

United States of America  
First Circuit Court of Appeals

No. 21-1177

ROBERT CUSHING, &a.  
individually and in his capacity as Minority Leader of the  
New Hampshire House of Representatives;  
(plaintiffs-appellants),

v.

SHERMAN PACKARD,  
in his official capacity as Speaker of the  
New Hampshire House of Representatives  
(defendant/appellee).

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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF NEW HAMPSHIRE

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BRIEF OF *AMICI CURIAE* (supporting the position of the appellants)  
National Disability Rights Network,  
New Hampshire Disability Rights  
Center, and ABLE-New Hampshire

July 23, 2021

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## STATEMENT OF INTEREST

On April 8, 2021, a three-judge panel of this court issued its decision in this matter. On June 1, 2021, a majority of the qualified active justices voted to hear this case *en banc*, and also welcomed *amici* to file briefs. By motion filed herewith, *amici* National Disability Rights Network, Disability Rights Center - New Hampshire, and ABLE-New Hampshire, seek leave to file this brief.<sup>1</sup>

### **I. National Disability Rights Network**

The National Disability Rights Network (NDRN), based in Washington, DC, is a nonprofit membership organization established in 1980 to protect the rights of individuals with disabilities. Its network includes agencies in every state and United States territory, working to provide legal protection and advocacy services for people with disabilities. Its mission is to promote the integrity and capacity of the federally mandated Protection and Advocacy (P&A) Systems and Client Assistance Programs (CAP), which it has expanded from a narrow initial focus on institutional care provided to people with intellectual disabilities in facilities, to include advocacy services for all people with disabilities no matter the type or nature of their disability.

NDRN advocates for the enactment and vigorous enforcement of laws protecting civil and human rights of people with disabilities. It seeks to guard against abuse, and ensure access and accountability in health care, education, employment, housing, transportation, voting, and within the

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<sup>1</sup>The New Hampshire Council on Developmental Disabilities is a state agency and cannot take part in this litigation, but has expressed its interest in being referenced as a potential resource.

juvenile and criminal justice systems. NDRN has a vision for society where people with disabilities have equality of opportunity and are able to participate fully in community life by exercising choice and self-determination.

NDRN's board of directors, members, and staff understand that the rights implicated in this case are solidly grounded in the Federal and New Hampshire Constitutions, and that given the history of pervasive discrimination against people with disabilities, the Americans with Disabilities Act (ADA) is an appropriate and constitutional means of requiring that facilities and voting processes used by the New Hampshire House accommodate people with disabilities.

## **II. Disability Rights Center - New Hampshire**

The Disability Rights Center - New Hampshire, Inc. (DRC-NH) is a New Hampshire nonprofit organization established in 1978, authorized by federal statute "to pursue legal, administrative and other appropriate remedies" on behalf of individuals with disabilities, independent from state government or service providers. Its mission is to eliminate barriers existing in New Hampshire to the full and equal enjoyment of civil and other legal rights by people with disabilities.

DRC-NH provides information, referral, advice, legal representation and advocacy to individuals with disabilities on a wide range of disability-related problems including special education, accessibility, employment discrimination, home and community-based services, and Medicaid. It also works on systemic issues via litigation, investigations, monitoring and other policy change efforts, which are all focused on improving the lives of people with disabilities across New



Hampshire.

DRC-NH serves over 1,000 New Hampshire residents annually, and has taken on high-profile cases related to voting rights, incarceration, the rights of children in the foster care system, access to services under Medicaid, and mental health treatment facilities. DRC-NH frequently represents individuals who have been denied reasonable accommodations in their workplaces, and employs a talented team of legal professionals with expert knowledge on the ADA and related legislation.

DRC-NH's board of directors, members, and staff understand that the rights implicated in this case are solidly grounded in the Federal and New Hampshire Constitutions, and that given the history of pervasive discrimination against people with disabilities, the ADA is an appropriate and constitutional means of requiring that facilities and voting processes used by the New Hampshire House accommodate people with disabilities.

### **III. ABLE-New Hampshire**

ABLE-NH (Advocates Building Lasting Equality in New Hampshire) is an independent, private non-profit organization, founded in 2009 and based in Concord, New Hampshire, whose mission is to advocate for the civil and human rights of children and adults with disabilities, promote full participation in society by improving systems of support, connecting families, inspiring communities, and influencing public policy.

ABLE-NH seeks to educate neighbors, family and friends, and public officials year-round, as well as during election cycles and budget seasons. It is committed to building strong coalitions to create a broad

powerful base, ensuring that citizens of all abilities have adequate supports and services they need, and protecting the state and federal systems which support citizens' ability to remain in their homes and communities. ABLE-NH seeks to end all Medicaid waiting lists for individuals with developmental disabilities, and ensure that people who need assistance have access to the high quality services and supports they need to maintain their health and safety, and live in their home communities with freedom and dignity.

ABLE-NH's board of directors, members, and staff understand that the rights implicated in this case are solidly grounded in the Federal and New Hampshire Constitutions, and that given the history of pervasive discrimination against people with disabilities, the ADA is an appropriate and constitutional means of requiring that facilities and voting processes used by the New Hampshire House accommodate people with disabilities.

## ARGUMENT

*Amici* submit this brief to support lawmakers and others with disabilities, seeking reasonable accommodations pursuant to the Americans with Disabilities Act (ADA). The case involves New Hampshire legislators with disabilities who are at high risk during the COVID-19 pandemic, and who seek accommodations to maintain their ability to participate in legislative business remotely.

These lawmakers are not alone in these accommodation requests during this pandemic. Many people with disabilities hold office in other states and have sought similar accommodations. *See e.g. Vetterkind, Paralyzed Lawmaker Jimmy Anderson Renews Request for Assembly Accommodations*, WISCONSIN STATE JOURNAL (May 5, 2021)<sup>2</sup>; Birkeland, *Lawmaker in Wheelchair Puts Capitol Access in Spotlight*, ASSOCIATED PRESS (Nov. 28, 2020).<sup>3</sup> Unlike the New Hampshire legislature, the Colorado legislature spent around \$30,000 to modify Representative David Ortiz's desk and committee room doors so that they were accessible to him. Representative Ortiz explained that he sought accommodations at the Colorado Capitol to "mak[e] sure that entire building is truly the people's house for anybody living with a disability." *Id.*

The question presented in this appeal is whether the New Hampshire legislature has immunity from an ADA suit. *Amici* will not duplicate the parties' briefs. Instead, we seek to provide information for

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<sup>2</sup>Available at <[https://madison.com/wsj/news/local/govt-and-politics/paralyzed-lawmaker-jimmy-anderson-renews-request-for-assembly-accommodations/article\\_44a0070f-3407-5b13-8a87-ca2d24d16427.html](https://madison.com/wsj/news/local/govt-and-politics/paralyzed-lawmaker-jimmy-anderson-renews-request-for-assembly-accommodations/article_44a0070f-3407-5b13-8a87-ca2d24d16427.html)>.

<sup>3</sup>Available at <<https://apnews.com/article/accidents-veterans-colorado-denver-337b7e8017af81d202bda7a013d1d551>>.

this court's consideration; namely, the democratic role of a diverse electorate to effectuate their duties and to represent the interests of their constituents.

The disability community has long had a motto: "Nothing About Us Without Us." This applies even at the highest levels of state government.

Each of the New Hampshire legislators identified in this brief were voted into office by their constituents, including those constituents who also have disabilities. Effectively denying these lawmakers access to the duties of their office raises critical concerns regarding the 30-year-old protections afforded to all Americans under the ADA, and democracy itself.

**I. Denying Reasonable Accommodations for Legislators with Disabilities Prevents Exercise of Their Rights as Legislators, and Impedes Their Duties to Constituents**

Under the federal constitution, the New Hampshire constitution, and federal statutory law regarding discrimination against those with disabilities, the New Hampshire legislature is unlawfully denying reasonable accommodations to legislators with disabilities, thus preventing the exercise of their rights as legislators, and impeding their duties to their constituents.

**A. Legislators Have Constitutional Rights and Duties to Effectively Represent Their Constituents**

Under federal law, individual legislators hold their seat “as trustee for [their] constituents.” *Raines v. Byrd*, 521 U.S. 811, 821 (1997). As such, individual state legislators “have a plain, direct and adequate interest in maintaining the effectiveness of their votes.” *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

[T]he act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment. This is especially true when the agency members are elected officials. There can be no more definite expression of opinion than by voting on a controversial public issue.

*Miller v. Town of Hull, Mass.*, 878 F.2d 523, 532 (1st Cir. 1989).

Accordingly, state legislators have a “right to vote on legislation” and an interest in preventing “a diminution or deprivation of the legislator’s ... power or authority.” *Robinson Township v. Commonwealth*, 84 A.3d 1054, 1055 (Pa. 2014).

Legislators’ right to vote enables them “to consummate their duty to their constituents.” *Miller v. Town of Hull*, 878 F.2d at 533.

Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.

*Bond v. Floyd*, 385 U.S. 116, 136-37 (1966). “When a legislator cannot appear[,] the people whom the legislator represents lose their voice in

debate and vote.” *State v. Beno*, 341 N.W.2d 668, 676 (Wis. 1984).

Candidates for public office are treated commensurately. “The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.” *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

Here, without the provision of reasonable accommodations or modifications to the legislature’s procedures, lawmakers with disabilities are being effectively denied their ability to appear, making them unable to exercise their rights and denying them the opportunity to fulfill their duties to their constituents.

Regarding its legislature, the New Hampshire constitution provides:

The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer.

N.H. CONST. pt. I, art. 32.

As to voting rights, the New Hampshire constitution provides that “[e]very inhabitant of the state, having the proper qualifications, has an equal right to be elected into office.” N.H. CONST. pt. I, art. 11. The same article also provides that “[v]oting registration and polling places shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote.” *Id.* Pursuant to article 11, the New Hampshire Supreme Court has held that the rights of voters, legislators, and candidates, are coexistent:

[T]he right to vote and the equal right to be elected are “closely connected.” *Opinion of the Justices*, 83 N.H. 589, 592-93 (1927). Both of these rights have been linked in our constitution in Part I, Article 11 since 1784. *See* N.H. CONST. pt. I, art. 11; *see also Wilkes v. Jackson*, 101 N.H. 420, 422 (1958). Other courts have recognized the close connection between the rights of candidates and the right to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (stating, “the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters”); *Gould [v. Grubb]*, 122 Cal.Rptr. 377 [(1975)], (concluding, “any procedure which allocates [an] advantageous position[] to a particular class of candidates inevitably discriminates against voters supporting all other candidates”).

*Akins v. Secretary of State*, 154 N.H. 67, 71 (2006) (some citation details omitted); *see also* N.H. CONST. pt. I, art. 8 (“All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them.”).

The New Hampshire legislature’s failure to accommodate legislators with disabilities violates the federal and state constitutional rights of both legislators and their constituents. It also discriminates against candidates and members of the public with disabilities who may be put at heightened risk of infection due to complications related to their own disabilities.

## **B. Federal Law Requires Reasonable Accommodations or Modifications for Persons With Disabilities**

Enacted in 1990, among the ADA's purposes was to address "discrimination against individuals with disabilities ... in such critical areas as ... voting, and access to public services." 42 U.S.C. § 12101(a)(3). This includes the "failure to make modifications to existing facilities and practices, ... [or] relegation to lesser services." 42 U.S.C. § 12101(a)(5). Congress's intent was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, ... [and] to ensure that the Federal Government plays a central role in enforcing the standards established" in the ADA. 42 U.S.C. § 12101(b).

"Failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion," and therefore "Congress required the States to take reasonable measures to remove ... barriers to accessibility." *Tennessee v. Lane*, 541 U.S. 509, 511 (2004).

"Disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Disability is "construed in favor of broad coverage," 42 U.S.C. § 12102(4)(A), and includes not only physical impairments, but also diseases that compromise a person's immune system. *See Bragdon v. Abbott*, 524 U.S. 624 (1998). New Hampshire legislators who have been denied remote voting, in their efforts to avoid COVID-19 infection, are disabled for purposes of the ADA.

The ADA covers any "public entity," including "any State or local government" and "any department, agency, special purpose district, or



other instrumentality of a State ... or local government.” 42 U.S.C. § 12131. “Public entity” is construed broadly, *Pennsylvania Dep’t of Correction. v. Yeskey*, 524 U.S. 206, 212 (1998), and includes, for instance, access to state courthouses and participation in state court proceedings. *Tennessee v. Lane*, 541 U.S. at 509; *Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1 (1st Cir. 2004). The New Hampshire legislature is a covered public entity which must comply with the ADA.

The ADA requires that persons with disabilities be provided “reasonable accommodation” of their disability. *Hargrave v. Vermont*, 340 F.3d 27, 34-35 (2d Cir. 2003) (“To prove a violation of Title II, a party must ... establish: (1) that he is a ‘qualified individual’ with a disability; (2) that he was excluded from participation in a public entity’s services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to his disability.”); *Mary Jo C. v. New York State & Local Retirement System*, 707 F.3d 144, 153 (2d Cir. 2013) (ADA mandates that “covered entities make reasonable accommodations in order to provide qualified individuals with an equal opportunity ... to participate in programs.”) (quotations omitted); *see also* 29 U.S.C. § 794 (“No ... individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in ... any program or activity [which] means all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government.”).

“A modification is reasonable if it is reasonable on its face or used ordinarily ... and will not cause undue hardship.” *National Federation of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016) (quotations

omitted).

While states may have once been reticent of telecommuting technology as an accommodation, *see e.g., Kvorjak v. Maine*, 259 F.3d 48 (1st Cir. 2001), that has been largely abrogated by the pandemic, and such technology was in fact implemented during the pandemic by the New Hampshire House of Representatives for some meetings and votes.

## **II. Legislators, Candidates, and Members of the Public Have Been Prevented From Participating in the Democratic Process by the New Hampshire Legislature's Refusal to Accommodate Disabilities**

*Amici* can point to numerous situations in which legislators, candidates for public office, and citizens participating in legislative proceedings have experienced difficulties as a result of the New Hampshire House of Representatives' failure to provide reasonable accommodations for their disabilities. In some cases these difficulties have prevented participation. The anecdotes reported herein are not exclusive, and are not necessarily part of the record, but merely represent a sampling of such situations of which the *amici* are aware, and for which *amici* have been given permission to share.

### **A. Legislators With Disabilities Were Prevented From Exercising Rights and Duties**

Several legislators with disabilities have been prevented from exercising their constitutional duties as a result of the House Speaker's refusal to accommodate their disabilities. It is apparent that in most cases, remote House session voting, which was implemented during the pandemic for House committee votes, would rectify the violations.

#### **1. House Minority Leader Representative Robert Cushing**

Plaintiff Robert Cushing of Hampton, New Hampshire, is 68 years old. He was first elected to the New Hampshire House of Representatives in 1996, and is now the Democratic Minority Leader.

Rep. Cushing was diagnosed with Stage 4 prostate cancer in July 2020, for which he is currently treated with medicines that leave him with a compromised immune system. This means that should he come into contact with infectious diseases, his body will be unlikely to produce

antibodies that allow for recovery. To accommodate this, Rep. Cushing left his home only a few times during the pandemic, and eschewed places that would place him into contact with others. Recently, Rep. Cushing was hospitalized with a serious infection stemming from his chemotherapy treatment, leaving him even more vulnerable.

Rep. Cushing made known his medical condition to the Speaker, and in his role as Minority Leader, requested that remote attendance and voting be authorized for himself and all members of the House.

As he had been elected by House Democrats to be their leader, Rep. Cushing reluctantly attended the session of the House on January 6, 2021, despite the obvious risks to his health. This required the day-long assistance of another person. The gathering resulted in exposure from fellow legislators who refused to follow COVID-19 safety protocols such as masks and social distancing.

Rep. Cushing renewed his request to the Speaker to accommodate such disabilities among his caucus by allowing remote attendance, which was denied.

## **2. Deputy Minority Leader Representative David Cote**

Plaintiff David Cote, of Nashua, New Hampshire, a retired legal researcher, is 60 years old. He was first elected to the House in 1982, and is now the Deputy Minority Leader.

Rep. Cote has had cerebral palsy from birth, so wears leg braces for stability and uses crutches to walk. He is unable to drive. Rep. Cote also suffers from epilepsy and high blood pressure, which restricts walking and manual tasks. Prolonged sitting, such as in a car, is both uncomfortable and presents risk of blood clots. In 2018 Rep. Cote had a heart attack

which necessitated implantation of four stents, and was diagnosed with coronary artery disease, which puts him at greater than normal risk of severe outcomes if infected with a virus. To accommodate these conditions, Rep. Cote left his home only a few times during the pandemic, and eschewed places that would place him into contact with others.

The House voting sessions throughout the Winter and Spring did not accommodate Rep. Cote's disabilities. As a result, he Rep. Cote was unable to attend sessions. He was therefore prevented from his constitutional duties to vote on his constituents' behalf.

### **3. Representative Paul Berch**

Plaintiff Paul Berch, of Westmoreland, New Hampshire, a retired lawyer, is 74 years old, and was first elected in 2012. He suffers from a critical kidney disease and is scheduled to receive a kidney transplant in September 2021. He is starting dialysis and taking an anti-rejection drug that has been shown to put vaccinated people at higher risk for COVID-19. Rep. Berch suffered a serious heart attack and had triple by-pass graft surgery, and also has coronary heart disease.

Any exposure to COVID-19 represents a direct and imminent threat to his life, and would likely remove him as an organ transplant candidate. Rep. Berch was forced to miss several legislative sessions at which important votes were taken. He resumed attendance beginning in April 2021, at great personal risk, because he had no alternative way to vote on his constituents' behalf.

#### **4. Representative Charlotte DiLorenzo**

Plaintiff Charlotte DiLorenzo, of Newmarket, New Hampshire, is 71 years old, and was first elected in 2016. She has been diagnosed with coronary artery disease and Type 2 diabetes, and had an ischemic stroke in 2013, which resulted in limited mobility. Rep. DiLorenzo also has asthma, a chronic respiratory disease. She requested an accommodation to attend sessions remotely since all of her conditions make any exposure to COVID-19 a direct and imminent threat to her life and that of her husband, who is 79 years old and suffers from a chronic heart condition.

Rep. DiLorenzo attended the session on January 6, 2021, but due to the car fumes produced by the vast number of vehicles in the parking lot which constituted the session, she suffered an asthma attack and had to leave the session early. Based on her voting record, it appears that Rep. DiLorenzo was in attendance at all House sessions despite the obvious risk to her health.

#### **5. Representative Diane Langley**

Plaintiff Diane Langley, of Manchester, New Hampshire, the former Senior Director of the Office of Quality Assurance and Improvement in the New Hampshire Department of Health and Human Services, is 72 years old, and was first elected in 2018. She suffers from osteoarthritis and rheumatoid arthritis, cardiac arrest, cellulitis, and deep vein thrombosis. She requires the use of a power wheelchair. In addition, she suffers from heart disease and has a compromised immune system that is further complicated by her prescribed medications. During the last five years, she has been hospitalized once annually, with stays of between 3 to 12 weeks each, as a result of these complications from her medical

conditions, most recently in September 2020.

Due to her multiple medical conditions and their complications, exposure to COVID-19 is a direct and imminent threat to Rep. Langley's life. She requested an accommodation to attend the session on December 2, 2020, but was offered only a parking spot. Knowing from previous sessions that a large contingent of attendees would not be wearing masks or observing social distancing protocols, Rep. Langley was forced to miss several legislative sessions at which important votes were taken. She resumed attendance beginning in April 2021, at great personal risk, because she had no alternative way to vote on her constituents' behalf.

## **6. Representative Katherine Rogers**

Plaintiff Katherine Rogers, of Concord, New Hampshire, a retired attorney, is 65 years old, and was first elected to the House in 2012. She suffers from degenerative joint disease and requires adaptive aids to walk – a cane, a walker, or a wheelchair depending on how far she is going. Sitting for extended periods causes extreme pain, for which she has been prescribed medication, although she cannot drive after taking it. Rep. Rogers has recently been diagnosed with uterine cancer and underwent surgery in July 2021 to remove most of it. She will be taking chemotherapy medication that will leave her severely immuno-compromised.

Rep. Rogers requested to attend the session of the House on January 6, 2021 on a remote basis, but was denied. She subsequently engaged a friend to drive with her, creating danger for both, as they sat together in a small unventilated space for 10 hours. The session was very painful, despite a dose of her prescribed medication, and she felt on the

verge of tears throughout the day. After attending that session, she saw her doctor, and now expects she will increase permanently her use of a wheelchair as a result.

## **7. Representative Kendall Snow**

Plaintiff Kendall Snow, of Manchester, New Hampshire, a retired social worker, is 81 years old, and was first elected to the House in 2014. He lives at a continuing care senior citizen living facility – the type of facility which suffered high COVID-19 mortality. During the pandemic, his home forbid residents from attending gatherings of greater than 10, and warned of severe consequences if the rules were violated.

Rep. Snow is afflicted with Guillain-Barre Syndrome, which causes temporary paralysis from the chest down. After hospitalization, residual symptoms include lung vulnerability, which put him at increased risk of fatality from COVID-19. Accordingly, Rep. Snow was forced to miss several legislative sessions at which important votes were taken. He resumed attendance beginning in April 2021, at great personal risk, because he had no alternative way to vote on his constituents' behalf.

### **B. New Hampshire Citizens' Accommodation Experiences During the Pandemic**

New Hampshire citizens with disabilities have also been affected by the legislature's uneven implementation of accommodations during the pandemic.

#### **1. Karin Cevalasco**

Karin Cevalasco, 45, of Milford, New Hampshire, has been hospitalized four times over the past nine months, and is now permanently disabled. As a result, she cannot drive the hour from her



home to the New Hampshire state capitol. In February 2021, Cevasco registered her support for legislative initiatives on her phone from her hospital bed, illustrating her commitment to ensuring her perspective was heard by the House. Remote access allowed Cevasco to continue engaging with the legislative process.

## **2. Jane Doe**

Jane Doe, a middle-aged New Hampshire resident wishing to remain anonymous, is employed by the State of New Hampshire. She has been put at risk in her role due to underlying health conditions that result in a compromised immune system. Doe was informed that if she had items on the agenda to bring forth at meetings for her job, attendance would need to be in-person, or her ideas would not be considered. The space where such meetings are held is not large enough to accommodate appropriate social distancing, and therefore Doe has been unable to attend.

## **3. Nikki Fordey**

Nikki Fordey, 34, recently a long-time resident of Litchfield, New Hampshire, is a social worker holding masters degrees in both social work and public policy. She has chronic pain from a genetic connective tissue disorder known as hypermobile Ehlers-Danlos syndrome. Given her intellect and background, she has engaged the legislature in how to accommodate complex challenges.

Due to her chronic pain, in-person participation in the legislature is not always possible or safe. A remote option allows her to testify in the current legislative session without posing a risk to her health.

#### **4. Nancy Glynn**

Nancy Glynn, 36, and her 9-year old son, are residents of Sutton, New Hampshire. Glynn is an activist who regularly attends and testifies at House meetings, and her son is eager to as well. The child is deaf, and while he wears bilateral hearing aids, many rooms in the State House are large and acoustically imperfect, making it impossible for him to understand what is being said. As noted below, the process to request live captioning at the Statehouse is complicated and rarely actuated. Remote access, which is a key factor in encouraging young people to become civically engaged and ultimately sustain our democracy, has allowed Nancy and her son to participate in the legislative process using assistive devices at their home, which are compatible with the child's hearing aids.

#### **5. Juliana Good**

Juliana Good, 21, of Concord, New Hampshire, holds a master's degree in public policy. Good is a communication technology specialist at Northeast Deaf and Hard of Hearing Services, and is an advocate for disability rights. Good is deaf, and relies on captions or American Sign Language interpreters to access House proceedings.

When in-person attendance was the only option for committee hearings, Good was often unable to participate due to the lack of adaptive language access. This is because the lead time for requesting an ASL interpreter is longer than the time between when proceedings are scheduled and when they occur. Consequently, Good would often arrange and pay for interpreters. Remote access to legislative committee hearings has allowed Good to use free services for language access, such as relay conference captioning provided by services which allow deaf people to

dial an interpreter into a hearing.

More than 6 percent of New Hampshire residents have a significant hearing loss or are fully deaf. Yet they are prevented from participating in the legislative process because of the lack of language access availability, which could be remedied by allowing remote access as a permanent option.

#### **6. MK Kilcoyne**

MK Kilcoyne, 29, of Dover, New Hampshire, is a community organizer with Open Democracy. In 2015, Kilcoyne was diagnosed with Stage 3 hodgkin's lymphoma. One of the required treatments was a stem cell transplant that greatly reduced immune system function. While Kilcoyne is currently in remission from cancer, a compromised immune system has meant that the ability to testify this legislative session was only because remote access was offered.

#### **7. Sara Smith**

Sara Smith, 68, of Pembroke, New Hampshire, is a long-time hearing aid user with bilateral moderate hearing loss. Smith is unable to hear proceedings in the gallery of the House chamber due to the echoey nature of the room. Smith found the process to request accommodations very difficult, but with the ability to control volume at remote proceedings, she has been able to more easily participate.

#### **8. Leah Stagnone**

Leah Stagnone, 25, of Litchfield, New Hampshire, works for ABLE-New Hampshire. She lives with several chronic health conditions that significantly impact her life, and experiences a variety of symptoms that affect her in various ways including chronic pain, fatigue, dizziness,

difficulty walking long distances or standing for long periods, and a compromised immune system.

While she is now vaccinated against COVID-19, her doctors instructed her to remain cautious, as her conditions are exacerbated by even relatively minor illnesses such as the flu, from which it takes weeks or months for her to fully recover.

In addition, nearly every time Stagnone has been to the New Hampshire Statehouse or Legislative Office Building, she has been unable to find available accessible street parking. This causes her to walk further than she is able without severe pain and commensurate flare-ups of her conditions; in hot weather, it poses a risk of passing out. The dearth of disabled parking spots in the vicinity of the legislative buildings does not meet demand from both disabled members of the public and New Hampshire's large legislature, which consists of many elderly and disabled people.

The opportunity to testify remotely on behalf of ABLE-New Hampshire this past legislative session played an important role in allowing Stagnone to fulfill the duties of her job.

## **9. Ash Willow**

Ash Willow, 30, of Dover, New Hampshire, is a business owner. Willow lives with several chronic illnesses that lead to severe pain, limited mobility, and a compromised immune system, which sometimes prevents walking and driving. Despite years of experience in community organizing, Willow has often been unable to participate in the legislative process due to the lack of accessibility accommodations, and the prevalence of unmasked and unvaccinated participants.

## **CONCLUSION**

For over three decades, people with disabilities have been guaranteed the right to equal participation in all aspects of community living, including the democratic bedrock principles of voting and taking part in state government. Yet, New Hampshire lawmakers with disabilities and their constituents have been discriminated against by the legislature's refusal to comply with well-established federal law and related rights to receive reasonable accommodations.

Participation in the democratic process is constitutionally guaranteed to all citizens, all legislators, and all their constituents.

While the COVID-19 pandemic may be subsiding, there is the possibility that the pandemic will surge again, that vaccines do not protect some immuno-compromising disabilities, that new variants will reduce the efficacy of vaccines, or that other infectious diseases arise. These could have disastrous effects on the health of legislators who have pre-existing conditions which are triggered or exacerbated by continuing or future public health dangers. This issue thus has not gone away, and it is imperative that remote access be allowed as a reasonable accommodation going forward. Failure to provide reasonable accommodations violates disabled legislators' rights, and the rights of their constituents.

It also perpetuates the bias Congress sought to eradicate in enacting the ADA. When signing the ADA into law in July 1990, President George H.W. Bush stated:

[N]ow I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.

*Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act* (July 26, 1990).<sup>4</sup>

This court should recognize the violation of rights caused by the lack of reasonable accommodations, and should uphold the judgment of the appellate panel.

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<sup>4</sup>Available at <[https://www.ada.gov/ghw\\_bush\\_ada\\_remarks.html](https://www.ada.gov/ghw_bush_ada_remarks.html)>.

Respectfully submitted,  
National Disability Rights Network,  
New Hampshire Disability Rights Center-  
NH, Inc., and ABLE-New Hampshire,

By their Attorney,  
Law Office of Joshua L. Gordon

/s/

Dated: July 23, 2021

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### **CERTIFICATIONS**

I hereby certify that on July 23, 2021, I am forwarding via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to Paul J. Twomey, Esq.; Israel F. Piedra, Esq.; William Christie, Esq.; Amy Spencer, Esq.; Daniel Will, Esq.; Anthony J. Galdieri, Esq.; Samuel R. V. Garland, Esq.; Jennifer Ramsey, Esq.; James S. Cianci, Esq.; Thomas E. Chandler, Esq.; and Katherine Elmlinger Lamm, Esq.

I hereby certify, pursuant to F.R.A.P 29(a)(4)(E) that the *amici* parties' counsel authored this brief in whole, that no party nor party's counsel contributed money for the preparation or submission of this brief, and that no person other than the *amici curiae*, their members, or their counsel, contributed money for the preparation or submission of this brief.

/s/

Dated: July 23, 2021

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Joshua L. Gordon, Esq.