

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

Rep. Robert “Renny” Cushing, individually and
in his capacity as Minority Leader of the NH
House of Representatives

Rep. David Cote

Rep. Kendall Snow

Rep. Katherine Rogers

Rep. Paul Berch

Rep. Diane Langley

Rep. Charlotte DiLorenzo

New Hampshire Democratic Party

V

Rep Sherman Packard

Speaker of the NH House of Representatives

(in his official capacity only)

Civil Action No:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Robert “Renny” Cushing, David Cote, Kenneth Snow, Katherine Rogers, Paul Berch, Diane Langley, Charlotte DiLorenzo (collectively, “Individual Plaintiffs”), Robert “Renny” Cushing, in his capacity as Minority Leader of the NH House of Representative, as well as the New Hampshire Democratic Party (“NHPD”) complain against Sherman Packard (“Speaker”) (“Defendant”) for violations of the Section of 504 of Rehabilitation Act (29 U.S.C. § 794) (“Section 504”), Title II of Americans with Disabilities Act (42 U.S.C. §§ 12131 - 12134) (“Title II” or “ADA”), the Fourteenth Amendment to the United States Constitution, and Part One Article 11 of the New Hampshire Constitution.

2. Each of Individual Plaintiffs was elected as a Democrat to the New Hampshire House of Representatives (“House”) in the 2020 General Election. Each is the democratically

chosen representative of thousands of New Hampshire citizens performing the absolute core function of a representative democracy.

3. Each Individual Plaintiff suffers from one or more medical conditions and disabilities that render them extremely vulnerable to a potentially deadly infection from the COVID-19 virus such that in-person attendance at sessions of the House is impossible without subjecting them to extreme pain and suffering, as well as a serious threat to their health and their lives.

4. Each Individual Plaintiff has made a request for the reasonable accommodation of being allowed to attend remotely and take part in the legislative process of the House. *See*, Appendix A. (Minority Leader Cushing did not make a specific written request for himself, as he felt obligated by his position to attend whenever possible. He did, however, make numerous requests for a remote attendance accommodation for all House members and he specifically informed Defendant of the critical health issues he would face if no accommodation were made.) Each of these requests has been denied. Numerous other Democratic representatives have had similar requests denied. Appendix B.

5. As nominees of the NHDP, each of Individual Plaintiffs ran for office and was elected to reflect and represent the associational values of the NHDP in the House of Representatives.

6. Plaintiff NHDP represents the associational rights of New Hampshire Democrats.

PARTIES

7. Plaintiff Cushing is the Democratic Minority Leader in the House and lives at 395 Winnacunnett Road, Hampton, NH 03842. He is 68 years old and was diagnosed with Stage 4 prostate cancer in late July 2020, for which he currently is being treated with medicines that have

left him with a compromised immune system. He has only left his home for non-medical reasons four times since being diagnosed – once to attend Veto Day on September 16, 2021, second to review the layout for Organization Day (December 2, 2020), third to attend a session of the House on January 6, 2021, and fourth to visit his mother on February 6, 2021, who was dying from COVID-19. He was not able to attend Organization Day due to complications from his cancer treatment. He has been hospitalized four times since August at Massachusetts General Hospital due to infections occasioned by his suppressed immune system. These conditions significantly impact Cushing’s major life activities such as immune system, normal cell growth, sleeping, performing manual tasks, and the following bodily functions: digestive, bowel, bladder, respiratory, circulatory, endocrine, and reproductive. He has made his medical condition known to Defendant and in his role as Minority Leader has requested that remote attendance be authorized for all members of the House, including himself.¹ Because he had been elected by House Democrats to be their candidate for Speaker, he reluctantly attended the session of the House on January 6, 2021. In doing so, he needed the assistance of another person with whom he had to spend the entire day in the confined space of a car and be exposed to multiple potentially lethal interactions with others. In-person attendance presents a clear life-threatening danger to Plaintiff Cushing.

8. Plaintiff Cote is the Deputy Minority Leader of the House. He is 60 years old and lives at 96 West Hollis St, Nashua, NH 03060. He has suffered from cerebral palsy since birth, so must wear leg braces for stability and uses crutches to walk. He does not drive. In 2018 he had a heart attack which necessitated the implantation of four stents. He was subsequently diagnosed

¹ Kevin Landrigan, “*House Dems plead to allow remote attendance at Jan. 6 session*”, New Hampshire Union Leader, December 29, 2020 and updated December 30, 2020
https://www.unionleader.com/news/health/coronavirus/house-dems-plead-to-allow-remote-attendance-at-jan-6-session/article_5b376a9e-eb1f-5b1c-b357-ebc149226b7c.html

with coronary artery disease. Furthermore, Representative Cote suffers from epilepsy and high blood pressure. These conditions are physical impairments which substantially restrict his life activities such as walking, performing manual tasks, and circulatory functions. Since the pandemic, he only leaves his house for medical reasons. As he stated in his accommodation request, sitting in a car for hours with another person will both cause Representative Cote significant discomfort and present an unacceptable risk of death or serious illness. *See*, Appendix A. As a result of the refusal of Defendant to provide a reasonable accommodation, he was unable to attend the session of the House on January 6, 2021 and will be similarly unable to attend future sessions during the pandemic. Therefore, he is being denied his equal right to serve as a Representative and his constituents are being deprived of their rights to be represented in the House.

9. Plaintiff Rogers is 65 years old and lives at 804 Alton Woods Drive, Concord NH 03301. She suffers from degenerative joint disease and requires adaptive aids to walk - a walker and cane or a wheelchair depending on how far and long she must walk. Sitting for extended periods of time causes her to suffer extreme pain. She has prescribed pain medication but cannot drive after taking it. These conditions are physical impairments which substantially limit her major life activities such as walking, working, performing manual tasks, and caring for oneself. Her request to attend the session of the House on January 6, 2021 on a remote basis was denied by Defendant. She subsequently engaged a friend to drive with her to the session, thus creating a dangerous situation for both in that they were together in a small unventilated space for 10 hours. Representative Rogers suffered extreme pain during the session despite taking her prescribed pain medication and was on the verge of tears due to the pain throughout the day. Since attending the session on January 6, 2021, she has been seeing a doctor for the severe pain caused by her

attendance at the session and expects that she will increase permanently her use of a wheelchair as a direct result of attending the session. All because Defendant refused to accommodate her request for reasonable accommodation by remote attendance.

10. Plaintiff Snow is 81 years old and lives at 200 Alliance Way, #302, Manchester NH, which is located in Birch Hill, a continuing care senior citizen living facility. Because of the extremely high levels of deaths in such facilities in New Hampshire,² Birch Hill requires its residents not to attend any gatherings of over 10 people and has told Plaintiff Snow that there will be severe consequences if that rule is violated. In 2017 he was afflicted with Guillain-Barre Syndrome, which causes temporary paralysis from the chest down. He was hospitalized for three months including 18 days in the Intensive Care Unit and 8 days on a ventilator. Representative Snow has residual symptoms including lung vulnerability and limited mobility. These conditions are physical impairments which substantially limit his major life activities such as breathing, working, and walking, among other things. Because of concerns of exposure to COVID-19 and a need to avoid lengthy quarantine, Representative Snow was not able to attend the last meeting of the House on January 6, 2021 and will not be able to attend any further meetings unless afforded an opportunity to do so remotely.

11. Plaintiff Berch is 74 years old and lives at 956 River Rd, Westmoreland, NH. He suffers from an extremely critical kidney disease and, upon the successful completion of a series of tests and exams, will be placed on a list awaiting a kidney transplant. Plaintiff Berch suffered a serious heart attack and had triple by-pass graft surgery (CABG); he also suffers from coronary heart disease. These conditions are physical impairments which substantially limit his major life

² Residents of long-term facilities account for 72% of the deaths from COVID-19 according to the Covid-19 Summary Dashboard, February 13, 2021, NH Department of Health and Human Services Website, <https://www.nh.gov/covid19/dashboard/case-summary.htm>

activities such as organ functions, working, performing manual tasks, walking and other activities. Any exposure to COVID-19 represents both a direct and imminent threat to his life and will likely remove organ transplant as an option. Accordingly, there is no accommodation short of remote attendance that will enable him to attend House sessions and represent the citizens he was elected to represent. The refusal to allow for remote attendance thus completely disenfranchises the thousands of citizens of his district, including voters who are registered Democrats and/or who tend to vote for Democratic candidates such as Individual Plaintiffs.

12. Plaintiff Langley is 72 years old and lives at 330 Day Street, Manchester, NH 03104-2866. She suffers from osteo arthritis and rheumatoid arthritis and 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: cardiac arrest, cellulitis, and deep vein thrombosis (DVT). Her most recent hospitalization was in September 2020. These conditions constitute physical impairments that substantially limit her major life activities such as immune system, walking, performing manual tasks, caring for oneself, and working. Due to her multiple medical conditions and their complications, exposure to COVID-19 is a direct and imminent threat to her life. Plaintiff Langley requested an accommodation to attend the session on December 2, 2020. The only accommodation offered was a special parking spot large enough for her van and access to an indoor restroom. Rep. Langley did not attend the session, knowing from the previous sessions that a large contingent of Republican attendees would not be wearing masks or observing social distancing protocols.

13. Plaintiff DiLorenzo is 71 years old, is African American, and lives at 193 South Main Street, Apt. 6, Newmarket, NH 03857. She has been diagnosed with coronary artery disease and Type 2 diabetes. She had an Ischemic Stroke in 2013, which resulted in limited mobility. Plaintiff DiLorenzo also has asthma, a chronic respiratory disease. These conditions are physical impairments which substantially limit her major life activities, such as breathing, performing manual tasks, and other activities. In addition, as an African American over the age of 60, Plaintiff DiLorenzo has a substantially increased risk of being infected, being hospitalized, and dying of COVID-19.³ Plaintiff DiLorenzo requested an accommodation from Defendant 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. Since her request for accommodation was not granted by Defendant, Plaintiff DiLorenzo attended the session on January 6, 2021. Due to the car fumes produced by the vast number of vehicles in the UNH parking lot during the session, Plaintiff DiLorenzo suffered an asthma attack and had to leave the session early.

14. Plaintiff NEW HAMPSHIRE DEMOCRATIC PARTY ("NHDP") is a political party as defined by N.H. RSA 652:11. NHDP's address is 105 N. State Street, Concord, New Hampshire. Raymond Buckley is the duly elected chairman of NHPD and is authorized to act on behalf of NHDP in this matter. NHDP is comprised of New Hampshire citizens, voters, and elected officials who seek to associate; to express their political views; to nominate candidates for elective office who promote the official NHDP platform; to run and vote in fair and open

³ "COVID-19 Hospitalization and Death by Race/Ethnicity," Centers for Disease Control and Prevention Website, updated February 12, 2021 <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> ; See also, "Coronavirus infections by race: What's behind the health disparities," Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/coronavirus/expert-answers/coronavirus-infection-by-race/faq-20488802>

local, state, and federal elections; and to work to promote the official NHDP platform throughout the State. NHDP nominated each of the Individual Plaintiffs to run as candidates for the House to reflect the associational views of its members. Each of the Individual Plaintiffs is a registered Democrat and the following Individual Plaintiffs are members of the NHDP State Committee, which is the governing body of NHDP: Plaintiff Cushing, Plaintiff Cote, Plaintiff Rogers, Plaintiff Langley, and Plaintiff DiLorenzo.

15. Defendant is Speaker of the House and is sued here in his official capacity only as leader of the House of Representatives. His office is located at the NH State Capitol, Main St. Concord NH 03301. The House of Representatives is a public entity which conducts the activity of legislative business on behalf of the State of New Hampshire. It has received federal funds from the CARES Act to assist with the conduct of its legislative business.

**JURISDICTION, VENUE AND
EXHAUSTION OF ADMINISTRATIVE PROCESS**

16. The jurisdiction of this Court is founded upon 28 U.S.C. § 1331, 28 U.S.C. 1343 (a) (3), 28 U.S.C. § 1367. the Fourteenth Amendment to the United States Constitution, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et. seq.), and Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12131 – 12134).

17. The Court has personal jurisdiction over Defendant because he is an official of a New Hampshire state governmental entity, conducts business in this District and engaged in unlawful conduct and/or caused the harm at issue in this District.

18. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because the events giving rise to the claim occurred in this District and all parties reside and/or do business in this District.

19. Exhaustion of administrative process is not necessary under Title II of the Americans with Disabilities Act of 1990. 28 CFR §§ 35.170, 35.178, and 35.190. Individual Plaintiffs have filed requests for a reasonable accommodation, which Defendant has denied.

FACTS

COVID-19

20. The spread of COVID-19 has exploded since March 2020 with daily new cases reported from the NH Department of Health and Human Services increasing from a 7-day average of about 35 per day throughout the spring, summer and fall to peaks of between 700 and 900 new cases per day in December and January. As of February 8, 2021, the 7-day average number of new cases per day in New Hampshire was 370, over ten times more than the rate in June and September when the House met inside the Whittemore Coliseum on the UNH campus in Durham.⁴

21. As of February 13, 2021, New Hampshire had experienced 70,505 confirmed cases of COVID-19 with 1,130 deaths⁵, one of which was Plaintiff Cushing's mother, Marie Cushing, who died on February 6, 2021.

22. Recently, "New Hampshire was the only state with an increase for newly confirmed cases," recording "a hike of 4 percent."⁶

⁴ See, Covid-19 Summary Dashboard, February 13, 2021, NH Department of Health and Human Services Website, <https://www.nh.gov/covid19/dashboard/case-summary.htm> and Explore the Data: Tracking Covid-19 in New Hampshire, New Hampshire Public Radio website, February 13, 2021, <https://www.nhpr.org/post/updated-tracking-covid-19-cases-and-testing-new-hampshire>

⁵ *Id.*

⁶ David Mills, *Here Are the States Where COVID-19 Is Increasing*, Healthline (Jan. 26, 2021), <https://www.healthline.com/health-news/here-are-the-states-where-covid-19-is-increasing#Where-cases-are-the-highest>.

23. Accordingly, Governor Christopher Sununu has issued emergency orders to curtail the spread of the virus and the extraordinary danger it poses to our state.⁷

24. The more infectious coronavirus variant first found in the United Kingdom has been detected in a New Hampshire resident according to State health officials on February 12, 2021.⁸

25. Both deaths and hospitalizations in New Hampshire from COVID-19 are heavily weighted toward those over the age of 60. People over 60 account for 71.7% of hospitalizations and 96.9% of deaths.⁹

26. Largely because it is essentially a volunteer job with compensation of only \$100 per year, the average age of House Representatives is approximately 63.¹⁰

27. COVID-19 is spread via respiratory droplets, in-person contact, and contaminated surfaces and objects. Spread of the virus is particularly difficult to prevent because 40 to 45 percent of all those infected are asymptomatic or pre-symptomatic.¹¹

28. Because of the airborne nature of the disease, the risk of transmission is highest in heavily trafficked public locations—especially indoors, where there is prolonged exposure, or when protective measures like mask-wearing and social distancing are absent.¹² The risk of contagion is greater than ever as more infectious variants of the coronavirus have begun to

⁷ See, e.g., Exec. Order No. 2021-1, Fifteenth Extension of State of Emergency Declares in Executive Order 2020-04 (Jan. 22, 2021), <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2021-01.pdf>.

⁸ Holly Ramer, “UK virus variant found in New Hampshire for 1st time,” Associated Press, February 12, 2021 <https://apnews.com/article/health-new-hampshire-coronavirus-pandemic-bcd1c33b9d5730fc83efdc2d52b496f5>

⁹ See, Covid-19 Summary Dashboard, February 13, 2021, NH Department of Health and Human Services Website, <https://www.nh.gov/covid19/dashboard/case-summary.htm>

¹⁰ Associated Press, *Getting Out of the House: Masked Legislators Meet in Arena*, U.S. NEWS & WORLD REPORT (June 11, 2020), <https://www.usnews.com/news/best-states/new-hampshire/articles/2020-06-11/getting-out-of-the-house-masked-legislators-meet-in-arena>.

¹¹ Oran D P and Topol E J, *Prevalence of Asymptomatic SARS-CoV-2 Infection*, Annals of Internal Medicine (Sept. 1, 2020).

¹² Harvard Medical School, 5 factors to help you gauge where COVID-19 risk is highest (Nov. 2020), <https://www.health.harvard.edu/staying-healthy/5-factors-to-help-you-gauge-where-covid-19-risk-is-highest>.

spread in the U.S. and abroad.¹³ These risks are further compounded for individuals with a disability who are more likely to develop serious illness or death if they contract the coronavirus.¹⁴

Effect of COVID-19 on the Business of the NH House of Representatives

29. The House is the largest state legislative body in the nation with 400 members and normally sits in the oldest legislative chamber in the nation – Representatives Hall.

30. Attendance at committee meetings and sessions is an essential part of the work of a Representative.

31. In a “non-pandemic” year, there are typically about 20 sessions held in Representatives Hall. In 2019, there were 23. In 2020, there were 11, eight of which were held before Governor Sununu’s State of Emergency Order. *Supra* note 9.

32. Since March of 2020, due to concerns about COVID-19, the House has only met 5 times in full session¹⁵ and all sessions have taken place at the University of New Hampshire (“UNH”) and been in-person only.¹⁶

33. As conditions in the pandemic have worsened since last spring, the locations of the sessions at UNH have changed. The first three took place within the Whittemore Center at UNH, the fourth took place outside on an athletic field, and the fifth took place in a parking lot with the Representatives seated in their cars.

¹³ See, e.g., Matthew S. Schwartz, *New COVID-19 Variant Spreads To Dozens Of Countries*, NPR (Jan. 2, 2021), https://www.npr.org/sections/coronavirus-live-updates/2021/01/02/952842631/new-covid-19-variant-spreads-to-dozens-of-countries?utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_source=facebook.com&fbclid=IwAR1vJevkBypgmcswGLpqD25D-HIZ44fDIgUZwiLKsgR5WxEjJ8kJBY5HC8 (reporting the new variant “could be 50% more transmissible than the original strain”).

¹⁴ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): People with Disabilities*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>.

¹⁵ June 11, 2020, June 30, 2020, September 16, 2020, December 2, 2020, and January 6, 2021.

¹⁶ Until the Opinion of the Justices of the NH Supreme Court was issued on November 17, 2020, it was not clear that the House could meet remotely under the NH Constitution.

34. During the House session on June 11, 2020, then Speaker Shurtleff introduced a proposal that would have permitted the late drafting of an amendment to the New Hampshire Constitution “providing that the general court shall have the power and duty to adopt measures necessary for the continuity of government in periods of emergency.”¹⁷ The motion failed, with Defendant and all current members of his leadership team voting against it.

35. In anticipation of planning remote sessions for 2021, then Deputy Speaker Ebel made a motion to ask the New Hampshire Supreme Court on behalf of the House to issue an opinion on this question: “Would holding a session of the New Hampshire House of Representatives remotely, either wholly or in part, whereby a quorum could be determined electronically violate Part II, Article 20 of the New Hampshire Constitution?” HOUSE JOURNAL Vol. 42, No. 11, September 16, 2020, at pages 6-9.

36. The motion passed but was strongly opposed by Defendant and all of his current leadership team.

37. On November 17, 2020, the Supreme Court ruled that the House is permitted to meet, either wholly or in part, remotely under the New Hampshire Constitution. *Opinion of the Justices*, 173 N.H. ____, ____ (2020), 2020 N.H. LEXIS 196, at *18 (Nov. 17, 2020).¹⁸

38. The Democratic leadership had begun planning for remote sessions prior to the General Election on November 3, 2020, on which date the Republicans became the majority party in the House and, thus, in charge of planning the sessions.

¹⁷ CACR (N.H. 2020), HOUSE JOURNAL, Vol. 42, No. 9 (June 11, 2020) at pages 7-10. <http://gencourt.state.nh.us/house/caljournals/default.aspx>. See, also <https://legiscan.com/NH/bill/CACR21/2020> (introduced June 8, 2020).

¹⁸ Alternatively, see <https://www.courts.state.nh.us/supreme/opinions/2020/2020063OJ.pdf>.

39. Since November 17, 2020, Plaintiff Cushing and others in the Democratic caucus have urged Defendant and other Republican leaders to investigate and plan remote House sessions.¹⁹

40. Plaintiff Cushing provided Defendant with a concept for remote meetings involving Zoom sessions, coupled with voting software on December 15, 2020 via email. *See*, Appendix C.

41. Zoom had been used for months by the Legislature for committee meetings in 2020. Zoom and voting software were successfully used by both major party caucuses to elect their leaders. Zoom has also been used by both parties for full caucus meetings, with approximately 200 people participating.

42. According to the National Conference of State Legislatures, in 2020 one or both chambers in twenty-four (24) states, the District of Columbia, Guam and the Virgin Islands allowed for remote committee meetings or public meetings, and/or allowed for member participation, voting or proxy voting in floor sessions or committee meetings.²⁰ In 2021, numerous states have delayed sessions and others are meeting remotely, including Vermont.²¹

43. According to a memo from NCLS dated February 8, 2021, in at least 19 states, at least one chamber or both has allowed for remote participation on the floor. Appendix D. The process for remote participation varies. In both chambers of Vermont, the Virginia House and the Washington House, all or nearly all, members meet virtually. Remote participation is allowed when authorized by the presiding officer in Colorado and South Dakota. In Pennsylvania, the

¹⁹ *Supra* note 1.

²⁰ “COVID-19: State Actions Related to Legislative Operations”, January 26, 2021, NCLS website: <https://www.ncsl.org/research/about-state-legislatures/covid-19-state-actions-related-to-legislative-operations.aspx>

²¹ *See, Id.* *See*, also, “Coronavirus and State Legislatures in the News”, January 27, 2021, NCLS website: <https://www.ncsl.org/research/about-state-legislatures/coronavirus-and-state-legislatures-in-the-news.aspx>

House uses proxy voting, and the Senate uses technology for web-based video. *See*, Appendix D.

44. Plaintiff Cushing and others in the Democratic leadership team have provided information from NCLS periodically to the Speaker, including a memorandum entitled “Remote Voting Sessions: Practical Considerations and How Legislatures are Responding”, a guide that NCLS has developed for assisting State legislatures in setting up remote participation. Appendix E.

45. On February 1, 2021, Plaintiff Cushing, Defendant, Plaintiff Cote and others met remotely to discuss the logistics for the upcoming sessions. Notwithstanding being in the majority for two months, Defendant did not have any solid proposals or information to provide to Plaintiffs about remote participation. Clearly no real effort had been made by Defendant to develop options for remote participation. Nonetheless, Defendant asserted that while he was personally opposed to remote participation at sessions, he would be willing to review a plan.

46. Four days later, Plaintiffs learned in House Calendar No. 10 that Defendant had decided that the House would meet indoors at an undisclosed 55,000 square foot sports facility on February 24 and 25, 2021 and that all members would be “obligated to meet in-person”. N.H.H.R. Calendar #43-10 (Feb. 5, 2021)²²

47. No information about the facility’s HVAC or COVID-19 health guidelines were provided. *Id.*

48. The name and location of the sports facility was provided in the most recent House Calendar No. 11 – the NH Sportsplex in Bedford – but no details about COVID-19 health guidelines were provided. Defendant also stated, “We continue to research if a reasonable

²² House Calendars are available at <http://www.gencourt.state.nh.us/house/caljournals/default.aspx>.

remote solution exists that will not compromise the operation of the 400 member House of Representatives. A solution that would meet our unique needs has not been identified.”

N.H.H.R. Calendar #43-11 (February 12, 2021).

49. In his initial announcement about the sessions on February 24 and 25, Defendant stated that the House cannot meet remotely because it is not permitted to do so under the House Rules.²³ This reasoning is seriously flawed and disingenuous. It is flawed because, as noted above, the Supreme Court has ruled that the House is permitted to meet, either wholly or in part, remotely under the New Hampshire Constitution. *Opinion of the Justices*, 173 N.H. ____, ____, 2020 N.H. LEXIS 196, at *18 (Nov. 17, 2020). No rule is necessary. The New Hampshire Senate has been meeting remotely without anything in the Senate Rules explicitly allowing it, relying on the Governor’s Emergency Order Number 12, pursuant to Executive Order 2020-04 and its extensions. SENATE JOURNAL 2, January 6, 2021, at page 25.²⁴

50. It is disingenuous because Defendant and others in his party have consistently voted against allowing the House Rules to be amended to permit meeting remotely, and Defendant and his leadership team have not undertaken serious efforts to research a remote option for sessions.

51. At the Organization Day session of the House on December 2, 2020, Representative Bouldin moved to amend House Rule 65 to allow for remote attendance at Committee meetings and House sessions. Defendant spoke against the amendment. The amendment failed to pass with the vote along party lines. House Record, Vol. 43, No.1, Wednesday, December 2, 2020 at pages 9-10.

²³ N.H.H.R Calendar #43-10 (Feb. 5, 2021) at page 1.

²⁴ Senate Journals are available at http://gencourt.state.nh.us/Senate/calendars_journals/html. See, also Senate Calendar No. 10A, February 4, 2021 at page 2 announcing the Senate will meet in remote session on Thursday, February 11, 2021.

52. On December 16, 2020, the Rules Committee considered an amendment to Rule 110 explicitly permitting Defendant to convene session remotely. Defendant and the other Republican members of the Rules Committee voted against the amendment.

53. Once more, Plaintiffs made a motion at the session on January 6, 2021 that would allow Defendant to convene session remotely. And, again, Defendant and his caucus opposed the motion, which was defeated along party lines.

54. Plaintiff Cushing made another request for remote participation for himself and others in a letter that he sent to Defendant on February 9, 2021. *See*, Appendix F.

55. Defendant responded in the negative in a letter dated February 12, 2021, again citing the lack of a House Rule allowing for remote participation. *See*, Appendix G.

56. The following day, Plaintiff Cushing sent Defendant another proposal for remote participation for the 25-30 representatives with disabilities. *See*, Appendix H.

Accommodation is Necessary

57. To do their business as Representatives, Plaintiffs must be able to attend both sessions and committee meetings.

58. The House committees met remotely in 2020; remote attendance at committees has been permitted by Defendant in 2021.

59. In a recent Union Leader article, Defendant admitted that he faces a dual obligation regarding remote sessions. He is leading a Republican majority whose members are eager to return to the State House in person and about 60 of whom refuse to wear masks or follow COVID-19 protocols. At the same time, Defendant has pledged to keep all members of

the House and staff safe. He stated, “Our duty was to set up something up so that members and staff could be assured that it was safe; there is no greater responsibility I have as their speaker.”²⁵

60. In that same article, Defendant stated regarding remote participation by representatives at Committee meetings, “We fully understand there are some with pre-existing conditions or health risks that make is sensible for them to take part via Zoom.”²⁶ The same is true regarding House sessions.

61. All Individual Plaintiffs, along with a significant number of their colleagues, have identified disabilities that bring them within the protections of the ADA and Section 504. Each has requested Defendant for reasonable accommodation for remote attendance by themselves or others. These requests have been rejected, often without any reason given.

62. Plaintiff Cote does not drive, and it is unsafe for him to attend the sessions during the pandemic.

63. Likewise, Plaintiff Berch is awaiting a kidney transplant and has disabilities that prevent him from attending in person without endangering his life.

64. Plaintiff Cushing is undergoing cancer treatments that suppress his immune system to such a degree that any exposure to COVID-19 could be deadly.

65. Plaintiff Snow suffers from several ailments each of which make it impossible to attend in person without endangering his life. Furthermore, the rules of the senior living housing where he resides forbid being in a room with 400 others.

66. Plaintiff Rogers suffers from a degenerative joint disease and cannot sit for long periods of time without excruciating pain.

²⁵ Kevin Landrigan, “House soon to bring lawmakers back into committee rooms,” New Hampshire Union Leader, January 15, 2021. https://www.unionleader.com/news/health/coronavirus/house-soon-to-bring-lawmakers-back-into-committee-rooms/article_455b4fbb-6bdf-5baa-bbd9-96d102384b86.html

²⁶ *Id.*

67. Plaintiffs Langley and DiLorenzo have comorbidities which place them at increased risk of severe and life-threatening illness from COVID-19.

68. All Individual Plaintiffs are over 60 years of age and thus in the age cohort comprising the majority of COVID-19 related deaths. As noted above, people over 60 account for 71.7% of hospitalizations and 96.9% of deaths due to COVID-19.²⁷

69. The physical impairments described in this Complaint establish that all Individual Plaintiffs are qualified individuals with disabilities under the ADA and Section 504.

Consequences of No Accommodation

70. The failure to allow for remote attendance during upcoming House sessions means that all House members will be required to remain inside an enclosed space with many unmasked people for an entire day - an unnecessary and unreasonable risk. No matter what the distancing or ventilation in the space, the congregation of over 400 people inside, with upwards of 15% of them not wearing masks, violates the consistent advice of health officials.²⁸

71. Dr. Nora Traviss, an associate professor in environmental studies at Keene State College, told the Union Leader that the prudent course would be for the House to follow the Senate's lead and keep all sessions virtual until the vaccine is more widely given. She also stated, "Convening in person is just not recommended for public health right now. This is what the public health science is saying and our legislators should be implementing the best practices that are out there."²⁹

²⁷ See, Covid-19 Summary Dashboard, February 5, 2021, NH Department of Health and Human Services Website, <https://www.nh.gov/covid19/dashboard/case-summary.htm>

²⁸ CDC Guidelines, Considerations for Events and Gatherings, Updated January 8, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> ; NH Governor's Emergency Order 63 Pursuant to Executive Order 2020-04 as extended, An order requiring face coverings for certain scheduled gatherings of 100 or more individuals, dated August 11, 2020

²⁹ *Supra* note 27.

72. Meeting inside where masks are not required and where the ventilation system is unknown further present extreme and unjustified danger to all whose age or medical conditions leave them with significantly high levels of risk, such as each of Individual Plaintiffs.

73. Plaintiffs have lost confidence in the majority members' willingness to comply with COVID-19 guidelines due to several incidents that have occurred since March 2020. The most serious incident occurred when the majority caucus met on November 20, 2020, largely unmasked, even though several members present had active cases of COVID-19. The majority caucus then failed to inform Democratic colleagues of the danger wrought by this mass exposure when the full House held session on December 2, 2020. Plaintiffs only learned of the heightened risk to their health when reading press accounts of the majority's reckless behavior.³⁰

74. It is unknown how many members of the majority caucus contracted COVID-19 as a result of this reckless behavior because that information has been suppressed. The Republican Speaker of the House, Richard Hinch, died of COVID-19 shortly after being elected, and it is believed he contracted the virus as a result of the aforementioned caucus meeting.³¹ A second Republican leader, Speaker Pro Tem Kim Rice, also contracted COVID-19 shortly after Speaker Hinch's death.³²

³⁰ "Gathering of GOP N.H. Lawmakers Leads to Unspecified Number of COVID-19 Cases", NHPR Staff, New Hampshire Public Radio, December 1, 2020 <https://www.nhpr.org/post/gathering-gop-nh-lawmakers-leads-unspecified-number-covid-19-cases#stream/0>; Paula Tracy, "Some GOP Reps Test Positive For COVID-19 Angering Dems Who Weren't Told," INDepthNH.org, December 1, 2020 <http://indepthnh.org/2020/12/01/some-house-gop-members-test-positive-for-covid-19-after-manchester-event/>

³¹ Jennifer Crompton, "Late NH House Speaker Dick Hinch died of Covid-19, autopsy shows", WMUR, December 10, 2020, <https://www.wmur.com/article/late-new-hampshire-house-speaker-dick-hinch-covid/34932776>; Kevin Landrigan, "NH House Speaker died of COVID-19", Union Leader, December 9, 2020 and updated on December 10, 2020 https://www.unionleader.com/news/politics/state/nh-house-speaker-died-of-covid-19/article_0aa7c18d-9b3e-545a-8135-d17faeb7b94f.html

³² Josie Alberson-Grove, "Another Legislative Leader Announces COVID-19 Diagnosis", New Hampshire Union Leader, December 12, 2020 https://www.unionleader.com/search/?l=25&s=start_time&sd=desc&f=html&t=article%2Cvideo%2Cyoutube%2Ccollection&app%5B0%5D=editorial&nsa=eedition&q=hinch+covid&o=25

75. A physician who serves as a Republican Representative publicly attributed the death of Speaker Hinch to the behavior of his fellow Republican members.³³

76. Other incidents shaking Plaintiffs' confidence in Defendant's ability to provide a safe environment in an indoor facility occurred during the first three indoor sessions at UNH. At those sessions, many majority members flouted the COVID-19 rules established by then Speaker Shurtleff, those of UNH and those of the Town of Durham. Not only did they refuse to wear masks in the Town and on the UNH campus, but also during the third session on September 16, 2020, the unmasked section of the Republican caucus drank beer inside the Whittimore Center.³⁴

77. The fourth session at UNH took place on December 2, 2021 outside in 40-degree weather on a UNH athletic field where 60 masking refusers – 15% of the House - were told to sit apart from the masked Representatives.³⁵ At least one unmasked Republican Representative insisted on sitting next to a masked Democrat, who was seeking to distance himself. Speaker Hinch did not require the unmasked Republican Representative to relocate when requested to do so twice by Representative Bouldin.

78. The most recent meeting of the House took place on January 6, 2021 in a parking lot at UNH during which the individual Representatives were located within their vehicles.

79. Even there, it was impossible to avoid all contact with others, as various items had to be distributed by staff, microphones were held by staff for speaking outside cars, and staff had

³³ Will Wright and Lucy Tompkins, "COVID-19 Causes Sudden Death of Top N.H. State Lawmaker," New York Times, December 10, 2020 <https://www.nytimes.com/2020/12/10/us/richard-hinch-nh-covid.html>

³⁴ Daniela Allee, "State Reps Draw Criticism for Drinking Beer, Not Wearing Masks on UNH Campus," New Hampshire Public Radio, September 17, 2020 <https://www.nhpr.org/post/state-reps-draw-criticism-drinking-beer-not-wearing-masks-unh-campus#stream/0>

³⁵ Mark Hayward, "60 state reps have ignored executive order and doffed masks", New Hampshire Union Leader, January 16, 2021 https://www.unionleader.com/news/health/coronavirus/60-state-reps-have-ignored-executive-order-and-doffed-masks/article_668d5e12-e47d-53fd-8857-a9b58a0c8737.html ; Todd Bookman, *Under Open Skies And At A Distance, Newly Elected State Lawmakers Meet For First Time*, N.H. PUB. RADIO (Dec. 2, 2020), <https://www.nhpr.org/post/under-open-skies-and-distance-newly-elected-state-lawmakers-meet-first-time>

to troubleshoot defective voting devices. And, as at all the other UNH sessions, many members of the majority caucus refused to wear masks and socially distance.³⁶

80. Each Individual Plaintiff has requested accommodations from Defendant, including the ability to attend House sessions remotely. *See*, Appendix A and *Supra* note 1.

81. All Individual Plaintiffs were denied the ability to appear remotely at the sessions held on December 2, 2020 and January 6, 2021; as a result, they had to choose between not attending or attending under circumstances that subjected them to pain and discomfort, as well as an unacceptable risk of disease or death.

82. Even if Defendant provides better conditions and supports more stringent safety mandates than he has thus far rejected, no relief will come to those who cannot attend large gatherings of any kind whatsoever, such as Plaintiffs and other House members with severely compromised immune systems or other disabilities that make any in-person event physically painful or life-threatening.

83. In the face of these compelling equities, Defendant has completely refused to make the same accommodation – attendance by remote access - that he has implemented for House committees and his own caucus meetings in response to the disastrous in-person meetings in November 2020. He has thus unreasonably deprived Individual Plaintiffs of their rights to serve in the capacity to which they were elected and has deprived the constituents of Individual Plaintiffs of any representation.

84. Aside from the harmful effect the denial of reasonable remote accommodation has upon the Representatives themselves, it has the further deleterious effect of preventing the House from representing the will of the majority of citizens.

³⁶ Ellen Barry, *As State Legislatures Aim to Convene Amid Covid, One Tries a Drive-In*, N.Y. Times (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/us/new-hampshire-drive-in-legislature.html>

85. The margin enjoyed by the majority is slim – only 26. There are 212 members of the Republican caucus and 186 members of the Democratic caucus.³⁷

86. Many of the most controversial bills before the House are likely to be decided by exceedingly small margins and it is highly probable that in matters critical to the people of the State, the outcomes of votes will be determined by whether the full Democratic caucus can participate.

87. One hundred thirty (130) Representatives did not attend the December 2, 2020 session, most out of concern for their health, knowing the past violations of the majority caucus members of the mask requirements of UNH and the Town of Durham.³⁸

88. Attendance at the most recent session of the House on January 6, 2021 showed that a far greater number of Democrats were unable to attend than members of the majority party. There were 44 Democratic absences and 10 Republican absences during that session.³⁹

89. The advantage given to the majority party (a net of 34) thus exceeds the overall advantage of the majority (26 seats). Clearly, Defendant and his leadership team have a powerful political incentive to deny disabled Representatives the ability to attend remotely.

90. The unjustified refusal of Defendant to make reasonable accommodations has deprived Individual Plaintiffs of their right to due process and equal treatment under the law as guaranteed by the Fourteenth Amendment to the United States Constitution and codified by the ADA.

³⁷ New Hampshire Update, Office of the House Clerk, Resignations, Deaths, Special Elections dated January 26, 2021.

³⁸ Mark Hayward, “60 state reps have ignored executive order and doffed masks,” New Hampshire Union Leader, January 16, 2021 https://www.unionleader.com/news/health/coronavirus/60-state-reps-have-ignored-executive-order-and-doffed-masks/article_668d5e12-e47d-53fd-8857-a9b58a0c8737.html

³⁹ Based on information provided by Office of the House Clerk and reviewed by the staff of the Minority Office.

91. In addition, all Individual Plaintiffs have been denied equal access to the information and processes required to fulfill the duties of their office, and the citizens they represent therefore have been denied equal representation under the United States Constitution and Part One, Article 11 of the New Hampshire Constitution.

92. Plaintiffs have further been denied the special protections afforded the elderly and disabled under Article 11 of the New Hampshire Constitution.

93. Individual Plaintiffs and their constituent voters have been effectively and unnecessarily deprived of their substantive due process rights to representation in the House, as guaranteed by the Fourteenth Amendment of the United States Constitution.

COUNT I—Americans with Disabilities Act (Title II)

94. Plaintiffs incorporate all paragraphs herein as if fully restated.

95. Individual Plaintiffs are qualified individuals with a disability within the meaning of the ADA. Those disabilities make Individual Plaintiffs particularly susceptible to severe complications from COVID-19.

96. Plaintiffs have requested that they be permitted to participate in session remotely as described above.

97. The accommodation requested by Plaintiffs would allow them to participate in the activities of the legislature, in which they are eligible (and indeed, entitled) to participate.

98. Defendant is required to provide reasonable accommodations to disabled persons such as Plaintiffs.

99. Defendant's failure to provide the reasonable accommodation of remote attendance denies Plaintiffs the opportunity to participate in legislative activities meaningfully and safely.

100. Defendant's failure to provide the reasonable accommodation of remote attendance denies basic health and safety protection to Individuals Plaintiffs and other similarly situated Representatives and has a disparate impact on Plaintiffs, whose disability place them at greater risk than the general public for serious complications or death from COVID-19.

101. Accordingly, Individual Plaintiffs have been excluded from participation in or have been denied the benefits of the services, programs, or activities of a public entity on account of their disabilities within the meaning of Title II the ADA.

102. Although Individual Plaintiffs have sought reasonable modifications to allow them to attend and participate remotely in the proceedings of the House, Defendant has failed to provide these reasonable modifications or offer any other reasonable and effective alternative accommodations.

103. Defendant's failure to provide for reasonable accommodation to Plaintiffs constitutes discrimination under Title II the ADA.

104. Defendant's violations of the ADA also constitute violations of the Fourteenth Amendment to the United States Constitution and state constitution, as discussed below.

105. If Defendant continues to deny Individual Plaintiffs request for reasonable accommodations, Plaintiffs will be immediately and irreparably injured.

106. As such, the Court should issue declaratory and injunctive relief to enjoin Defendant from present and future violations of the ADA.

107. The Court should also award attorney's fees to Plaintiffs as authorized by statute.

COUNT II- Rehabilitation Act (Section 504)

108. Plaintiffs incorporate all paragraphs herein as if fully restated.

109. Individual Plaintiffs are qualified individuals with a disability within the meaning of Section 504 of the Rehabilitation Act. Those disabilities make Individual Plaintiffs particularly susceptible to severe complications from COVID-19.

110. The House is a recipient of federal financial assistance within the meaning of Section 504 of the Rehabilitation Act in that the House has received approximately \$190,000 in federal funds under the CARES Act of 2020 to respond to the needs of the pandemic.

111. These funds have been used to pay for costs associated with “off-site” meetings of the House at the University of New Hampshire, including for purchasing voting technology.

112. Plaintiffs have requested that they be allowed to participate in legislative sessions remotely as described above.

113. The accommodation requested by Plaintiffs would allow them to participate in the activities of the legislature, which they are eligible (and indeed, entitled) to participate in.

114. Under Section 504, Defendant is required to provide reasonable accommodations to disabled persons such as Plaintiffs.

115. Defendant’s failure to provide the reasonable accommodation of remote attendance denies Plaintiffs the opportunity to meaningfully and safely participate in legislative activities.

116. Defendant’s failure to provide the reasonable accommodation of remote attendance denies basic health and safety protection to Individual Plaintiffs and other similarly situated Representatives. It also has a disparate impact on Plaintiffs, whose disability place them at greater risk than the general public for serious complications or death from COVID-19.

117. Accordingly, Plaintiffs have been excluded from participation in or have been denied the benefits of programs or activities receiving federal financial assistance on account of their disabilities within the meaning of Section 504.

118. Although Individual Plaintiffs have sought reasonable modifications to allow them to attend and participate remotely in the proceedings of the House, Defendant has failed to provide these reasonable modifications or offer any other reasonable and effective alternative accommodations.

119. Defendant's failure to provide for reasonable accommodation to the Plaintiff constitutes discrimination under Section 504.

120. Defendant's violations of Section 504 also constitute violations of the Fourteenth Amendment to the United States Constitution and state constitution, as discussed below.

121. If Defendant continues to deny Individual Plaintiffs request for reasonable accommodations, Plaintiffs will be immediately and irreparably injured.

122. As such, the Court should issue declaratory and injunctive relief to enjoin Defendant from present and future violations of Section 504.

123. The Court should also award attorney's fees to Plaintiffs as authorized by statute.

COUNT III—Fourteenth Amendment to the United States Constitution

124. Plaintiffs incorporate all paragraphs herein as if fully restated.

125. At its core, the Fourteenth Amendment to the United States Constitution guarantees that the citizenship rights of Americans will not be denied either Due Process or Equal Protection of the laws. Critical to these rights is the ability to vote and to participate in government on every level without discrimination.

126. The refusal of Defendant to implement a simple accommodation of remote attendance has stripped Plaintiffs of their right to vote and to participate in the representative functions to which they have been elected. Their constituents have been and will be totally denied representation in the House of Representatives and all those who share the associational views of the Democratic Party have been denied due process and equal protection of the law. All of these denials are ultimately based upon discrimination that disparately affects Individual Plaintiffs due to their disabilities.

127. As such, Defendant's conduct and his violations of the ADA and Rehabilitation Act constitute violations of the Fourteenth Amendment and Defendant should be enjoined from the same.

COUNT IV—Article 11 of the NH Constitution

128. Plaintiffs incorporate all paragraphs herein as if fully restated.

129. Part One, Article 11 of the NH Constitution guarantees equal access to representative democracy to all qualified citizens. This guarantee extends to both voters and to those who choose to run for office. Article 11 thus guarantees the equal protection of the law for all residents to be represented by those chosen in fair and free elections. This guarantee would be meaningless if those elected were denied the right to serve.

130. In particular, Article 11 expressly guarantees these rights to those citizens who are either disabled or elderly.

131. Each of the Individual Plaintiffs are within both classes of expressly protected citizens. A large number of other members of the House from both political parties are in one or both of these protected categories. For whatever reason, the failure to allow for remote attendance has disparately burdened Democratic members and their constituents as demonstrated

by the significantly larger number who have requested accommodations and who were absent from the most recent session.

132. The failure of Defendant to authorize remote participation in the House meetings effectively strips disabled citizens such as Individual Plaintiffs of their right to take part in the self-government that is at the heart of our representative democracy.

133. The failure of Defendant to authorize remote participation in the House sessions results in the removal of those who share the viewpoints of Plaintiffs from equal representation in the House and thus violate the associational rights of Individual Plaintiffs and the NHDP.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court order the following relief:

1. Declare that pursuant to 28 U.S.C. Sec. 2201 that by failing to grant a reasonable accommodation enabling Plaintiffs and others similarly situated to participate remotely in a safe manner in the sessions of the House, which results in a disparate impact on Plaintiffs, Defendant is in violation of the ADA;

2. Declare that pursuant to 28 U.S.C. 2201, that by failing to grant a reasonable accommodation enabling Plaintiffs and others similarly situated to participate remotely in a safe manner in the sessions of the House, which results in a disparate impact of Plaintiffs, Defendant is in violation of Section 504 of the Rehabilitation Act.

3. Declare that Defendant's failure to allow for remote participation of Plaintiffs in sessions of the House constitutes a denial of rights protected by the Fourteenth Amendment and Part One, Article 11 of the New Hampshire Constitution.

4. Issue injunctive relief, on a preliminary and permanent basis, requiring Defendant to provide remote participation to sessions of the House by Individual Plaintiffs and others similarly situated.
5. Award Individual Plaintiffs reasonable attorneys' fees, including litigation expenses and costs.
6. Grant such other and further relief as this Court deems just and proper.

Respectfully Submitted,

REP. ROBERT "RENNY" CUSHING
(INDIVIDUALLY AND IN HIS CAPACITY AS
MINORITY LEADER OF THE NH HOUSE OF
REPRESENTATIVES), REP. DAVID COTE,
REP. KENDALL SNOW, REP. KATHERINE
ROGERS, REP. PAUL BERCH, REP. DIANE
LANGLEY, REP. CHARLOTTE DILORENZO

By and through their attorneys

Date: February 15, 2021

/s/ Paul Twomey
Paul Twomey, Esq., NH Bar No. 2589
P.O. Box 623
Epsom, NH 03234
paultwomey@comcast.net
(603) 568-3254

Date: February 15, 2021

/s/ Israel Piedra
Israel F. Piedra, Esq., NH Bar No. 267568
Welts, White & Fontaine, PC
29 Factory Street
Nashua, NH 03060
(603) 883-0797
ipiedra@lawyersnh.com

and

NEW HAMPSHIRE DEMOCRATIC PARTY

By its attorney

Dated: February 15, 2021

/s/ William Christie
William E. Christie, Esq., N.H. Bar no. 11255
Shaheen & Gordon, PA
107 Storrs Street
PO Box 2703
Concord, NH 03302
(603) 225-7262
wchristie@shaheengordon.com

APPENDIX A

INDIVIDUAL PLAINTIFFS REQUESTS FOR ACCOMODATION

Representative Paul Berch (12/24/20)

From: Paul Berch <pberch@myfairpoint.net>

Subject: Accommodations for January 6th

Date: December 24, 2020 at 10:22:44 AM EST

To: Sherman A Packard <sherm_packard@juno.com>, Paul Smith <Paul.Smith@leg.state.nh.us>, Renny Cushing <reprennycushing@gmail.com>, Sherman A Packard <sherman.packard@leg.state.nh.us>

Good morning, Acting Speaker -

First, Happy Holidays to you and yours. And I congratulate you on your nomination as the Republican candidate for Speaker. You have certainly devoted many years in the House to the betterment of our citizens.

Second - although the final plans seem to be still up in the air, I would like to ask for what accommodations that can be arranged for me for January 6th. In consultation with my doctors, I am at a very high risk for COVID, and due to other medical complications, I am at extreme risk should I contract this disease. A few years ago, I suffered a major heart attack, resulting in open heart surgery, triple-bypass, etc. I also have significant kidney disease and, due to a further medical issue, I take a drug that substantially reduces my immune system. Not to mention, as hard as it is to believe, I will turn 75 in June. Putting all that together, my doctors have advised me to seek accommodations.

I will not discuss the various alternatives, as I am sure you are actively considering them. Unless there is an alternative that appears to be fully safe. I fear I will not be able to attend on January 6th. I have notified Paul Smith that I will not attending the event on January 7th.

Please keep the details of my medical condition(s) as confidential as you are able.

Thank you for your consideration of this request.

Cordially,

Paul Berch

Rep. Paul Berch

Cheshire -01

Chesterfield, Hinsdale, Walpole & Westmoreland



Representative David Cote (12/24/20)

From: David Cote <david.cote@leg.state.nh.us>
Sent: Thursday, December 24, 2020 5:05 PM
To: Sherman Packard <Sherman.Packard@leg.state.nh.us>
Cc: Renny Cushing <reprennycushing@gmail.com>
Subject: January 6th

Dear Acting Speaker Packard-

I appreciate yesterday's conversation with you, but given the fact that you indicated there would be no remote option for the 6th, and given my prior coronary artery disease, diagnosed following a heart attack and the implantation of four stents in 2018, as well the fact that my attending would require me to carpool with at least one other person with no social distancing being possible, I cannot see how in the absence of a remote option I can safely participate in the session of January 6.

I am utterly mystified as to why we can't proceed under a hybrid option thus allowing each representative to make individual choices based on their individual health and family situation.

On Dec 27, 2020, at 11:13 AM, Aaron Goulette <Aaron.Goulette@leg.state.nh.us> wrote:

Rep. Cote,

Acting Speaker Packard asked me to let you know that if you chose to attend the proposed drive-in session in Durham on January 6th, we will make sure you are accommodated.

If you do plan to attend, let us know, and we can create a plan for your attendance.

From: David Cote <david.cote@leg.state.nh.us>
Date: December 28, 2020 at 10:45:19 AM EST
To: Aaron Goulette <Aaron.Goulette@leg.state.nh.us>
Cc: Sherman Packard <Sherman.Packard@leg.state.nh.us>
Subject: Re: January 6th

Hi Aaron-

Thank you to both yourself and the Acting Speaker for the courtesy of a reply.

As I hoped I had made clear previously, my attendance on January 6 is not a question of my choice, but rather a question of the availability of a remote attendance option, which would enable me to attend without risk of exposure to COVID 19, given my age, existing health challenges, and lack of driving capability, to which I have referred previously.

I continue to be mystified as to why a remote option accommodation is not made available. The Acting Speaker explicitly stated to me that there would be no remote option on January 6.

I have the greatest respect for my constituents, but I cannot imagine that they would expect me to risk my life to represent them. To give me or any member similarly situated such a Hobson's choice is to my mind utterly unsatisfactory.

Representative Katherine Rogers (12/20/20)

Speaker Sherman Packard
State House, Room 311
107 North Main Street
Concord, New Hampshire 03301

House Clerk Paul Smith
State House, Room 317
107 North Main Street
Concord, New Hampshire 03301

December 20, 2021

I am writing to you to request a reasonable accommodation to enable me to represent my constituents in the session of the House scheduled for January 6, 2021 and all sessions thereafter until the state of emergency has ended. In particular, I request that I be allowed to attend and vote in remote manner without needing to expose myself to life threatening situations and to do so in a manner of which I am capable given my disability. I make this request pursuant to the rights and protections granted by both state law and the federal ADA.

My disability is as follows:

I have degenerative Joint disease and require adaptive aids to walk either a walker and a cane or a wheelchair. Additionally sitting for long periods of time in the same position without the ability to stand or move around subjects me to a great deal of pain. I do have access to pain medication for said pain but have been instructed not to operate heavy machinery (such as a motor vehicle when I am using this pain medication). For these reasons participating in a “drive-in” session would prove difficult and dangerous if not impossible for me.

I request that you respond to me no later than the end of business day of December 28th, 2020. I also ask that you send a copy of any response to Paul Twomey, who is acting as legal counsel for the Democratic House Caucus.

Thank you for your attention to this matter,

Rep Katherine D Rogers, Merrimack County District #28
804 Alton Woods Drive, Concord, New Hampshire 03301
(603) 496-8521
Email; Katbeep@ICloud.com

Representative Ken Snow (12/24/20)

Acting Speaker Sherman Packard

House Clerk Paul Smith

Dear Acting Speaker Packard & House Clerk Smith,

I am writing to request a reasonable accommodation to enable me to represent my constituents in House sessions on January 6, 2021 and all sessions thereafter until the state of emergency has ended. I request that I be allowed to attend and vote in a remote manner to minimize my exposure to COVID-19 which is enhanced by my disability.

My disabilities and resulting restrictions are as follows:

1. In 2017 I was afflicted with Guillain-Barré Syndrome which caused temporary paralysis from the chest down and severe, life-threatening pneumonia. I was hospitalized for three months, including 18 days in intensive care and 8 days on a ventilator. I still have residual symptoms, including increased lung vulnerability and limited mobility.
2. I am 81 years old and my wife, who is 79, is also disabled. We currently reside at Birch Hill, a continuing care senior facility that offers independent apartments, assisted living, memory care and nursing home care.
3. I am currently restricted from participating in groups larger than 10 persons even when all are masked and socially distanced.

The “drive-in” model being considered would not be a reasonable accommodation due to having couriers coming to your car to distribute materials and collect votes. There may also be the need to leave one’s automobile for rest room use or other reasons. I am also concerned about the fumes emitted from four hundred automobiles even on a mild winter’s day in NH.

I hope you can find a remote approach that enables all elected Representatives, including those with disabilities, to fulfill their responsibilities in a manner that meets the requirements outlined in the Americans with Disabilities Act (ADA).

Thank you.

Rep. Kendall Snow
Hillsborough 19

Representative Charlotte DiLorenzo (2/12/21)

REQUEST FOR REASONABLE ACCOMODATION

February 12, 2021

Ms. Jennifer Becker,
ADA Representative
New Hampshire General Court

Dear Ms. Becker:

I write to request a Reasonable Accommodation to be allowed to attend House Session and House Committee Hearings virtually via Zoom or a similar platform.

The reason that I request this alternative option to attend and vote during House Session and to virtually attend and vote on bills during House Committee Hearings is that science has proven that a person of my age with my health condition and ethnic attributes make me especially vulnerable to contract the Covid 19 virus.

- I am a 71-year-old woman of African American descent.
- I have been diagnosed with Coronary Artery Disease.
- I have been diagnosed with Type 2 Diabetes.
- I am a stroke survivor with limited mobility, having had an Ischemic Stroke in 2013.
- I live with Asthma, a chronic respiratory disease.
- I have not been inoculated against Covid 19 or its variants.
- I am solely responsible for care of my 79 years old spouse, who lives with a chronic heart condition.

All the conditions listed above, make me vulnerable to contracting the Covid 19 virus and jeopardize my ability to fulfill my duty as a State Representative, to the best of my ability and according to the New Hampshire Constitution.

Please verify receipt of this request and please respond to my request as soon as possible. Should you have questions or concerns or require third party verification of my health condition, or my caretaker responsibilities, please let me know.

Sincerely,

Rep. Charlotte DiLorenzo
Rockingham 17
Newmarket/Newfields
(603)659-2140 Home
(603)988-4405 Cell/Text

cc: Representative Robert "Renny" Cushing, House Democratic Leader
Dr. William G. Jackson, Personal Care Physician

APPENDIX B

**LIST OF REPRESENTATIVES WHO REQUESTED ACCOMMODATIONS
BUT WHO ARE NOT PLAINTIFFS**

Richard Abel

Susan Almy

Efstathia Booras

Tom Bucu

Gerri Cannon

Bruce Cohen

Roger Dontonville

Heidi Hamer

Tim Horrigan

Krista Fargo

Lath Mangipudi

Mel Myler

Ray Newman

Sue Newman

Fran Nutter-Upham

Lee Oxenham

Michael Pedersen

Marjorie Porter

Jan Schmidt

Catherine Sofitikis

Judith Spang

Deb Stevens

Gerry Ward

Proposal for Hybrid Legislative session of the NH House during COVID Pandemic

In order for the NH House to proceed in a manner that protects the health and safety of the State Representatives and legislative staff, it is imperative that House leadership provide a remote mechanism for legislators to participate the legislative session on January 6th and for sessions thereafter. The NH Supreme Court has determined that remote meetings of the legislature comply with our Constitution.

<https://www.courts.state.nh.us/caseinfo/pdf/supremerequest/2020/111720-Opinion.pdf>

This memo outlines possible processes for hybrid legislative sessions, in which staff and some members of the legislature are in Representatives Hall and others are participating online.

New Hampshire would not be unique. A review of the NCSL website alone indicates that many states have adopted procedures permitting them to conduct legislative business on a remote basis, both in committee and in legislative session.

<https://www.ncsl.org/research/about-state-legislatures/covid-19-state-actions-related-to-legislative-operations.aspx>

Committees

By way of background, the NH legislature developed and successfully deployed an effective method of doing committee work, while also complying with the RTK laws, as interpreted in the Governor's Emergency Order #12. This order outlines what must be provided to comply with the RTK laws in the context of remote meetings. In brief, the order requires that:

- 1) Public notice of meetings with methods of access be specified,
- 2) Telephonic access must be provided, even if video or electronic public access is available,
- 3) A method to notify the public body be given if public access breaks down or if a member of the public cannot access the public meeting, and
- 4) Provision made to halt the meeting if the full public access mechanism ceases to be operational.

The Attorney General has indicated that this Emergency Order requires the meeting to be adjourned *only* if full access fails and is not required if individual access fails.

<https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-12.pdf>

House Committee Services (HCS) has trained members of a large majority of the standing House committees, enabling them to participate fully in the committee process. Working with the Speaker's Office, our IT Department, and the Clerk's Office, over the past several months, HCS has streamlined its processes, including the public notification requirements, document delivery, committee participation, taking public testimony, the recording of minutes, etc. Zoom Webinar was selected as the best, most

secure platform for committee meetings. Public access is available either directly through Zoom links for attendees or via YouTube. All committee meetings are recorded and are available for viewing after the committee meeting.

https://www.youtube.com/channel/UCxqjz56akoWRL_5vyaQDtvQ/videos

Zoom Webinar allows only those members participating in the meeting to appear on screen and to participate. Members are “panelists.” “Attendees,” who have pre-registered to provide testimony, can be promoted by the HCS Zoom hosts to panelist status to give their testimony and then returned to their attendee status. Alternatively, those giving oral testimony can remain off-screen and simply be unmuted. This process has worked very smoothly thus far.

Voting has been done by roll call per the executive order. Members who wish to ask a question or speak during a committee meeting do so by “raising their hands” using the Zoom technology. Coordinating with staff, who keep track of the raised hands and the order in which they were raised, the committee chair calls on members wishing to speak and the committee meeting proceeds very much like an in-person committee meeting. Committee chairs can be made meeting co-hosts to better monitor member requests. No separate voting technology is needed because the limited number of participants can vote by roll call.

Legislative Session

Our committee model provides guidance when assessing our capability to conduct a hybrid method for conducting a legislative session on January 6th. Based on preliminary research, it appears that the session could be conducted using two forms of technology simultaneously, one for voting and the other for session participation.

Participation Tech. For purposes of this memo, Zoom Webinar is used as the participation technology, but that could be determined. It is convenient since members are now quite familiar Zoom. We know it works well. Only members and staff should appear on screen.

This concept assumes that the Clerk, his staff and those Speaker candidates who so choose, will be in the House chamber, along with other members who prefer to meet in person. That number should be limited by appropriate social distancing requirements to be developed with DHHS. Public access to the session could be provided by the existing in-House live-streaming technology, but could also use Zoom, since all members will also have to be able to see the Clerk/Speaker. The best method could be identified to maximize public access. It would be best if the Speaker and the Clerk also had access to large computer monitor showing remote members. Multiple screens might be necessary given the number of members in our legislature.

Voting Tech. ElectionBuddy is one popular form of voting technology. Limited experience with ElectionBuddy and an analysis of their website indicates that the software is used by state and municipal governments and is adaptable to the types of procedural actions necessary for a legislative session, including voting on motions and

elections. www.electionbuddy.com It also appears to be adaptable to providing for voting for floor motions that come up during the session. This descriptive video is very helpful in understanding the process, including how participants are notified, how they are registered, how security is ensured, votes tallied and results presented, among many other things. <https://electionbuddy.com/process-meeting> Basic pricing information is available on the website. While this will have a cost, as does Zoom licensing, much mileage funding has been saved due to remote operations. It is advisable that additional research be done to work through all voting requirements of a legislative session.

Secret ballot voting, as well as publicly available votes can be taken, the votes are immediately available, voting security measures are in place and every effort is made to reduce “technology anxiety” to ensure members focus on voting and their legislative duties. It is recognized that some members are far less comfortable than others with technology. Staff could be identified to work with those members and also to receive phone calls for those individuals needing assistance during the session. Many issues could be resolved in advance during the voter/software registration process.

Member and public trust, as well as experience with the voting software is paramount in this process. For this reason, it is recommended that a third party administer the vote, such as ElectionBuddy staff. If feasible, perhaps there could be a training in advance of the session day.

Speaker election. The first order of business on January 6th will be the election of the Speaker conducted by the Clerk. This is a straightforward election of the sort that ElectionBuddy can easily accommodate. Nominating speeches can be made in person or on Zoom, as can Speaker speeches.

Ballots can be cast in secret. Perhaps three majority and minority “tellers” can be identified to provide reassurance that the process conforms to necessary requirements and all can feel secure that the election process is fair and secure. If members have difficulty voting, telephone lines can be established for those having problems. This method tracks the Governor’s Emergency Order requirements outlined above.

ElectionBuddy’s process, as observed during the Democratic Caucus, works well. When the time to vote opens, the voting screen indicates as much, the vote is cast electronically, the voter is notified that the vote has been received, the voting period closes, the votes are tabulated and the results made immediately available to all voters. This was all done by secret ballot. If there is a tie, the software can easily accommodate this as well. Again, a mechanism should be established to provide those struggling with the technology to reach out for assistance. Tellers can ensure the fairness of the election. It is our understanding that blank and write-in votes can be cast using the ElectionBuddy technology. This should be determined.

Members who are physically present can ask questions by raising their hands and can be recognized by the Clerk in the ordinary manner. Those participating electronically

can do so using the Zoom technology. Questions regarding technology should go to the staff assisting for that purpose.

Members will have to be facile with the two forms of technology utilized, one to participate in the meeting and the other to vote. ElectionBuddy suggests that a computer can be used to participate and a tablet or phone be used to vote, if participants have access to both tools. Alternatively, using a computer, participants can toggle back and forth between the two forms of technology.

Regular legislative session. Once a Speaker is elected, s/he takes the podium and the legislative process can proceed through the Calendar as it does on any legislative day. Those who make and debate motions are required to register with the Clerk in the ordinary course and will be called upon to speak by the Speaker. Those who are participating remotely can speak through that mechanism.

All members should be muted through this process to keep the meeting orderly. Those who want to speak out of the ordinary course of business can make their requests as they usually do if they are on their floor. They can use the raised hand method if participating remotely. The Speaker can recognize members, as s/he sees appropriate. Members should be encouraged to ask no more questions and make no more motions than they would if on the floor, even though technology may make this easier, so legislative business can proceed in an orderly fashion.

ElectionBuddy can have all the anticipated votes pre-set, so the session can proceed in the ordinary manner. Motions made from the floor should be able to added in as necessary. While not absolutely necessary, given the time constraints, to maximize operability and to build trust among users, it is recommended that a third party, fully familiar with the technology be engaged. Other staff will have their regular responsibilities, although HCS is extremely familiar with Zoom Webinar and can assist a great deal, as needed.

Conclusion

For a legislative body the size of the NH House, the pandemic has presented major hurdles. Nevertheless, it is imperative that our legislature function. It is a vital branch of government and our constituents expect us to represent them. The House voted to request an advisory opinion of the Supreme Court to determine the constitutionality of remote meetings. Such meetings are constitutional and we must proceed availing ourselves of technology to ensure the health and safety of our members and staff. Other states are doing this. So can we. This memo sets out a viable path forward.

December 15, 2020



MEMO

To: Representative Karen Ebel, New Hampshire House of Representatives

From: Natalie Wood, Director, Center for Legislative Strengthening, NCSL

Date: February 8, 2021

RE: 2021 remote participation in the legislative process

Legislatures must consider several logistical and legal considerations in allowing remote participation in the legislative process. Legal issues include constitutional provisions, statutes, caselaw, and AG opinions dealing with provisions related to the seat of government, determining a quorum, or defining “present,” among other considerations. Our online resource on [continuity of legislatures in an emergency](#) explains these considerations and what continuity of government provisions were enacted prior to 2020.

We are in the process of refreshing that web page in light of 2021 rule changes. Accompanying this memo are examples of 2021 chamber rules that address remote participation (for members in floor session and committee and for the public) overall. In at least 19 states, one chamber or both has adopted rules or procedures for remote participation on the floor. In at least 27 states, one chamber or both has adopted rules or procedures for members to participate remotely in committee. In at least five states, one chamber or both has adopted rules that permit members to vote in areas other than the chamber floor, but within the capitol or on capitol grounds.

A few caveats about the examples listed:

- This list is not exhaustive; there may be other rules that chambers have adopted in 2021 or statutes that apply. And in some chambers, rules have not yet been adopted.
- As was the case in 2020, most of these rules are temporary or tied to an/this emergency.
- I have not yet located any relevant chamber rules in a few chambers that are using remote participation for members in committee proceedings (both chambers in MD, both chambers in Maine, both chambers in OR and the VA Senate) or in committee and floor session (Wyoming). However, you can review the operations plans for the Maryland [Senate](#) and [House](#); the [Maine Legislature](#) (see rule 4); and the [Oregon Legislature](#) (pp 12-13). The Wyoming Legislature, per its [session schedule](#), met remotely for about a week and will reconvene floor session in person on March 1st. These chambers are not included in the counts above.

As we discussed, remote participation on the floor can vary from chamber to chamber. For example:

- In both chambers in Vermont, the Virginia House and the Washington House, all, or nearly all, members are meeting virtually.
- In both chambers in Colorado and South Dakota, most members are physically present and remote participation is allowed when authorized by the presiding officer. (Included in the attached are policies Colorado developed as well.)

- The Pennsylvania House is using proxy voting for now; the Pennsylvania Senate is using technology for web-based video.
- While both chambers can use remote participation in New Jersey, the Assembly is using moderated conference calls for floor session; the Senate is meeting in person; and both chambers can hold virtual committee meetings via Zoom.
- Some rules only specify that members may participate in another location within the chamber, the capitol, or on capitol grounds (examples include the Alabama House, the Arkansas House, the Texas House and both chambers in Connecticut and Kentucky).

Where rules have been adopted to allow remote participation in committee, implementation might vary due to how the rules read and how much discretion is given to the chair. For example, the Virginia legislature held special session this fall. In observing the Senate's committee proceedings, the body conducted meetings where committee members were all together in-person and the public and those testifying participated virtually; where the committee met with some members in person and other members, and the public, participated virtually; and where proceedings were completely virtual.



Remote Voting Sessions: Practical Considerations and How Legislatures are Responding

- How can you mirror what happens on the floor?
 - Voting
 - Debate
 - Being recognized to speak
 - Making motions

- Who needs to be there in person?
 - Most chambers that have conducted a virtual remote vote session have had at least one member in the chamber (typically the presiding officer and/or some leaders) and some staff.

- How can you ensure member verification?
 - Pennsylvania Senate did this via the member-issued cell phone and a 4-digit pin.
 - New Jersey Assembly verified through the moderator on the teleconference.
 - Kentucky now allows proxy vote. Designated members in the chamber to vote, other members text a picture of their paper ballot with vote for member in the chamber to cast.
 - South Dakota sent meeting invitations to members' official email addresses and strongly recommended members use state-provided devices to participate, allowing IT staff to verify the device and email address signing into the remote meeting.
 - In Utah and Vermont members cell phone numbers provide a way to identify.

- How can other members and the public observe the votes occurring?
 - Could conduct roll call votes for each measure, which allows all members and the public to know how each member is voting, as done in the New Jersey Assembly. New Jersey also entered votes in the voting machine in the chamber so that they appeared on the electronic board.
 - With screens, could use thumbs up or thumbs down so members and staff can "see" the vote, as done in the Arizona House.
 - Could show the voting board so everyone can see the votes if using video, which is what South Dakota did and the Utah House planned to do.

- How can members can verify their votes?
 - The California Senate's rule requires members to verify their vote in writing after the fact within a few days.
 - The New Jersey Assembly sent emails to members confirming votes.

- What other ways can you ensure transparency?
 - Public can get access by broadcasting or streaming the process, as done in each chamber that has held a virtual voting session thus far.
 - Publish documents on the legislative website. South Dakota published bill drafts on the web before the remote session, along with an email address the public could use to submit comments.

- Plan, practice and test. Chambers that have conducted a remote voting session or are planning on it report testing out the process, the procedures and the hardware and software, and that even a script might help.
 - New Jersey asked members of the Assembly to call in to the moderated teleconference session an hour before the start.
 - South Dakota held training sessions for members and conducted a mock session prior to the remote veto session. The mock session had participation from almost all members, also allowing staff to make sure the system could handle the traffic.
 - Utah [tested](#) its remote session prior to its special session beginning.
 - [Wisconsin](#) held test meetings and a mock session.

- What technology options are legislatures using?
 - Zoom (Arizona House, Pennsylvania Senate, Vermont House)
 - Moderated teleconference (New Jersey Assembly),
 - Webex (Utah, Massachusetts House committee)
 - Microsoft Teams (South Dakota, Vermont)
 - Microsoft Teams and Skype (US Virgin Islands)
 - Skype for Business (Wisconsin Senate)
 - Pennsylvania Senate also used its own app so members could see bills, calendar, and customized content for caucuses.
 - Vermont used its own app to allow members to vote.
 - Streaming the session to the public via public broadcast, webcast
 - Consider the possibility that the platform may not be compatible with in-house streaming capability.

- What challenges could occur?
 - At least one chamber reported having trouble getting through to vendors so they chose to work with something they had worked with before; something that could quickly be put into place.
 - Control overturning audio/video streams on or off during short recesses or other times may not be possible on some remote platforms.

- What security issues could pop up?
 - Some legislatures report having breaches on Zoom, and other videoconferencing platforms have similar features that can create security problems.
 - Security and privacy settings are available and can be set appropriately in any conferencing software to ensure that participation is limited to authorized attendees

and that data collected from the call is not shared with third parties without consent (see news [article](#).)

- Working from home can create multiple insecure points of access that are vulnerable to intrusion. Be sure to provide [guidance](#) on how members and staff can secure their home networks.

RENNY CUSHING
NH HOUSE MINORITY LEADER

Sherman Packard
Speaker of the House of Representatives
(email)

February 8, 2021

Dear Speaker Packard:

Thanks to you, Deputy Speaker Steve Smith, and Chief of Staff Aaron Goulette for meeting with me, Deputy Democratic Leader David Cote, and Democratic Leader Pro Tempore Karen Ebel on February 1, 2021 to discuss the Democratic membership's public health concerns related to the pandemic in advance of the House of Representatives' next meeting, currently scheduled for February 24, 2021. In light of our conversation, I am writing to summarize our accommodation requests as well as the factual and legal context for those requests. We hope to work with you to ensure a safe environment where all representatives are able to fully engage in the legislative process without imperiling their health, including through the use of remote technology for access and participation in the session.

COVID-19 Is a Threat to Public Health

As you well know, we are in the midst of a global pandemic, and COVID-19 infection and fatality rates have continued to surge across the country. In the United States, "more than 26.5 million people . . . have been diagnosed with COVID-19, making up a quarter of the 104.5 million cases reported worldwide."¹ The national death toll has surpassed 450,000 and is projected to reach up to 534,000 by the end of the month.² As of February 3, over 66,700 Granite Staters have contracted the virus and more than 1,000 people have died.³ Recently, "New Hampshire was the only state with an increase for newly confirmed cases," recording "a hike of 4 percent."⁴ Accordingly, Governor Christopher Sununu has issued emergency orders to curtail the spread of the virus and the extraordinary danger it poses to our state.⁵

COVID-19 spreads easily from person to person through respiratory droplets, close personal contact, and contaminated surfaces and objects. The average infected person spreads the disease to

¹ Carolyn Crist, *U.S. COVID-19 Death Toll Passes 450,000*, WebMD (Feb. 4, 2021), <https://www.webmd.com/lung/news/20210204/us-covid-19-death-toll-passes-450000>.

² Madeline Holcombe, *US coronavirus death toll could hit 530,000 this month. That would be 1 death per minute over the last year*, CNN (Feb. 4, 2021), <https://www.cnn.com/2021/02/04/health/us-coronavirus-thursday/index.html>.

³ New Hampshire Dep't of Health & Human Services, *New Hampshire 2019 Novel Coronavirus (COVID-19) Summary Report*, <https://www.nh.gov/covid19/> (last updated Feb. 3, 2021).

⁴ David Mills, *Here Are the States Where COVID-19 Is Increasing*, Healthline (Jan. 26, 2021), <https://www.healthline.com/health-news/here-are-the-states-where-covid-19-is-increasing#Where-cases-are-the-highest>.

⁵ See, e.g., Exec. Order No. 2021-1, *Fifteenth Extension of State of Emergency Declares in Executive Order 2020-04* (Jan. 22, 2021), <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2021-01.pdf>.

between two and four others,⁶ in large part due to transmission by individuals who do not appear sick. Because 40 to 45 percent of all those infected and contagious are asymptomatic or pre-symptomatic, individuals may go to work, school, or other public facilities feeling perfectly well.⁷ Thus, simply avoiding people who are coughing or visibly ill is an insufficient measure to avoid infection.⁸ For the same reasons, screening questions, temperature checks, and other similar measures do not entirely mitigate the risk of infection.

Because of the airborne nature of the disease, the risk of transmission is highest in heavily trafficked public locations—especially indoors, where there is prolonged exposure, or when protective measures like mask-wearing and social distancing are absent.⁹ The risk of contagion is greater than ever as more infectious variants of the coronavirus have begun to spread in the U.S. and abroad.¹⁰ These risks are further compounded for individuals with a disability who are more likely to develop serious illness or death if they contract the coronavirus.¹¹

The New Hampshire House Must Take Steps to Protect Its Members

Legislative bodies across the country have experienced outbreaks of COVID-19.¹² The New Hampshire General Court has not been immune from COVID-19's devastation. The loss of our colleague, Speaker Dick Hinch, has left us acutely aware of the threat the coronavirus poses to legislators who are meeting face-to-face.¹³ We remain concerned for all members who have been ill or continue to suffer from severe complications as a result of their COVID-19 diagnosis. We seek consensus to implement plans for the upcoming session to eliminate the risk of infections going forward.

⁶ Jenny Gross and Mariel Padilla, *From Flattening the Curve to Pandemic: A Coronavirus Glossary*, N.Y. Times (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/us/coronavirus-terms-glossary.html>.

⁷ Oran D P and Topol E J, *Prevalence of Asymptomatic SARS-CoV-2 Infection*, *Annals of Internal Medicine* (Sept. 1, 2020).

⁸ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): How it Spreads* (Oct. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>; Lissette Voytko, *Fauci says coronavirus temperature checks 'notoriously inaccurate'*, *Forbes* (Aug. 14, 2020), <https://www.forbes.com/sites/lissettevoytko/2020/08/13/fauci-says-coronavirus-temperature-checks-notoriously-inaccurate/?sh=476516f633f0>.

⁹ Harvard Medical School, *5 factors to help you gauge where COVID-19 risk is highest* (Nov. 2020), <https://www.health.harvard.edu/staying-healthy/5-factors-to-help-you-gauge-where-covid-19-risk-is-highest>.

¹⁰ See, e.g., Matthew S. Schwartz, *New COVID-19 Variant Spreads To Dozens Of Countries*, NPR (Jan. 2, 2021), https://www.npr.org/sections/coronavirus-live-updates/2021/01/02/952842631/new-covid-19-variant-spreads-to-dozens-of-countries?utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_source=facebook.com&fbclid=IwAR1vJevkBypgmcsWGLpQD25D-HIZ44fDIgUZwiLKsgR5WxEjJj8kJBY5HC8 (reporting the new variant “could be 50% more transmissible than the original strain”).

¹¹ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): People with Disabilities*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>.

¹² See, e.g., John Keefe, *Which Members of Congress Have Tested Positive for the Coronavirus*, N.Y. Times (Feb. 2, 2021), <https://www.nytimes.com/interactive/2021/01/13/us/congressional-members-with-coronavirus.html>; Emily Wagster Pettus, *Mississippi seeing big virus outbreak in state legislature*, AP (July 10, 2020), <https://apnews.com/article/11198fc30f1cc29c29c27f62f6a23644>; Andrew DeMillo, *Coronavirus outbreak among Arkansas lawmakers grows to 11 total cases*, AP (Oct. 27, 2020), <https://www.thv11.com/article/news/health/coronavirus/coronavirus-outbreak-in-arkansas-legislature/91-da6056b8-27ff-40cb-b2b3-9f1be1efd354>.

¹³ Dan Barrick, Todd Bookman & Josh Rogers, *Newly Sworn-In GOP N.H. House Speaker Dies Of COVID-19, Autopsy Shows*, NPR (Dec. 10, 2020), <https://www.npr.org/2020/12/10/945137222/newly-sworn-in-n-h-gop-house-speaker-dies-of-covid-19-autopsy-shows>.

Although dangerous for any individual, requiring in-person attendance also poses a unique risk to members of the House with disabilities, myself included. As I shared with you, I was diagnosed with Stage 4 prostate cancer and am currently receiving treatment. The medication I take as part of this regimen has left me with a compromised immune system, placing me at particular risk of severe complications or death if I contract COVID-19. Indeed, I have recently been hospitalized due to other infections resulting from my immunosuppression. Since the governor's emergency declaration, I have only left home for non-medical reasons twice: both times to attend meetings of the House.

I am not the only legislator who will face a life-or-death choice when deciding whether to attend the upcoming February 24 session. Because of the imminent risks posed by in-person participation, many legislators feel they are forced to choose between their jobs and their lives. For example, House Minority Deputy Leader Cote suffers from coronary artery disease and received stent implantations after suffering a heart attack in 2018. He also has cerebral palsy and must use crutches and leg braces to walk; Deputy Cote also suffers from epilepsy and high blood pressure. Due to all of this, Deputy Cote does not drive. Representative Kenneth Snow suffers from Guillain-Barre Syndrome, which has previously required him to seek emergency care. On one occasion when suffering from partial paralysis, he was hospitalized for three months—spending eighteen days in intensive care and eight days on a ventilator. Because of restrictions at the Birch Hill senior citizen facility where Representative Snow lives, he is also prohibited from attending any gathering with more than ten people.

Although these stories are notable, regrettably, they are not unique. Other legislators grapple with this fear and face the same impossible choice: representing their constituents or imperiling their health. During the last session, several legislators were deterred from participating because of the risk presented by COVID-19. For these reasons, the minority caucus has made multiple requests for accommodation and has repeatedly attempted to further measures that will protect all legislators, but especially those who are entitled to such protections under disability law. You stated to the Union Leader in an article dated January 15, 2021 regarding hybrid Committee meetings in the Legislative Office Building, “We fully understand there are some with pre-existing conditions or health risks that make it sensible for them to take part via Zoom.”¹⁴ The same is true with regard to House sessions.

We have proposed several measures to protect members from COVID-19, which have failed because of opposition from members of your caucus. For instance, on June 11 of last year (before receiving the New Hampshire Supreme Court opinion described below), Speaker Shurtleff introduced a proposal that would have permitted the late drafting of an amendment to the New Hampshire Constitution “providing that the general court shall have the power and duty to adopt measures necessary for the continuity of government in periods of emergency.”¹⁵ The motion failed, with you and all current members of your leadership team voting against it. On September 16, 2020, Rep. Ebel made a motion to request an advisory opinion of the New Hampshire Supreme Court inquiring as to whether “holding a session of the New Hampshire House of Representatives remotely, either wholly or in part, whereby a quorum could be

¹⁴ Kevin Landrigan, “House soon to bring lawmakers back into committee rooms,” New Hampshire Union Leader, January 15, 2021 https://www.unionleader.com/news/health/coronavirus/house-soon-to-bring-lawmakers-back-into-committee-rooms/article_455b4fbb-6bdf-5baa-bbd9-96d102384b86.html

¹⁵ House Constitutional Amendment 21 (N.H. 2020), House Journal, Vol. 42, No. 9 (June 11, 2020) at pages 7-10. <http://gencourt.state.nh.us/house/caljournals/default.aspx>. See, also <https://legiscan.com/NH/bill/CACR21/2020> (introduced June 8, 2020).

determined electronically violate Part II, Article 20 of the New Hampshire Constitution.”¹⁶ The motion passed, but was strongly opposed by your caucus. The Supreme Court did ultimately opine that a quorum may be determined electronically, clearing the way for the remote sessions that would protect members from COVID-19. However, members of your caucus continued to claim that a House rule was required to allow remote participation. As such, a motion was introduced on Organization Day to permit the Speaker to pursue this option. However, it was voted down by your caucus, with you speaking in opposition. On December 16, 2020, the Rules Committee meeting considered, but the Republican members refused to support, our proposed Rule 110 explicitly permitting the Speaker to convene session remotely. A similar motion, introduced on January 6, 2021, Convening Day, also failed when opposed by your caucus. Most recently, in the Speaker’s Message in the February 5th House Calendar, despite consistently opposing such a rule, you said the House is obligated to meet in-person because there is no rule permitting it to do to meet remotely, in whole or in part.

The absence of such a rule, however, does not necessarily preclude remote participation. As the New Hampshire Supreme Court held in its recent advisory opinion, “it is within the competency of either house to prescribe any method which shall reasonably be certain to ascertain the presence of a quorum.”¹⁷ Given that current House rules do not preclude remote participation, the Speaker has authority to permit members to attend sessions virtually.

Past efforts to conduct safe and effective in-person sessions during the pandemic have also failed. The drive-in session held in the University of New Hampshire parking lot, for instance, presented both health risks and practical challenges.¹⁸ Participation in that session required members to have multiple contacts with staff and other members to receive the materials necessary to vote and speak. Flaws in the site logistics resulted in a bottleneck at the entrance, delaying admittance and the start of the session for over an hour. Poorly functioning equipment and the passage of freight and passenger trains on the adjoining railroad tracks caused frequent interruptions. The voting system also malfunctioned, ultimately failing to record the votes of multiple representatives. The extended time spent in vehicles itself burdened the health of some members, including Representative Katherine Rogers, who suffers from degenerative joint disease and requires the use of a walker, cane, or wheelchair as adaptive aids. Sitting for extended periods of time caused her to suffer extreme pain that day and for weeks after the drive-in session occurred.

The Current Lack of COVID-19 Protections for House Members May Violate Federal Law

All legislators have a right and an obligation to serve in the office entrusted to them by the citizens of New Hampshire, just as voters have a reciprocal right to be represented in the state’s legislature. Several House members suffer from serious medical conditions that make exposure to COVID-19 particularly dangerous and potentially fatal. For these representatives, reasonable accommodations are necessary to enable their participation and are required under federal anti-discrimination law.

State and local government entities are covered by both the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973. At a minimum, Title II of the ADA requires public entities to

¹⁶ House Journal Vol. 42, No. 11, September 16, 2020, at pages 6-9.

¹⁷ Supreme Court of New Hampshire, Op. No. 2020-0414 (Nov. 17, 2020), <https://www.courts.state.nh.us/supreme/opinions/2020/2020063OJ.pdf>.

¹⁸ Ellen Barry, *As State Legislatures Aim to Convene Amid Covid, One Tries a Drive-In*, N.Y. Times (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/us/new-hampshire-drive-in-legislature.html>.

ensure that no qualified individual with a disability is excluded from participating in, denied the benefits of, or subjected to discrimination under any of its programs, services, or activities solely on the basis of the individual's disability. *See* 42 U.S.C. § 12102, *et seq.* Title II also requires that public entities make reasonable modifications to their policies, practices, and procedures where necessary to avoid discrimination unless they can demonstrate that doing so would fundamentally alter the nature of the service, program, or activity being provided.

Similarly, Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability in programs that receive federal financial assistance. 29 U.S.C. §§ 701, *et seq.* It is our understanding that the General Court has received federal CARES Act funds that it has used to respond to the COVID-19 pandemic by providing testing for members and staff and is thus subject to the requirements of the Rehabilitation Act.

Reasonable Accommodations Are Necessary to Protect the Health and Safety of All Members

In order of preference, we seek the following reasonable accommodations to ensure the health and safety of all House members while conducting legislative business.

1. We ask that any legislator who requests remote access be allowed to participate via remote technology.

During our conversation, although we did not reach an agreement regarding remote participation, you agreed to consider proposals made to implement a remote option. The House has successfully employed remote technology for committee meetings, and the Senate has been conducting all of its business remotely. The House's existing technology infrastructure can be adapted to allow for remote access and participation. Alternatively, one or more technology platforms can be used to enable legislative meetings. As proposed during our discussion, the use of a videoconferencing application (Zoom, GoToMeeting, Microsoft Teams, etc.) in conjunction with a voting tool (Election Buddy, eBallot, Election Runner, etc.) can enable all of the legislature's business to be conducted remotely. Legislatures across the country have adopted similar technology that has proven to be a practical and cost-effective method of holding their sessions remotely, either entirely or partially.¹⁹

2. We request that any legislator with a qualifying disability under the ADA or Rehabilitation Act be permitted to participate remotely.

If not granted to any legislator upon request, remote participation should nonetheless be allowed for members who are entitled to an accommodation under the federal disability laws described above. The U.S. Equal Employment Opportunity Commission has made clear that individuals with disabilities that place them at a higher risk of severe illness may be entitled to reasonable accommodations that "reduce chances of exposure."²⁰ Disability is broadly defined under the ADA and "shall be construed in favor of

¹⁹ National Conference of State Legislatures, COVID-19: State Actions Related to Legislative Operations, <https://www.ncsl.org/research/about-state-legislatures/covid-19-state-actions-related-to-legislative-operations.aspx> (last updated Jan. 26, 2021).

²⁰ U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated Dec. 16, 2020).

broad coverage of individuals.” § 12102(4)(a). The Rehabilitation Act adopts the same standard and applies to “all of the operations of” federal funding recipients. *See* 29 U.S.C. § 794(b).

3. We request additional information regarding safety precautions for members who do attend session in-person

During our conversation, you indicated you were considering several potential sites for the upcoming legislative meeting, including the sports complex in Bedford or a similarly large facility in Epping. Moreover, although you shared that social distancing and ventilation precautions were being weighed, you did not provide details about what protocols would be implemented for those attending in-person. We require more information about what specific health precautions will be adopted, and we request that the information be provided as soon as possible.

If you insist on in-person participation, we ask the majority to consider the following measures: keeping members at least ten feet apart; requiring mask-wearing for all members; using protective physical barriers, like plexiglass shields; implementing enhanced cleaning protocols; providing hand sanitizer and surface cleaners; securing supplemental ventilation or air circulation; and adopting other COVID-19 screening and safety protocols. We also request any rules be clearly publicized in advance of the meeting, with sufficient assurances that they will be enforced against members who do not comply.

Conclusion

We hope to continue our dialogue to achieve an amicable resolution to this matter. We also wish to avoid the time and expense of litigation so that we can all do the important work that the people of New Hampshire have elected us to do. Accordingly, we ask you to notify us in writing that members of the House, or, at a minimum, its disabled members, will have the option of attending all future session meetings remotely so that they can fully and safely participate. If this request is denied, we ask that you provide the reason(s) in writing for such a refusal. If in-person attendance will be required, we ask you to provide us with details about the plans for the event, including what public health precautions will be implemented and how they will be enforced. Although we are eager to continue discussions in the interim, please advise us in writing by Friday, February 12, 2021, whether these accommodations will be in effect for the House meeting on February 24, so we can seek appropriate legal relief, if necessary.

Sincerely,

Robert Renny Cushing
House Minority Leader
(email)

CC:

Aaron Goulette
Chief of Staff to Speaker Packard
(email)

David Cote
Deputy Democratic Leader
(email)

Karen Ebel
Democratic Leader Pro Tempore
(email)

Steve Smith
Deputy Speaker of the House of Representatives
(email)



**STATE OF NEW HAMPSHIRE
HOUSE OF REPRESENTATIVES**

**Office of the Speaker
107 North Main Street
Concord, NH 03301-4988**

**Sherman A. Packard
Acting Speaker of the House**

February 12, 2021

Hon. Renny Cushing
House Democratic Leader
State House Room 307
Concord, NH 03301

Sent via Email

Leader Cushing,

Thank you for your continued dialogue on remote session participation. Your staff and Rep. Ebel have been helpful in bringing information to our attention with regard to processes and technology being used in other states.

We continue to research if a reasonable remote solution exists that will meet the unique logistical and security requirements of our 400 member House of Representatives. A solution that would meet our unique needs has not yet been identified.

While I acknowledge that several legislative bodies in other states and our own state senate have found methods that work for them, I'm sure you will agree with me that a solution suitable for our body will be of far greater complexity. Additionally, developing a set of rules and parameters that would be acceptable to the body for remote participation of their peers could be equally challenging.

Regarding the House session on the 24th and 25th, I want to assure you and your caucus that we will have health and safety documentation outlining precautions and protocols. This administration, like the previous administration, has and will take all reasonable measures to mitigate risk at these sessions.

Members, under any circumstances, must make decisions about their own health situations, and assess their own levels of risk. This was the case before the pandemic and is heightened as a result of the current pandemic.

I wanted to address the three requests included in your February 9th in detail.

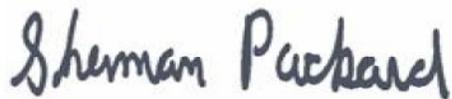
I believe it is impractical to permit remote participation to all members who request it. States who have successfully done so have memberships of less than half of ours, and most have provided state issued equipment to those members to facilitate it. Deployment of equipment, testing, training of members, technical support protocols, and backend software development would all be tremendously time consuming and costly.

Remote participation may be possible for future sessions for members with specific health issues. As I indicated earlier in this letter, we are continuing to search for solutions that will meet our unique needs as a body, but will not compromise the operation of the House. Identifying our specific needs for a solution, then identifying the proper vendor to facilitate the solution, training our staff on how to use it, testing the technology, procuring devices to support the technology, deploying the technology and devices to members, training members, analyzing members' data connectivity, developing support protocols and analog backups, would all need to be done prior to using any system. These important steps are necessary.

The facility will permit us to make reasonable accommodations for members who request it. The facility is ADA accessible. Significant distancing and enhanced health and safety protocols will be in place. We believe we are creating the safest possible environment for members and staff. We will be working with Dr. Ballard of DHHS and our first responder partners to develop our plans and documentation. Site visits with Dr. Ballard and others have not been completed. We will be sure to keep you and your caucus members informed as details come together. Details will be published in the next House calendar, but if they are available sooner, I will let you know.

Lastly, I would like to encourage continued good faith dialogue without the constant threat of litigation. I have an obligation to defend the institution and ensure its ability to conduct its business. You have an obligation to communicate the position of your caucus. We can operate with this mutual understanding and without costly litigation. It is in the best interests of our state to do so.

Best Wishes,

A handwritten signature in black ink that reads "Sherman Packard". The signature is written in a cursive, slightly slanted style.

Sherman Packard
Speaker of the House

To: Leader Renny Cushing
From: Rep. Karen Ebel
Date: February 13, 2021
Re: Proposed Technological Solution to Accommodate Vulnerable Members

In light of the Speaker's response to your letter of February 9th, here are my thoughts on a very simple solution to accommodate our estimated 25-30 most vulnerable members. This incorporates hybrid concepts that the NH House and Senate are already using successfully, techniques with which our IT, House Committee Services and members are all very familiar.

First of all, the Senate is already successfully meeting in hybrid fashion, using Zoom. The Senate President presides over the session from the House of Representatives, joined by the Senate Clerk. I assume, and it appears from public Senate session videos, that the President and the Clerk have access to a large computer screen, similar to what we have for our hybrid committee meetings in the LOB. Like the House committee chairs, the Senate President and Clerk can view the Senators, all of whom are attending remotely. An additional tile on the Zoom Gallery view is the camera feed from the House Chambers. Our IT department has set this up and it works perfectly well. It should be relatively simple to put this together in time for the February 24th/25th session. You can view the Senate setup here: <http://sg001-harmony.sliq.net/00286/Harmony/en/PowerBrowser/PowerBrowserV2/20210211/-1/21510#agenda>

Both Aaron and I have spoken to the Vermont legislature's IT director about its program. The Senate's hybrid meeting stream can be viewed here and is of interest, as it is another good example of what other legislatures are doing. <https://www.youtube.com/watch?v=TZfmHfV95BY> They do have differing mechanisms in the Vermont House, but since I am proposing something more limited for the upcoming session, the Senate is more relevant.

Our House/Joint staff will surely be working with the Bedford Sportsplex staff to set up the public access live stream and member participation mechanisms. Having worked closely with House Committee Services and our IT staff in the past, I have full confidence in their ability to create a limited remote plan.

This is a simple idea for a compromise tech solution:

Provide a large monitor for the Speaker, the Clerk and the staff to view, as has been done for the Senate. Assign a member of the Clerk's staff to work with those members who are participating on Zoom. Set up a Zoom meeting for the 25-30 members who it is anticipated will need accommodation. Include the live stream on a separate tile in the Gallery view as the Senate and our committees do. Those participating remotely would also be able to see the live stream and listen, as remote members now do in committee and in the Senate. This system is very familiar to our members.

When it comes time to vote, online members could indicate yay or nay with an agreed upon Zoom "reaction" while remaining on-screen, or with a thumbs up, thumbs down motion, so the staff person can see them to verify that the members are, in fact, the ones voting. For voice votes, they can all be unmuted, or if preferable, give a thumbs up or down that can be noted by the clerk.

The clerk's staff person can count the votes and pass them on to the clerk who can add them to the total count. That may take a little extra time, but it will accomplish the purpose. We should not need anything more complex. Both Speakers in past sessions at UNH always work with members to record their votes, as when clickers do not work properly. This is no different.

If members are scheduled to speak on a motion, the Clerk will already have them on the agenda and can call on them to speak. If a member wants to otherwise participate in the session by asking a question, making a point of order, etc., the staff person could communicate that request to the Clerk to advise the Speaker. In order to address the body, the member could be unmuted, and their voices could be heard through the audio system. The public access feed could show those on Zoom and the live stream, or just the live stream. This is essentially how the committee and the Senate are operating. This suggestion uses many of the same systems already in place. The effort needed to arrange this pales in comparison to the arrangements needed for in-person House sessions at alternative locations.

Notably, the methodology the Senate is using is exactly what the former Chief of Staff, Eileen Kelly, was contemplating for the House, in the hope that the Supreme Court would opine that the House could meet remotely. Of course, during the time the Democrats were in the majority, no member could participate in sessions remotely without the Supreme Court's blessing. We most certainly did explore ways in which members could participate remotely in session. But no member could participate remotely while we were in the majority without that opinion.

On November 4th, the Democrats lost the majority. Our work to develop processes for remote sessions stopped for obvious reasons. The Supreme Court finally issued its opinion on November 17th. We had the basics of a remote session plan in mind, but our input was never solicited. Failing that, trying to be of assistance to the new majority, and to all our members in light of the pandemic, I did the memorandum summarizing remote options for a full House session that you provided to the Speaker. Had the Democrats remained in the majority, I have little doubt that, at a minimum, we would have found a path forward for the most vulnerable to participate in sessions. It is my hope we will still be able to do so.

If I can be of any additional assistance in this or other matters, please let me know.