaintiffs and other similar deaf New Yorkers who cannot read English.⁵ In other words, without in-frame ASL interpretation, Plaintiffs are, “as a practical matter, [un]able to access benefits to which they are legally entitled.”⁶ *Henrietta D.*, 331 F.3d at 273. Defendant's suggestion that Plaintiffs are merely “choos[ing] not to take advantage of the various means by which the Governor communicates critical information during his press briefings,” Def. Opp. at 18, is unfounded, conclusory, and cavalier. While Governor Cuomo's accommodations may “constitute a reasonable accommodation under some circumstances,” and may be utilized and valued by deaf New Yorkers with internet access, the “determination of reasonableness must be made on a case by case basis.” *D'Amico*, 813 F. Supp. at 221. The current accommodations – however well-intentioned – simply do not provide “meaningful access in the circumstances [presented] here.” *Disabled in Action*, 752 F.3d at 201; see also *Jones v. Nat'l Conference of Bar Examiners*, 801 F. Supp. 2d 270, 285, 289 (D. Vt. 2011) (“It cannot reasonably be disputed that what renders an examination ‘accessible’ to one disabled individual may not render it ‘accessible’ to another. ... For this reason, the court concludes that Defendant's extensive evidence regarding accommodations that were deemed appropriate many years ago, or for different individuals with different needs, constitutes an inappropriate benchmark for what must be offered” to Plaintiff); *Wong v. Regents of Univ. of California*, 192 F.3d 807, 818 (9th Cir. 1999) (“Because the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations”).

*6 In sum, Plaintiffs have established that, despite the accommodations currently offered, they cannot access Governor Cuomo's briefings without an in-frame ASL interpreter and have therefore demonstrated a likelihood of success on the merits. See *Jones*, 801 F. Supp. 2d at 285 (explaining that the Court's analysis “remains an individualized inquiry, and not a one-size-fits-all approach.”).

Notably, in opposing Plaintiffs' requested accommodation, Defendant does *not* argue that providing an in-frame ASL interpretation would be burdensome. Nor is there any evidence that this proposed accommodation would “fundamentally alter the nature” of Governor Cuomo's press briefings or “impose an undue financial or administrative burden.” *Disabled in Action*, 752 F.3d at 202. In fact, as noted *supra*, the 49 other Governors in this country, as well as the Mayor of New York City, provide this accommodation.

B. Plaintiffs Will Suffer Irreparable Harm if a Preliminary Injunction is Not Granted

[12] [13] Irreparable harm requires a showing that Plaintiffs will suffer an “actual and imminent” injury that “cannot be remedied if a court waits until the end of trial to resolve the harm.” *Singas Famous Pizza Brands Corp. v. New York Adver. LLC*, 468 F. App'x 43, 45 (2d Cir. 2012). In evaluating whether the plaintiff will suffer imminent harm, “the court must actually consider the injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the ‘remedies available at law, such as monetary damages, are adequate to compensate for that injury.’” *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010) (internal quotation marks omitted).

Here, Plaintiffs are seeking vital and continually changing information regarding their health and safety. Governor Cuomo's decision to hold a *daily* press briefing reflects the reality that information regarding the COVID-19 pandemic is constantly evolving and his assessment that it is important for New Yorkers to have ready access to the latest information. Thus, the Court agrees that, without access to Cuomo's daily briefings, Plaintiffs are subject to actual and imminent injury that cannot be remedied if the court were to wait “until the end of trial to resolve the harm.” For example, in the upcoming days and weeks, Governor Cuomo will not only continue to update New Yorkers about the daily COVID-19 toll, but he will also provide updated information regarding his thinking and plans relative to reopening businesses, resumption of non-essential travel, lessening of social distancing restrictions, diagnostic testing, and public transportation. Without immediate implementation of an in-frame ASL interpreter, Plaintiffs and other similarly situated deaf New Yorkers will continue to be denied timely access to this critical information, leaving them less able to comply with current orders and advice, less able to prepare for the future, and more anxious about current conditions and the

future. Legal remedies, such as monetary damages, would be wholly inadequate to compensate for these injuries.

C. The Balance of Hardships Weighs Heavily in Favor of Plaintiffs and an Injunction is in the Public Interest

[14] [15] [16] In considering a motion for a preliminary injunction, the court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Plaintiffs must establish that the balance of hardships tips in their favor regardless of the likelihood of success. *Salinger*, 607 F.3d at 79-80. In addition, a court may award preliminary injunctive relief only if the “public interest would not be disserved.” *Id.* at 80.

Here, the Court finds that the balance of hardship tips decidedly in favor of the Plaintiffs. As noted *supra*, Governor Cuomo does not argue that implementing an in-frame ASL interpreter would be burdensome.⁷ By contrast, Plaintiffs have demonstrated that they experience hardship on a daily basis as a result of their inability to access Governor Cuomo's briefings. Moreover, the Court agrees that Plaintiffs cannot follow Governor Cuomo's executive orders or health department recommendations if they are not aware of them. Pls.' Mem. of Law at 15. As a result, Plaintiffs and members of the deaf community who are similarly situated to Plaintiffs cannot “ensure that they act in the public's interest, and may unknowingly endanger themselves or others.” *Id.* Furthermore, the Court sees no disservice to the public by providing Plaintiffs' proposed accommodation.

CONCLUSION

*7 For the foregoing reasons, Plaintiffs' motion for a preliminary injunction was GRANTED on May 11, 2020. Defendant was ordered to immediately implement in-frame ASL interpretation during his daily press briefings. If in-frame ASL translation cannot be implemented by **May 13, 2020**, Defendant must submit a detailed affidavit by **May 13, 2020**, explaining why and providing a date by which it will be implemented.

The Court urges the parties to proceed with the currently-scheduled settlement conference. If the case fails to settle, the deadline for fact discovery is **June 8, 2020**. A pretrial conference will be held on **June 12, 2020 at 10:00 a.m.**

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 2393285

Footnotes

- 1 See Jesse McKinley et al., *How Cuomo, Once on Sidelines, Became the Politician of the Moment*, N.Y. Times (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/nyregion/governor-andrew-cuomo-coronavirus.html>. According to news reports, even President Trump – who has direct access to the country's most knowledgeable medical experts – views Governor Cuomo's briefings as “must-see-TV.” See Katie Rogers et al., *Home Alone at the White House: A Sour President, With TV His Constant Companion*, N.Y. Times (April 23, 2020), <https://www.nytimes.com/2020/04/23/us/politics/coronavirus-trump.html>.
- 2 Neither the complaint nor the reply brief with its accompanying declarations clarify the exact state of Martinez's access to the internet. The complaint states that he “has to seek out videos on social media platforms with ASL interpretation,” Compl. ¶ 58, which suggests that he has some internet access. The supplemental declaration submitted with the reply brief states, however, that he “cannot consistently access Governor Cuomo's briefings through any of the means currently available.” Martinez Decl., Dkt 17-1 ¶ 7. If Martinez were the only Plaintiff that lack of clarity could be problematic. Because he is not, the lack of clarity is not dispositive.
- 3 Governor Cuomo relies heavily on *Brooklyn Ctr. for Indep. of Disabled v. Bloomberg*, 980 F. Supp. 2d 588 (S.D.N.Y. 2013), to argue that, although his accommodations may not be “perfect,” the “multiplicity of means by which information is distributed ensures that people with disabilities have an equal opportunity to access ... information as those without disabilities.” Def. Opp. at 18 (quoting 980 F. Supp. 2d at 655). The Court notes, however, that among the “multiplicity of means” at issue in *Brooklyn Center* was in-frame ASL interpretation at the Mayor's press conferences. 980 F. Supp. 2d at 632. Moreover, here, the “multiplicity of means” employed by Governor Cuomo do *not* ensure that people with disabilities have an equal opportunity to access the information he is providing; Plaintiffs are unable to access the information due to their lack of internet access. Finally, in *Brooklyn Center*, the Court concluded that plaintiffs “provided no evidence that the means of communication employed by the City during an emergency are any less effective at reaching people with disabilities as those without.” *Id.* at 656. That is not the case here; in addition to the individual Plaintiffs' allegations, the complaint alleges that DRNY has received a “large number of complaints from deaf New Yorkers who are unable to understand Governor Cuomo's daily briefings due to the lack of in frame televised ASL interpretation.” Defendant's reliance on *Loye v. Cty. of Dakota*, 625 F.3d 494, 499 (8th Cir. 2010), is similarly misplaced. In *Loye*, the Eighth Circuit affirmed the district court's grant of summary judgment for the county, holding in part that the ADA and RA did not require the county to provide an ASL interpreter at every meeting held to discuss emergency decontamination in the plaintiffs' community. That conclusion, however, was based on the fact that an ASL interpreter was provided at most of the meetings and Plaintiffs were unable to identify any “information they missed nor any harm suffered as a result of any alleged failure to provide interpreters [at every meeting].” *Id.* at 499. Here, by contrast, Governor Cuomo has not provided an in-frame ASL interpreter in a single live press briefing, and Plaintiffs have alleged that they missed critical information communicated during those briefings. See, e.g., Compl. ¶¶ 57, 65, 73, 81; Wildberger Decl. ¶ 7.
- 4 The COVID-19 pandemic has exposed the disparity in internet access for individuals across New York and across the United States. The difficulties surrounding the transition to remote work and schooling provided inarguable evidence that many people in America, including many in New York, do not have internet access. See, e.g., Geoffrey Starks, *To Fight Coronavirus, Millions More Americans Need Internet Access*, N.Y. Times (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/opinion/internet-broadband-coronavirus.html> (“The coming weeks will lay bare the already-cruel reality of the digital divide: tens of millions of Americans cannot access or cannot afford the home broadband connections they need to telework, access medical information and help young people learn when school is closed.”); *Locked Out of the Virtual Classroom*, N.Y. Times (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/opinion/coronavirus-internet-schools-learning.html> (“America came face to face with the festering problem of digital inequality when most of the country responded to the coronavirus pandemic by shutting elementary and high schools that serve more than 50 million children.”); Suzanne Woolley et al., *U.S. Schools Trying to Teach Online Highlight a Digital Divide*, Bloomberg (Mar. 26, 2020), <https://www.bloomberg.com/news/articles/2020-03-26/covid-19-school-closures-reveal-disparity-in-access-to-internet> (“[M]any U.S. households lack not only devices but also sufficient internet connections.”); Erin Mansfield et al., *Coronavirus for Kids Without Internet: Quarantined Worksheets, Learning in Parking Lots*, USA Today (April 1, 2020), [WESTLAW © 2020 Thomson Reuters. No claim to original U.S. Government Works.](https://www.usatoday.com/story/news/education/2020/04/01/coronavirus-

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internet-speed-broadband-online-learning-school-closures/5091051002/. (“A study by Microsoft in 2018 estimated that about half of Americans – 163 million people – do not have high-speed internet at home.”).

While the accommodations provided via the internet are impressive, the right of deaf New Yorkers to access Governor Cuomo's briefings and get critical information regarding the COVID-19 pandemic “should not be contingent on the happenstance” that they have access to the internet. *Disabled in Action*, 752 F.3d at 200 (“The right to vote [for disabled individuals] should not be contingent on the happenstance that others are available to help”).

5 Plaintiffs also point out that closed captioning is not provided on all channels broadcasting the briefings and, even when closed captioning is provided, questions from the audience are not captioned. Compl. ¶ 41. Moreover, Plaintiffs allege that there are often errors or omissions in the transcription. *Id.* ¶ 42.

6 Defendant argues that Plaintiffs fail to “allege facts supporting a reasonable inference that they cannot access the ASL interpretation the Governor already provides on his website.” The Court disagrees. See Compl. ¶¶ 50-81; Nguyen Decl. ¶¶ 4-7; Hallenbeck Decl. ¶¶ 2-8; Wildberger Decl. ¶¶ 2-8.

7 The Defendant has not explained why he resisted Plaintiffs' pre-litigation pleas for him to implement in-frame ASL interpretation. See Compl. ¶¶ 40, 44-46; Pls.' Mem. of Law, Dkt. 4 at 3. His position in this litigation comes down to his view that the law does not require it; he has done other things to accommodate the deaf, and therefore, he will not provide in-frame ASL interpretation. That dismissive attitude towards this segment of his constituency – beyond being unkind – runs counter to the law of the land as articulated in the ADA and RA.

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Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.

Denis DILLON and Integrity
Party of N.Y. State, Plaintiff,

v.

NEW YORK STATE BOARD OF ELECTIONS, and
the Nassau County Board of Elections, Defendants.

No. 05 CV 4766(JG).

|
Oct. 31, 2005.

Attorneys and Law Firms

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Steven R. Schlesinger, Jasper Schlesinger Hoffman, LLP, Garden City, NY, for Intervenor Kathleen Rice.

MEMORANDUM AND ORDER

GLEESON, J.

*1 In the upcoming election for District Attorney in Nassau County, plaintiff Denis Dillon and Kathleen Rice will each be the nominee of three political parties. But Dillon's name will appear on the ballot only twice, while Rice's will appear three times. The reason: one of the parties that nominated Dillon, the plaintiff Integrity Party of New York State (the "Integrity Party"), is classified under New York Election Law as an "independent body," not as a "party," and independent bodies do not always get their own ballot lines under New York law. They never get their own lines where, as here, they cross-nominate a candidate who has received the nomination of two political parties that have achieved the more lofty status as a "Party" under New York law. Instead, the independent

party's name and emblem will appear next to their candidate's name on another political party's ballot line.

Both Dillon and the Integrity Party challenge, on federal constitutional grounds, the New York law that deprives them of a separate Integrity Party ballot line in the upcoming election. They seek an injunction declaring the law invalid and directing that new ballots be created with a separate line for the Integrity Party showing Dillon as its nominee for the office of Nassau County District Attorney.

For the reasons set forth below, I deny the plaintiffs' request.¹

BACKGROUND

Under New York election law, political organizations are defined as either "Parties" or "independent bodies." A "Party" is any political organization whose candidate in the preceding gubernatorial election received at least 50,000 votes. N.Y. Elec. Law § 1-104(3). An organization that participates in the campaign and election process but did not receive the requisite number of votes in that election to achieve "Party" status is defined as an "independent body." *Id.* at § 1-104(12). For the sake of clarity, I use here the statutory term "Party," by itself and in the upper-case, and the phrase "independent body" to refer, respectively, to these two types of political parties in New York.

Various consequences flow from an organization's status as either a Party or independent body. This case focuses on one of them—the form in which a political party's nomination of a candidate is reflected on the ballot. The issue is governed by New York Election Law § 7-104. That section provides that the names of candidates for election nominated by a Party or independent body appear in the "row or column containing generally the names of candidates nominated" by the Party or independent body. § 7-104.5(a). Thus, a candidate nominated by a single political party, whether it is a Party or an independent body, will appear on the ballot line for that political party.

A candidate nominated by multiple political parties may appear on multiple ballot lines. If he or she has been nominated by more than one Party, the candidate's name will appear in the row of each nominating party. § 7-104.5(b). A candidate who has been nominated by one Party and one independent body will also appear in the separate row of each. § 7-104.5(a) & (d). There is no limit to the number of ballot

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lines a candidate can obtain as long as each of his or her nominations is by a Party.

*2 However, the ballot form changes when an independent body's nominee is also the nominee of (1) more than one Party; (2) one Party and one or more other independent bodies; or (3) one or more other independent bodies. In those circumstances, New York law does not provide for as many ballot lines as a candidate has nominations, and an independent body may get only its "name and emblem" on another political party's ballot line, instead of a separate ballot line. § 7-104.5(c). Specifically, when a candidate has been nominated by more than one Party and an independent body, that candidate appears on the ballot lines for each such Party, but there is no separate line for the independent party nomination. Rather, that independent body's name and emblem are printed on one of the candidate's Party lines on the ballot. § 7-104.5(c). When a candidate is nominated by one Party and more than one independent body, the candidate appears on two ballot lines, one for the Party and one for the independent body of the candidate's choosing. § 7-104.5(d). The other nominating independent body's (or bodies') name(s) and emblem(s) appear on the ballot line designated by the candidate. § 7-104.5(d). Finally, when a candidate has no Party nominations but multiple independent body nominations, the candidate gets a single ballot line, and designates for the Board of Elections which independent body's ballot line it will be. Other independent body nominations appear by the nominating organization's name emblem on that ballot line. § 7-104.5(e).

The foregoing ballot form provisions do not apply to candidates for the offices of governor, state senator or member of assembly. Candidates for those offices get as many ballot lines as they get nominations, even if one or more of the nominations is by an independent body. *See* § 7-104.6.

Plaintiff Denis Dillon is the incumbent District Attorney of Nassau County and a candidate nominated for that office in the upcoming November 8, 2005 election. Dillon has been nominated by the Republican Party, the Conservative Party, and by plaintiff Integrity Party, an independent body. Thus, under the statutory scheme described above, Dillon's name will appear on the Republican Party line and on the Conservative Party line. In accordance with § 7-104.5(c), the Integrity Party name and emblem will appear in the row chosen by Dillon (which, I have been informed, is the Republican Party row). A copy of such a ballot, prepared at my direction, is attached. On the Republican Party line, the

box with Dillon's name also includes the word "Integrity" and the party's emblem, a check mark (#).

Dillon's opponent, Kathleen Rice, has been nominated by three Parties—the Democratic Party, the Independence Party and the Working Families Party. Thus, her name will appear on the ballot three times, in the row of each nominating Party.

Plaintiffs allege that the form of the ballot infringes upon their rights of freedom of speech and association, and that it unreasonably discriminates against them, thereby depriving them of equal protection of the law. Pursuant to 42 U.S.C. § 1983, they seek a declaration that N.Y. Elec. Law § 7-104.5(c) is unconstitutional, a preliminary injunction requiring a distinct line on the ballot listing Dillon as the Integrity Party candidate for District Attorney, and attorneys' fees.²

DISCUSSION

*3 To prevail on their motion for a preliminary injunction, plaintiffs must demonstrate two things. First, they must demonstrate that, absent a preliminary injunction, they are likely to suffer irreparable injury. Second, they must show that either (a) they are likely to succeed on the merits of their case, or (b) they have raised questions going to the merits that are sufficiently serious to render them fair grounds for litigation, and that a balancing of the hardships tips "decidedly toward the party requesting relief." *Green Party of New York State v. New York State Bd. of Elections*, 267 F.Supp.2d 342, 351 (E.D.N.Y.2003) (citing *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir.1996), *aff'd*, 389 F.3d 411 (2d Cir.2004)). Where, as here, a plaintiff seeks to enjoin "government action taken in the public interest pursuant to a statutory or regulatory scheme," a preliminary injunction will issue only upon a showing of the "more rigorous likelihood-of-success standard." *Id.* (quotation marks omitted). In considering the plaintiffs' likelihood of success in an action taken to enjoin government action, "regulations developed through reasoned democratic processes" are entitled to some deference. *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 348 (2d Cir.2003). Finally, because the injunction sought would alter rather than maintain the status quo, plaintiffs must show a "clear" or "substantial" likelihood of success. *Green Party*, 389 F.3d at 418; *see Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2d Cir.1998) (per curiam); *Jolly v. Coughlin*, 76 F.3d 468, 473-74 (2d Cir.1996).

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A. Irreparable Harm

The plaintiffs allege violations of their First and Fourteenth Amendment rights of expression and association and equal protection of the law. Because “[v]iolations of First Amendment rights are commonly considered irreparable injuries,” irreparable injury is presumed and the first prong of the test for a preliminary injunction is satisfied. *Green Party*, 389 F.3d at 418; *Bery*, 97 F.3d at 693-94; *see also Jolly*, 76 F.3d at 482.

B. Likelihood of Success on the Merits

1. The Legal Standards

All election laws necessarily implicate the First and Fourteenth Amendments. However, “it does not follow ... that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citations and quotation marks omitted). Rather,

[e]lection laws will invariably impose some burden upon individual voters. Each provision of a code, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends. Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

*4 *Id.* (citations and quotation marks omitted); *Wit v. Berman*, 306 F.3d 1256, 1259 (2d Cir.2002). Moreover, candidacy is not a fundamental right. *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (“we have held that the existence of barriers to a candidate’s access to the ballot does not of itself compel close scrutiny.” (citations and quotation marks omitted)); *Fulani v. Democratic Nat’l Comm.*, 2005

U.S. Dist. LEXIS 20400, at *10-11 (S.D.N.Y. Sept. 19, 2005). In reviewing claims like the ones raised here, a court should “consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

The “rigorousness” of this judicial inquiry depends, therefore, upon “the extent to which a challenged regulation burdens the First and Fourteenth Amendment rights.” *Burdick*, 504 U.S. at 434. Regulations that impose “severe restrictions” must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* (citations and quotations omitted). By contrast, “reasonable, nondiscriminatory restrictions,” may be justified by a showing of “important regulatory” state interests. *Id.* Finally, the restrictions in question must be considered as part of the state’s overall regulatory scheme governing elections. *Prestia v. O’Connor*, 178 F.3d 86, 88 (2d Cir.1999) (“In assessing the burden imposed by the challenged regulation, we view the regulation in light of the state’s overall election scheme.”).

Plaintiffs assert further that, by “prohibiting” Denis Dillon from appearing on a distinct ballot line for the Integrity Party, § 7-104.5(c) violates their Fourteenth Amendment equal protection rights. Plaintiffs do not challenge the constitutionality of the New York law that a political organization can only qualify as a Party by obtaining 50,000 votes for its candidate in the preceding gubernatorial election. Rather, they argue that the ballot form consequence flowing from that law, *i.e.*, the different ballot treatment mandated by § 7-104.5, deprives them of equal protection of the laws.

Although the Equal Protection Clause prohibits “invidious distinctions” that grant “established parties a decided advantage over any new parties struggling for existence,” *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968), the law nevertheless gives states “considerable leeway to enact legislation that may appear to affect similarly situated people differently.” *Clements*, 457 U.S. at 962-63. Not every “minor difference in the application of laws to different groups” is considered a constitutional violation. *Williams*, 393 U.S. at 30. A successful equal protection claim must be based on “impermissible differential treatment”; only those regulations that place essentially equal burdens on the right to vote and the right to associate are constitutionally invalid. *Wit*, 306 F.3d at

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1260; *see Clements*, 457 U.S. at 965-66 (“Not all ballot access restrictions require heightened equal protection scrutiny.”).

*5 In some settings, it is necessary to distinguish between, on the one hand, First Amendment speech and association claims and, on the other, Equal Protection claims. But where, as here, the challenged election laws place burdens only on minor political parties, these separate claims tend to coalesce. “A burden that falls unequally on new or small political parties ... impinges, by its very nature, on associational choices protected by the First Amendment.” *Anderson*, 460 U.S. at 793; *see also Green Party of the State of New York v. Weiner*, 216 F.Supp.2d 176, 188-89 (S.D.N.Y.2002) (noting that “neat distinctions” between First Amendment and Equal Protection challenges to state election laws that burden the rights of minor parties are “difficult” and perhaps “irrelevant” because “the ultimate analysis” requires the state to pass both tests). I find that in this context the balancing test is essentially the same for each claim. It weighs the severity of the burdens placed on the asserted rights by the challenged scheme, and then evaluates the interests of the state in the challenged provisions. *See Green Party*, 389 F.3d at 420 (because New York's voter registration scheme placed unequal burdens on independent bodies, the analyses of plaintiffs' First Amendment and equal protection claims “substantially overlap”).

2. The State's Asserted Interest

The New York State and Nassau County Boards of Elections argue that the ballot form prescribed by N.Y. Elec. Law § 7-104, and specifically the ballot line limitations it imposes on independent bodies, serves a legitimate state purpose. New York law requires that the entire ballot be exhibited on each voting machine, and there is a limited amount of space on the machine. In its effort to ensure an orderly and comprehensible ballot, New York law limits the number of ballot lines where candidates receive multiple cross-nominations. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (“States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”).

Employing unnecessary overstatement, the defendant New York State Board of Elections argues that it is impossible to guarantee that every candidate's name will appear on the ballot “an infinite number of times.” NYSBOE Letter dated October 12, 2005, at 2. Of course that is impossible, but that is not the question; the question is whether the law *requires* that the ballot contain a separate line for every minor party

that has nominated a candidate, no matter how many such nominations there are or how many other nominations that candidate has received.

Given the number of political organizations that qualify as Parties from time to time—there were eight during the period from 1998-2002, *see Green Party*, 267 F.Supp.2d at 346—the defendants' ballot space concerns are real. A form-of-ballot statute that accommodates those concerns by signaling in limited circumstances a minor party's cross-nomination via its name and emblem, rather than via a separate ballot line, is not unreasonable.

2. The Severity of the Burdens

*6 In arguing that New York's ballot form law is unconstitutional, plaintiffs rely on *Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305 (3d Cir.1999). The Pennsylvania statutes challenged in that case permitted major parties to cross-nominate candidates in office primaries for certain offices, but they foreclosed entirely cross-nomination by minor parties. Thus, once a candidate was nominated by a major party, minor parties could not nominate that candidate. The Third Circuit found that this prohibition violated the minority parties' right to equal protection of the laws. *Id.* at 318. The court also found that the Department of Elections had offered no countervailing interests to justify the burdens on the right to vote and the right to associate created by the statutory scheme. *Id.* at 315.

Plaintiffs here contend that *Reform Party* is “directly on point.” Plaintiff's Reply, at 4, 9. It is not remotely on point. Indeed, the differences between the cases place in clear relief the greatly diminished burden New York law places on minor parties.

New York does not ban cross-nominations by minor parties (*i.e.*, independent bodies) at all. Independent bodies, like Parties, can cross-nominate, and the cross-nominations will *always* be reflected on the ballot. If the Integrity Party nominates a candidate no other political party has nominated, it will get its own ballot line. If the Integrity Party cross-nominates a candidate whose only other nomination is by a Party, the Integrity Party will have its own ballot line. Even if the Integrity Party cross-nominates a candidate who has received other independent body nominations, the Integrity Party may still get its own ballot line, provided the candidate so chooses. It is true that, in some circumstances, including the upcoming election, the Integrity Party nomination is

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signified only by its name and emblem on another political party's ballot line, but even that diminution in ballot prominence pales in comparison to the outright ban on cross-nominations at issue in *Reform Party*.

It is true, as the Integrity Party points out, that when an Integrity Party nomination appears on the ballot only by its name and emblem on another political party's line, it is not possible to separately count the votes that were cast for that candidate as the Integrity Party nominee. But that does not, as the Integrity Party argues, "make [it] virtually impossible for the party to ever achieve 50,000 votes in a gubernatorial election," Johnson Aff. ¶ 9, thereby achieving Party status. On the record before me, that argument is at best a non sequitur. If and when the Integrity Party cross-nominates a candidate for the office of governor, it will get its own ballot line no matter how many Parties or other independent bodies nominate the same candidate. Plaintiff has adduced no evidence that the inability to disaggregate the votes cast in prior elections for candidates cross-nominated by the Integrity Party will impair its ability to get 50,000 votes in a gubernatorial election.³

*7 In any event, the Integrity Party's interest in expressing its support for its cross-nominated candidates through a separate vote tally is overstated. As the Supreme Court observed in *Timmons*, "[b]allots serve primarily to elect candidates, not as forums for political expression." 520 U.S. at 363.

The Integrity Party further contends that its name and emblem on the Republican Party line in the upcoming election for District Attorney will "invariably" cause voters to believe either that a new "Republican-Integrity Party" has been created or that the Integrity Party emblem "is a deceptive trick" that will "inevitably create resentment of the" Republican Party. Johnson Aff. ¶ 8. These claims are frivolous. First, it seems to me that if the latter argument had any weight, the Republican Party would be the first to complain. That it has not confirms my instinct that there is little danger that voters will resent the Republican Party because another political party's name and emblem will appear in Dillon's box on the ballot. Second, I disagree with the claim that voters will "invariably" believe upon seeing the ballot that a new political party has been born. If Dillon's cross-nomination had been by the Green Party, or the Liberal Party, the appearance of those independent bodies' names and emblems on the Republican line would not likely produce an argument that the voters would believe a new Republican-Green Party, or Republican-Liberal Party had come into being. In any event, even with respect to the

Integrity Party, I see no logic to the argument. Voters will, in my opinion, understand from the form of the ballot that Dillon, the Republican Party's nominee, has also received the nomination of the Integrity Party.

The Integrity Party also argues that its name-and-emblem ballot appearance will "inevitably lead to voter confusion" because voters will "think that the Integrity Party either stands for nothing, or will stand for anything." Johnson Aff. ¶ 7. But if those dangers exist, they inhere in cross-nominating other political parties' candidates, not in the form of the ballot. And the Integrity Party is free to avoid them by selecting candidates that have not been nominated by multiple Parties or by one or more other independent bodies.

It is true that Section 7-104.5(c) could produce some anomalous results. For example, if the Integrity Party had nominated a candidate for another office in Nassau County and thereby obtained a separate ballot line, the law would (according to the defendant Boards of Elections) require that the box in the District Attorney column be blank. That is, the Integrity Party's name and emblem would appear on the Republican Party's line for District Attorney *even if the Integrity Party had its own line*. I need not address that remorseless reading of the statute, and the absurd result it would produce, as the Integrity Party had not otherwise earned its own line on next week's ballot in the race in which Dillon is running.

*8 For the first time at oral argument on October 18, 2005, plaintiffs asserted that the ballot regulations impede their ability to recruit candidates for the Integrity Party nomination. At that time, I invited written submissions on this asserted injury. In subsequently-filed affidavits, plaintiffs submitted that only 10 of the 50 potential candidates approached by the Integrity Party accepted the offered nomination. From this, the Integrity Party concludes that the reason "potential candidates declined the Integrity Party nomination was invariably because they concluded that in the absence of a separate line for the Integrity Party, it was not worthwhile to expend resources on trying to obtain the necessary numbers of Integrity Party signatures on the designating petitions." Johnson Aff. ¶ 5. Notably, the premise of this assertion is that the other 40 candidates had already been (or were intending to be) cross-nominated either by two Parties or by one party and one other independent body, and so would not appear on a separate Integrity Party line on the ballot. A glance at the ballot, which lists a total of 45 candidates for all positions, underscores the improbability of this assertion.

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Nonetheless, even assuming the truth of plaintiffs' argument, I do not find it persuasive. It is conceivable that some potential candidates would be discouraged from accepting a minor party nomination by the ballot form prescribed by § 7-104(c). But only those candidates intending to secure the nomination of at least two Parties, or one Party as well as at least one other independent body, would be put off. Plaintiffs have failed to persuade me that such candidates exist in sufficient numbers to constitute a significant burden flowing from § 7-104.5(c).

Finally, according to Dillon, "there are people who would vote for [him] as the candidate of the Integrity Party, but who will not vote for [him] as the candidate of the Republican Party or the Conservative Party." Dillon Aff. ¶ 9. I accept that statement as true, but it fails to explain why such people will not cast their vote for Dillon in the upcoming election. Whether the Integrity Party gets a separate ballot line or not, the voters will know that Dillon has been nominated by three political parties (Republican, Conservative, Integrity). Those who would vote for him only because he has the Integrity

Party nomination will be permitted to do so. Those who would bolt because he is also the Republican (or Conservative) Party nominee would presumably do so no matter what the ballot looks like.

CONCLUSION

In sum, I find that the state's asserted interest in reducing the risk of voter confusion outweighs the minor burden § 7-104(c) places on independent bodies and their candidates. Accordingly, plaintiffs' motion for a preliminary injunction is denied.

So Ordered.

All Citations

Not Reported in F.Supp.2d, 2005 WL 2847465

Footnotes

- 1 In a telephone conference on October 28, 2005, the parties were informed that the motion was denied and that this opinion would be filed today.
- 2 Kathleen Rice moved to intervene in this matter pursuant to Fed.R.Civ.P. 24(a)(2). Because I find that Rice is "so situated that the disposition of the action may as a practical matter impair or impede [her] ability to protect" her interest in this action, her motion to intervene is granted. Concurrently, Rice moved to dismiss the instant action pursuant to Fed.R.Civ.P. 12(b)(7) for failure to join an indispensable party. Since Rice argues that she herself is the indispensable party, and she is now a party as a result of her successful intervention, I deny her request for dismissal pursuant to Rule 12(b)(7). In addition, I disagree with Rice's contention that Justice Department preclearance is necessary for any change in the structure of the Nassau County ballot under 42 U.S.C.1973(c). Her motion to dismiss on that ground is therefore denied as well. Rice also argues that plaintiffs' claims for equitable relief are barred by the doctrine of laches. I disagree. The plaintiffs in this case did not inexcusably delay filing this action; it was appropriate for plaintiffs to wait until after a challenge to the nominating petitions was denied before filing this action. Rice's reliance on *Tuitt v. Smith* in this regard is misplaced. That case was replete with factual questions that made it "unlikely [the] court could fully resolve the disputed issues before the primary election itself," and even more unlikely that the court's resolution, "if it favored plaintiffs, would leave the Board time to alter the ballot machines." 1992 U.S. Dist. LEXIS 13517, at *8 (S.D.N.Y. Sept. 10, 1992). There is no similar knot of factual issues in this case.
- 3 Moreover, one can conceive that the appearance of the Integrity Party's name and emblem on a Party line for a popular candidate might even *enhance* the Integrity Party's ability to garner votes on its separate line in a subsequent gubernatorial election.

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