

**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: 1:21-cv-00147

**EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR
PRELIMINARY INJUNCTION**

(EXPEDITED CONSIDERATION REQUESTED)

Pursuant to Federal Rule of Civil Procedure 65, New Hampshire Representatives Cushing, Cote, Snow Rogers, Berch, Langley, and DiLorenzo (Individual Plaintiffs) and the New Hampshire Democratic Party (NHDP) hereby move for a temporary restraining order and/or preliminary injunction requiring the Defendant to institute procedures that will allow Individual Plaintiffs and other similarly situated members of the NH House of Representatives who have requested ADA accommodations to participate in all meetings and sessions of the House on a remote basis. Plaintiffs state as follows:

1. Plaintiffs adopt and expressly incorporate herein all factual and legal statements contained in the Complaint filed in this case. Plaintiffs also adopt and expressly incorporate

herein all facts and statements of law contained in the Memorandum of Law in support of Motion for Temporary Restraining Order and Emergency Injunctive Relief.

2. The Defendant has announced that he anticipates calling the New Hampshire House of Representatives into session on February 24, 2021 and February 25, 2021.

3. The Defendant has stated that the sessions will be in-person only, with no remote attendance option.

4. Defendant and his leadership team are in complete control over what bills will be reported out of committees and acted upon by the House on that date.

5. At the last session of the House, 44 state representatives were unable to attend almost all due to concerns occasioned by the previous reckless behavior of majority members of the House who refuse to wear masks to diminish risk. These 44 representatives are the collective voice of over 140,000 citizens of New Hampshire. Without issuance of injunctive relief, all of the representatives who are unable to appear without danger to their lives and all of their constituents including members of the NHDP will be deprived of their rights to participate in democracy as guaranteed by the Fourteenth Amendment to the United States Constitution, Part One Article 11, the Americans with Disabilities Acts and Section 504 of the Rehabilitation Act of 1973.

6. Plaintiffs have repeatedly tried to convince Defendant to allow reasonable accommodation as required by federal law. Plaintiffs have requested on several occasions that the Defendant allow for an accommodation for the 28 Representatives known to Plaintiffs that have filed requests for a remote accommodation. This small number of representatives, all of whom have serious medical disabilities, could easily be accommodated in a Zoom meeting just as the Defendant has utilized for committee meetings. Votes could be monitored by a single

staff member. The House already has a Zoom license so this accommodation would be simple and inexpensive to implement.

7. This request for injunctive relief is made pursuant to the counts in the Complaint alleging violations of the ADA and Section 504. The other counts are relevant to this request to the extent that they explain the irreparable harm the Plaintiffs will suffer in the absence of relief.

8. The Plaintiffs are likely to succeed in this action because the Individual Plaintiffs are qualified individual with disabilities and the accommodation requested is eminently reasonable.

9. The Individual Plaintiffs, as well as the NHDP, will suffer irreparable harm if injunctive relief does not issue.

10. The balance of equities is in Plaintiffs' favor.

11. An injunction is in the public interest.

12. Plaintiffs request an expedited hearing and decision on this motion. As noted above, two sessions of the House are scheduled for February 24 and 25. Without a prompt order from the Court, the Individual Plaintiffs will be forced to either miss session or put their lives at risk to attend.

LOCAL RULE 7.1(a) CERTIFICATION

13. This motion is accompanied by a memorandum of law.¹

¹ The accompanying memorandum does appear to exceed the page limit contained in L.R. 7.1(a)(3) for non-dispositive motions; however, the Plaintiffs request leave of the Court to exceed that page limit given the nature of the factual and legal issues and the public interest considerations implicated. Plaintiffs additionally submit that this Motion is akin to a dispositive motion in terms of substantive complexity and note that the memorandum complies with the page limit for dispositive motions.

LOCAL RULE 7.1(c) CERTIFICATION

14. Given the nature of the relief requested herein and the timing of this Motion, Plaintiffs have not sought Defendant's assent on this motion. Defendant has been asked scores of times to provide for remote access.

LOCAL RULE 65.1 CERTIFICATION

15. This motion is accompanied by a proposed order.

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Consider and decide this Motion on an expedited basis;
- B. Issue a temporary restraining order and/or preliminary injunction ordering the Defendant to allow the Individual Plaintiffs the accommodation of remote attendance to sessions of the House;
- C. Grant such other and further relief as the Court deems proper and just in the circumstances.

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: 2/15/21

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NEW HAMPSHIRE DEMOCRATIC PARTY

By its attorneys

Dated: 2/15/21

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CERTIFICATE OF SERVICE

I certify that a copy of this Motion and the accompanying Memorandum of Law and attachments was forwarded by e-mail to James S. Cianci, Esq., House Legal Counsel, at james.cianci@leg.state.nh.us.

Date: 2/15/21

/s/ Paul Twomey
Paul Twomey, Esq.

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

Rep. Robert “Renny” Cushing
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MEMORANDUM OF LAW
IN SUPPORT OF
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR
PRELIMINARY INJUNCTION

NOW COME the Plaintiffs in this matter and submit the following memorandum in support of their Motion for Temporary Restraining Order and Preliminary Injunction:

BACKGROUND AND FACTS

I. Introduction

The plaintiffs in this matter are seven Democratic members of the New Hampshire House of Representatives (Robert ‘Renny’ Cushing, David Cote, Kenneth Snow, Katherine Rogers, Paul Berch, Charlotte DiLorenzo, Diane Langley) and the New Hampshire Democratic Party. The plaintiffs seek injunctive relief against the Defendant, Sherman Packard, in his official capacity as Speaker of the New Hampshire House (referred to as “Defendant” or the “Speaker”).

In sum, Defendant has refused to allow the legislator plaintiffs (“Plaintiffs”) to attend sessions of the House via remote means (i.e., Zoom or similar platform) despite multiple written

and verbal requests for such an accommodation. The Plaintiffs all suffer from extremely serious medical conditions and disabilities — including, among other things, stage 4 cancer, compromised immune systems, and kidney disease requiring a transplant — which render them especially vulnerable to complications from COVID-19. *See* COMPLAINT. As such, without the option of remote attendance, the Plaintiffs must choose between putting themselves at risk of serious injury/death or leaving their constituents unrepresented in the legislature.

The Plaintiffs have made many attempts — over multiple months — to convince the Defendant to allow remote participation in session. Those attempts include multiple formal letters from the Democratic Leader and counsel, written ADA accommodation requests from the individual members, e-mails, and many verbal conversations. The Plaintiffs have made every effort to avoid litigation and have allowed the Defendant a multitude of opportunities to reconsider his position and permit the reasonable and limited accommodation requested herein. Unfortunately, the Defendant has chosen not to heed the Plaintiffs’ pleas.

In the House Calendar issued on February 5, the Defendant announced that the House would meet in session on February 24 and 25. He further stated that all members would be “obligated to meet in-person” at the session. N.H.H.R. CALENDAR #43-10 (Feb. 5, 2021).¹ In response, the Plaintiffs — through Democratic Leader Renny Cushing — sent a final letter to the Defendant requesting reasonable accommodation in an attempt to avoid this lawsuit. DECLARATION OF RENNY CUSHING (“Cushing Dec.”) at ¶24. On February 12, Defendant provided a response denying the availability of remote participation for the upcoming session days. Correspondence between the parties has continued, but without an acceptable resolution.

¹ House Calendars are available at <http://www.gencourt.state.nh.us/house/caljournals/default.aspx>.

The Defendant's refusal to allow the accommodation of remote participation for disabled legislators violates the Americans with Disabilities Act, the Rehabilitation Act of 1973, and the Fourteenth Amendment to the United States Constitution. Further, the Defendant's actions contravene Part One, Article 11 of the New Hampshire Constitution.

Because of these violations, Plaintiffs seek emergency injunctive relief from the Court allowing them to participate remotely in the February 24 and 25 session days.

II. Background and Timeline

a. COVID-19

The Court is aware of the history of the COVID-19 pandemic and its effect on New Hampshire. *See generally* N.H. EXEC. ORDER No. 2020-04 (March 13, 2020) (Governor's declaration of a state of emergency due to COVID-19). As of February 3, over 66,700 Granite Staters have contracted the virus and more than 1,000 people have died.² Recently, "New Hampshire was the only state with an increase for newly confirmed cases," recording "a hike of 4 percent."³ The virus 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 and contagious are asymptomatic or pre-symptomatic.⁴

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.⁵ The risk of contagion is

² 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).

³ 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>.

⁴ Oran D P and Topol E J, *Prevalence of Asymptomatic SARS-CoV-2 Infection*, ANNALS OF INTERNAL MEDICINE (Sept. 1, 2020).

⁵ 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>.

greater than ever as more infectious variants of the coronavirus have begun to spread in the U.S. and abroad. These risks are further compounded for individuals with a disability — such as the Plaintiffs, *see* COMPLAINT — who are more likely to develop serious illness or death if they contract the coronavirus.⁶

b. Legislative activities during the pandemic

Following the declaration of a State of Emergency in New Hampshire, the House of Representatives suspended all legislative activity. Conducting House legislative activity during the pandemic presents two challenges which are relatively unique to New Hampshire: (1) at 400 members, the body is one of the largest legislatures in the English-speaking world, and (2) the average age of state representatives is unusually high: approximately 63 years.⁷ Many members are in their seventies, eighties, or older. Furthermore, House members are essentially volunteers — they are paid a \$100-per-year salary. House members do not have dedicated offices or staffs.

In spring/summer 2020, House leadership considered whether remote House sessions (i.e., via Zoom or similar) were permissible under the New Hampshire Constitution. DECLARATION OF KAREN EBEL (“Ebel Dec.”) at ¶ 4. After consultation with House counsel, it was determined that there was too much doubt about constitutionality to convene a remote meeting. *Id.* at ¶5. As such, alternative arrangements were made, and in June 2020 the House convened twice at the Whittemore Center in Durham (the University of New Hampshire ice hockey arena). *Id.* at ¶6.

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

⁶ 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>.

⁷ 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>.

“providing that the general court shall have the power and duty to adopt measures necessary for the continuity of government in periods of emergency.”⁸ The purpose of this amendment was to ensure that remote meetings could be conducted under the Constitution.⁹ The motion failed, with the Defendant and all current members of his leadership team voting against it.¹⁰

Masks and social-distancing were required at the Whittemore Center sessions; however, approximately three dozen Republican members refused to wear masks.¹¹ The sessions were marred by reports that a group of Republican members were drinking beers in the arena.¹² University President Jim Dean also criticized GOP state representatives who flouted campus mask policies, and warned that the House would not be welcomed back to UNH if their conduct went unaddressed.¹³

During the spring and summer of 2020, the House conducted committee meetings (including executive sessions) fully remotely, via Zoom. EBEL DEC. at ¶ 8. The decision to allow remote committee meetings was made unilaterally by then-Speaker Shurtleff and without any specific authorization from the House Rules or the body at large.¹⁴ *See also id.* at ¶ 9.

The final session day of the 2020 term occurred on September 16, 2020 at the Whittemore Center. A motion was made by Representative Karen Ebel 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

⁸ CACR 21 (N.H. 2020), HOUSE JOURNAL, Vol. 42, No. 9 (June 11, 2020) at pages 7-10.

⁹ *Supra* note 7.

¹⁰ *See* CACR21 (2020) roll call, at <https://legiscan.com/NH/bill/CACR21/2020>.

¹¹ *Supra* note 7.

¹² Daniela Allee, *State Reps Draw Criticism For Drinking Beer, Not Wearing Masks On UNH Campus*, N.H. PUB. RADIO (Sept. 17, 2020), <https://www.nhpr.org/post/state-reps-draw-criticism-drinking-beer-not-wearing-masks-unh-campus>.

¹³ *See id.*

¹⁴ N.H.H.R. CALENDAR #42-16 (Apr. 17, 2020).

determined electronically, violate Part II, Article 20 of the New Hampshire Constitution.”¹⁵ The motion passed, but was overwhelmingly opposed by the Republican caucus, including the Defendant.

Republicans gained control of the House in the November 2020 elections. On November 17, 2020, the Supreme Court issued its advisory opinion regarding the constitutionality of remote House sessions. The Court opined that “holding a House session remotely, either wholly or in part, whereby a quorum could be determined electronically, would not violate Part II, Article 20 of the New Hampshire Constitution.” *Opinion of the Justices*, 173 N.H. ____, ____ (2020), 2020 N.H. LEXIS 196, at *18 (Nov. 17, 2020) (emphasis added).

The House is constitutionally mandated to meet on the first Wednesday in December for Organization Day. N.H. CONST., Part 2, Art. 3. Following the Supreme Court opinion, Democratic leaders immediately began calling for sessions to be conducted remotely, or at least include an option for remote participation.¹⁶ CUSHING DEC. at ¶ 8. Republicans, however, opposed the idea. *Id.* Ultimately, Organization Day was held on the UNH campus on December 2, 2020 outside the Whittemore Center on a field hockey field in 40-degree weather.¹⁷

Less than a day before Organization Day, Republican leadership revealed that an “unspecified number of New Hampshire House Republicans ha[d] tested positive for COVID-19 after an indoor [Republican] caucus.”¹⁸ CUSHING DEC. at ¶ 10. Governor Sununu criticized House

¹⁵ HOUSE JOURNAL Vol. 42, No. 11, September 16, 2020, at pages 6-9.

¹⁶ Ethan DeWitt, *N.H. Legislature’s meeting plans for 2021 unclear as COVID cases rise*, CONCORD MONITOR (Nov. 21, 2020), <https://www.concordmonitor.com/Unclear-2021-meetings-plans-for-Legislature-as-COVID-cases-rise-37267692>.

¹⁷ 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>.

¹⁸ Ethan DeWitt, *GOP lawmakers contracted COVID and leaders were slow to tell colleagues*, CONCORD MONITOR (Dec. 1, 2020), <https://www.concordmonitor.com/New-Hampshire-House-Republican-caucus-COVID-19-outbreak-prompts-anger-from-Democrats-37566965>.

Republicans for the indoor caucus, which apparently included an open buffet and many members who were not wearing masks or socially distancing.¹⁹ Sununu also criticized Republican leadership for failing to timely inform Democratic members of the House of the super-spreader event.²⁰ *See also* CUSHING DEC. at ¶ 11.

At least 61 members of the House — all Republicans — refused to wear masks during the Organization Day session despite potential exposure at their earlier caucus, and in contravention to University of New Hampshire policy, a Durham town ordinance, and the Governor’s executive order mandating face coverings.²¹ Republican Richard “Dick” Hinch, of Merrimack, was elected Speaker of the House.²² One of the main orders of business for Organization Day was adopting House Rules, and Democrats proposed a rule that would explicitly allow for remote participation in both committee hearings and legislative sessions. Republicans blocked the proposal.²³

One week after being elected Speaker of the House on Organization Day, Speaker Dick Hinch (R-Merrimack) died of COVID-19.²⁴ The second-ranking Republican in the House also contracted the illness. Another Republican member endured a lengthy hospital stay and had to be placed on a ventilator.²⁵

The House was next required to meet on Convening Day (the first Wednesday in January). The Defendant, then Acting Speaker after the death of Speaker Hinch, determined that the House

¹⁹ AP, *Sununu: GOP lawmakers ‘horribly managed’ caucus meeting, should have told Dems about infections*, CONCORD MONITOR (Dec. 4, 2020), <https://www.concordmonitor.com/Sununu-GOP-lawmakers-should-ve-told-Dems-about-infections-37622957>.

²⁰ *Id.*

²¹ Mark Hayward, *60 state reps have ignored executive order and doffed masks*, UNION LEADER (Jan. 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.

²² *Supra* note 17.

²³ *Id.*

²⁴ Will Wright & Lucy Tompkins, *Covid-19 Causes Sudden Death of Top N.H. State Lawmaker*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/us/richard-hinch-nh-covid.html>.

²⁵ Sofia Miller, *Central Kentucky woman prays for brother in coma fighting COVID-19*, LEX 18, <https://www.lex18.com/news/covering-kentucky/central-kentucky-woman-prays-for-brother-in-coma-fighting-covid-19>.

would meet in parking lots on the UNH campus, with members voting from their cars via remote control “clicker” devices.

In response, Democratic members of the House again asked for the ability to attend session remotely. Multiple members of the House, including the Plaintiffs, sent written requests to the Defendant citing the Americans with Disabilities Act and requesting the reasonable accommodation of remote access.²⁶ *See, e.g.*, CUSHING DEC. at ¶ 12. In most cases no response was received at all; the accommodation of remote participation was never offered. *Id.* at ¶ 13.

The Convening Day “drive in” session took place on January 6, 2021. The session was delayed by more than an hour as a traffic jam developed with hundreds of members attempting to enter the UNH parking lots.²⁷ Cars were spread out over several acres, most without a sightline to the rostrum. *Id.* at ¶¶ 14, 17. The enterprise involved considerable logistical challenges and expense, and included UNH workers, emergency personnel, State House staffers, a dedicated radio transmitter, many loudspeakers, and a portable video screen. *Id.* at ¶ 16. Malfunctions occurred with the remote-control “clickers” used for voting, and it was later determined that the votes of several members had not been counted. *Id.* at ¶ 18. The Defendant was formally elected Speaker of the House. The session received national attention for its peculiarities, which included delays due to passing freight trains, malfunctioning voting devices, the use of hazard lights to notify staff of technical issues, and microphones being transported to members via golf cart.²⁸ Many

²⁶ Kevin Landrigan, *House Dems plead to allow remote attendance at Jan. 6 session*, UNION LEADER (Dec. 29, 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.

²⁷ Garry Rayno, *House and Senate Open 2021 Session in Different Universes*, INDEPTH N.H. (Jan. 6, 2021), <http://indepthnh.org/2021/01/06/house-and-senate-open-2021-session-in-different-universes/>.

²⁸ 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>.

Democratic members of the House, including most of the Plaintiffs, did not attend the Convening Day session due to their disabilities. *See, e.g., id.* ¶ 22.

Following Convening Day, members of the Democratic leadership continued to speak with the Speaker's office regarding remote options for future session days. A letter, specifically referencing the ADA and Rehabilitation Act, was sent on January 29, 2021 from Rep. Cushing to the Defendant. CUSHING DEC. at ¶ 23. Another letter was sent on February 9, 2021. *Id.* at ¶ 24. Yet another letter was sent on February 12, 2021. *Id.* at ¶ 25. These letters were supplemented by additional information regarding options for remote participation used by other state legislatures around the country, including Vermont. *Id.* at ¶ 26.

The Defendant, over the course now of several months, has claimed that he is "looking into" the possibility of remote participation. *Id.* at ¶ 27. However, there is no evidence that the Defendant has made any concrete steps towards allowing such an option, nor that he is even seriously considering it. *Id.* at ¶ 28. Now that the Defendant has officially scheduled in-person sessions for February 24 and 25 and specifically stated that there will be no remote attendance option, the Plaintiffs' only recourse is this lawsuit.

ARGUMENT

I. Preliminary Injunction Standard

In evaluating a request for a preliminary injunction or temporary restraining order, the Court considers:

[1] the movant's likelihood of success on the merits; [2] whether and to what extent the movant will suffer irreparable harm in the absence of injunctive relief; [3] the balance of relative hardships, that is, the hardship of the nonmovant if enjoined as opposed to the hardship to the movant if no injunction issues; and [4] the effect, if any that an injunction or the lack of one may have on the public interest.

Russomano v. Novo Nordisk Inc., 960 F.3d 48, 52 (1st Cir. 2020) (citation and alteration omitted); *Nw. Bypass Grp. v. United States Army Corps of Eng'rs*, 453 F. Supp. 2d 333, 337 (D.N.H. 2006). “The first two factors are the most critical.” *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). The “balance of the relative hardships” and the “public interest” factors “merge when the Government is the party opposing the preliminary injunction.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). This suit is against the Speaker in his official capacity; thus, it “is a suit against the governmental entity itself.” *Suprenant v. Rivas*, 424 F.3d 5, 19 (1st Cir. 2005).

II. Plaintiffs Are Likely to Succeed on the Merits

The Plaintiffs advance claims under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.²⁹

To prevail on a Title II claim, a plaintiff must demonstrate “(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity’s services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff’s disability.” *Parker v. Universidad de P.R.*, 225 F.3d 1, 5 (1st Cir. 2000).

a. Plaintiffs are qualified individuals with disabilities

Under Title II, a qualified individual with a disability is “an individual with a disability who, with or without reasonable modification to rules, policies, or practices . . . meets the essential

²⁹ Section 504 is generally coextensive with Title II of the ADA. *Parker*, 225 F.3d at 4. The only additional element required for a Section 504 claim is that the defendant must receive federal funding to be subject to the Act’s provisions. 29 U.S.C. § 794(a). The House has received at least \$190,000 in federal funding over the past year under the CARES Act. See EBEL DEC. at ¶ 7; John DiStaso, *State lawmakers to resume sessions June 11 at UNH Whittemore Center, State House*, WMUR (May 15, 2020), <https://www.wmur.com/article/state-lawmakers-to-resume-sessions-june-11-at-unh-whittemore-center-state-house/32501308>. As such, it is subject to the Rehabilitation Act. Plaintiffs’ references to the “ADA” and “Title II” in this Memorandum include both the ADA and Section 504.

eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2).

Presumably, there will be no disagreement that the Plaintiffs are “qualified individuals” under the ADA. As noted in the Complaint and declarations appended to this memorandum, the Plaintiffs suffer from serious medical conditions which are indisputably “disabilities” under the statute. *See* 42 U.S.C. § 12102(2). Further, the Plaintiffs are all duly elected members of the General Court and therefore are of course eligible (and indeed, entitled) to participate in the legislature’s activities. *See* 42 U.S.C. § 12131(2).

The House of Representatives also falls squarely within the Act’s definition of “public entity,” which includes “any State or local government” and “any department, agency, special purpose district, or other instrumentality of a State or States or local government. *Id.* at (1). By its plain terms, this definition includes state legislative bodies, and administrative guidance confirms this understanding.³⁰ *See Introduction to the Americans With Disabilities Act*, U.S. DEP’T OF JUSTICE, <https://www.ada.gov/adaintro.htm> (last updated Feb. 22, 2002) (“All programs, services, and activities of State or local governments are covered. These include . . . State legislatures and courts . . .”); *see also* 56 FED. REG. 35,696 (1991) (“Title II coverage . . . includes activities of the legislative and judicial branches of State and local governments.”).

b. By refusing to provide a reasonable accommodation allowing for Plaintiffs to participate in sessions of the General Court, Defendant has discriminated against the Plaintiffs because of their disabilities

Title II protects the rights of disabled individuals to participate in “programs or activities provided by a public entity,” and prohibits discrimination by a public entity against disabled

³⁰ Indeed, the N.H. House of Representatives website (<https://www.gencourt.state.nh.us/house/>) contains an “ADA Compliance Notice” which specifically acknowledges the applicability of Title II. *See* <http://gencourt.state.nh.us/misc/ADAnotice3.pdf>.

individuals. *See* 42 U.S.C. § 12131; 42 U.S.C. § 12132. Public entities must conduct their activities “in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 18 (1st Cir. 2019). The term “most integrated setting” means “a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.” *Id.* (quotation omitted).

Title II “require[s] a public entity to make ‘reasonable modifications’ to its ‘policies, practices, or procedures’ when necessary to avoid violations of Title II.” *Id.* “A public entity’s failure to provide disabled persons with reasonable modifications³¹ constitutes discrimination within the meaning of Title II.” *Rivera-Concepcion v. Puerto Rico*, 786 F. Supp. 2d 442, 454 (D.P.R. 2010); *see also Parent/Professional Advocacy League*, 934 F.3d at 18.

Title II’s prohibition of discrimination applies to “anything a public entity does.” *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (emphasis added) (citation omitted); *see also Doe v. Mass. Dep’t of Corr.*, 2018 U.S. Dist. LEXIS 99925, at *22 (D. Mass. June 14, 2018); *Schorr v. Borough of Lemoyne*, 243 F. Supp. 2d 232, 235 (M.D. Pa. 2003) (“[T]he Act in no way limits the terms ‘services, programs, or activities,’ and appears to include all core functions of government.”). This broad scope prohibits discrimination against both members of the public and members of the government entity itself. *See Skinner v. Salem Sch. Dist.*, 718 F. Supp. 2d 186, 192 (D.N.H. 2010).

The Defendant’s refusal to allow the Plaintiffs to participate remotely in legislative session constitutes a failure to offer reasonable accommodation, and is therefore discrimination. *See Parent/Professional Advocacy League*, 934 F.3d at 18.

³¹ The regulations under the relevant portion of the ADA refer to ‘reasonable modification,’ while the coordinating regulations under the Rehabilitation Act use the term ‘reasonable accommodation,’ but there is no material difference between the terms.” *Nunes v. Mass. Dep’t of Corr.*, 766 F.3d 136, 145 n.6 (1st Cir. 2014).

i. The requested accommodation is reasonable

The Plaintiffs here have requested the accommodation of remote participation in legislative session. As detailed above, these requests have been made multiple times over the past two months. Yet, no such accommodation has been provided.

In considering whether a requested accommodation is reasonable, courts balance “the benefits that would accrue to the handicapped individual against the burdens that the accommodation would entail.” *Summars v. City of Fitchburg*, 940 F.3d 133, 139 (1st Cir. 2019).

The benefits of the proposed accommodation are obvious. It would allow the Plaintiffs to avoid an impossible choice: either forgo attendance of legislative session entirely or put their lives in mortal danger.

Each of the Plaintiffs live with a medical condition which make them especially susceptible to complications from COVID-19. Indeed, their conditions are such that exposure to the virus would likely be a death sentence. *See* COMPLAINT. Courts have concluded that a “higher risk for serious illness or even death if [plaintiffs] contract COVID-19” is an impairment requiring accommodation under the ADA. *Peeples v. Clinical Support Options, Inc.*, 2020 U.S. Dist. LEXIS 169167, at *10 (D. Mass. Sept. 16, 2020); *Valentine v. Collier*, 2020 U.S. Dist. LEXIS 116267, at *2 (S.D. Tex. July 2, 2020) (plaintiffs successfully pled a failure to accommodate claim where they identified disabilities that subjected them to a heightened risk of death or serious illness if they contracted COVID-19); *see also What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>, at ¶D.1 (last updated Dec. 16, 2020).

Additionally, the government activity the Plaintiffs are barred from is not a routine or low-stakes matter. Rather, the Plaintiffs are duly-elected members of the New Hampshire legislature. As legislators, they have an important substantive “right to vote on legislation.” *Robinson Twp., Wash. County v. Commonwealth*, 84 A.3d 1054, 1055 (Pa. 2014). This “right to vote freely enables legislators to consummate their duty to their constituents.” *See Miller v. Hull*, 878 F.2d 523, 533 (1st Cir. 1989); *see also Bond v. Floyd*, 385 U.S. 116 (1966). The requested accommodation allows the Plaintiffs to exercise their important right.

Even more significantly, failure to provide an accommodation would prejudice the Plaintiffs’ constituents. If the accommodation is not granted, the Plaintiffs will not be able to attend or vote in session. “When a legislator cannot appear, the people whom the legislator represents lose their voice in debate and vote.” *State v. Beno*, 341 N.W.2d 668, 676 (Wis. 1984) (comma added). “No right is more precious in a free country than that of having a voice in . . . those who make the laws under which, as good citizens, we must live.” *Reynolds v. Sims*, 377 U.S. 533, 560 (1964); *see also* N.H. CONST. Part I, Art. 11 (right to vote and run for office). Allowing the Plaintiffs to duly represent their constituents constitutes a “benefit” of immense importance.

With these considerations in mind, it is clear “the benefits that would accrue” under the proposed accommodation vastly outweigh “the burdens that the accommodation would entail.” *See Summars*, 940 F.3d at 139. Although remote access would impose certain additional burdens on the Defendant, they are not onerous. Entities around the country — the state and federal courts, Fortune 500 companies, the joint chiefs of staff of the United States military, and other state legislatures, among many other examples — have adapted to remote or hybrid forms of meeting and communication. Indeed, other legislative bodies (or subsections thereof) within New Hampshire have regularly met and voted remotely, including boards of aldermen, county

delegations, the state Senate, and the Democratic and Republican Caucuses of the New Hampshire House of Representatives (both party caucuses include approximately 200 members). CUSHING DEC. at ¶ 29. These bodies have performed binding legislative acts remotely and without any genuine suggestions of illegitimacy or impropriety. Perhaps most saliently, the standing committees of the House have been conducting legislative business in fully-remote or hybrid settings since April 2020.³² See N.H. HOUS. J. 15 (2020).

All these factors combine to make remote participation by qualifying legislators a reasonable accommodation under the ADA. Courts have already concluded that “[t]elework is certainly contemplated as a viable accommodation,” under the ADA. *Peeples*, 2020 U.S. Dist. LEXIS 169167, at *12 (citing *Merrill v. McCarthy*, 184 F. Supp. 3d 221, 239 (E.D.N.C. 2016)); see also *Work at Home/Telework as a Reasonable Accommodation*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation> (Feb. 3, 2003). Specifically, the EEOC has stated that persons “with disabilities that put them at a higher risk for complications of pandemic [coronavirus] may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.” *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (last updated March 21, 2020). In the *Peeples* case out of the District of Massachusetts, the federal court: (a) held that asthma and the corresponding heightened risk of injury from COVID-19 was a qualifying disability requiring accommodation, (b) found that

³² Indeed, referring to remote attendance for House committee hearings, the Defendant has stated: “We fully understand there are some with pre-existing conditions or health risks that make it sensible for them to take part via Zoom.” Kevin Landrigan, *House soon to bring lawmakers back into committee rooms*, UNION LEADER (Jan. 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.

telework was a reasonable accommodation for that disability, despite the employer's argument that the workplace included safety measures such as social distancing, face masks, and an air purifier, and (c) granted a preliminary injunction requiring the employer to permit telework, irrespective of the employer's contention that it needed plaintiff "to be present in the office to provide supervision and in-person client visits." *Peeples*, 2020 U.S. Dist. LEXIS 169167, at *8-15. The considerations in *Peeples* are analogous to the case at bar.

In sum, considering the rights at risk, the potential harm to the Plaintiffs and their constituents, the widespread use of remote participation for government proceedings (including the state Senate and within the House itself), and the case law and administrative guidance, the option of remote participation in legislative session is a reasonable accommodation under the ADA. The plaintiffs have demonstrated that they are likely to prevail on the merits of their ADA failure to accommodate claim.

ii. No rule is required to allow remote participation and the lack of such a rule does not excuse the Defendant from his obligations under the ADA

As noted above, on September 16, 2020, the House of Representatives voted 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 determined electronically, [would] violate Part II, Article 20 of the New Hampshire Constitution." N.H.H.R. Jour. ____ (2020); 11 HOUSE RECORD 2-3 (Sept. 16, 2020). On November 17, 2020, the Supreme Court issued an opinion advising the House that "holding a House session remotely, either wholly or in part, whereby a quorum could be determined electronically, would not violate Part II, Article 20 of the New Hampshire Constitution." *Opinion of the Justices*, 173 N.H. ____, ____ (2020), 2020 N.H. LEXIS 196, at *18 (Nov. 17, 2020).

Despite this clear pronouncement from the Supreme Court, the Defendant has justified his refusal to allow remote participation in session by stating his “opinion,” N.H.H.R. CALENDAR #43-4 (Dec. 18, 2020), that because the “House has not adopted a rule which allows it to meet remotely, either wholly or in part . . . we are obligated to meet in-person.” N.H.H.R. CALENDAR #43-5 (Dec. 31, 2020); *id.* at #43-10 (Feb. 5, 2021).

1. The Supremacy Clause obviates the need for a House rule

Such a rule is not necessary to allow a reasonable accommodation under the ADA. As noted above, Title II of the ADA applies to state legislatures. 56 FED. REG. 35,696 (1991). The Supremacy Clause of the federal Constitution “instructs that federal law ‘shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’” *Brown v. United Airlines, Inc.*, 720 F.3d 60, 63 (1st Cir. 2013) (quoting U.S. CONST. art. VI, cl. 2). It is therefore clear that the rules of the New Hampshire House of Representatives (or in this case, the lack of rules) must yield in the face of an applicable federal statute. *See id.*; *see also Iwata v. Intel Corp.*, 349 F. Supp. 2d 135, 157 (D. Mass. 2004). Indeed, Title II of the ADA explicitly contemplates that a “public entity” such as a “State or . . . instrumentality of a State” might have to make “modifications to rules, policies, or practices” in order to avoid discrimination against disabled individuals. 42 U.S.C. § 12131(1), (2); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 749 (2017). As such, the Defendant must comply with the ADA.

2. The Speaker has discretion to allow remote participation under the current House rules

Additionally, even if the Rules of the House were relevant to an ADA inquiry, the Speaker already enjoys the discretion to allow remote participation. To start, the Rules of the House do not

dictate any particular method for determining whether a quorum of the House is in session, nor whether a particular member is considered “present.” *See* 2021-2022 HOUSE RULES.³³ In the absence of such a rule, the presiding officer (here, the Defendant) prescribes the conduct of the House based on custom, usage and precedent. *See* HOUSE R. 65.

The custom, usage and precedent of the New Hampshire House dictates that the Speaker determines how and where the body shall meet. Over the past year, the House has met in session at the University of New Hampshire Whittemore Center, outside on a field hockey field, and in a parking lot. In all of those situations, the Speaker unilaterally decided in what fashion that House should meet and whether a quorum was present.

The parking lot example is most relevant here. The Defendant chose that method of meeting. Members were seated in their personal vehicles sprawled across several vast parking lots, and voted via remote control. In some cases, non-legislators sat alongside representatives in their vehicles. CUSHING DEC. at ¶¶ 14-20. Only a small fraction of the attending members were within the Speaker’s eyesight, and there was no other method employed to determine which members were present or to confirm the authenticity of their votes. *Id.* Yet the session was conducted and all agree that it was a legitimate legislative meeting.

Neither the New Hampshire Constitution nor the House Rules explicitly permit session to be conducted with members spread out over several acres of land and hidden from view. The Speaker exercised his discretion to allow such a meeting. The same discretion could be used to permit remote attendance.

³³ Available at <https://gencourt.state.nh.us/house/abouthouse/houserules.htm>.

**3. The Defendant should be estopped from using the “no rule”
excuse**

Finally, the Defendant’s “no rule” justification rings hollow. Having been informed of the Defendant’s opinion that a rule is required for remote attendance, Plaintiffs and other members of the Democratic Caucus have repeatedly attempted to institute such a rule. Those attempts are described above, and include: a motion to add a rule on Organization Day on December 2, 2020, a rule proposed in the House Rules Committee on December 16, 2020, and a second motion to add a rule on Convening Day on January 6, 2021. All these proposals were defeated along party lines, with Defendant and the rest of the Republican Caucus opposed. In fact, the Defendant personally spoke in opposition to the rule proposed on Organization Day, before he ascended to the Speakership after the death of his predecessor.

It would be unjust to allow the Defendant to use his political power to thwart the passage of proposed rules, and then use the absence of those rules as an excuse for denying equal rights to disabled persons. The United States Constitution and an act of Congress passed pursuant thereto cannot be evaded by such tactics.

c. Conclusion of Merits Section

In summary, the Plaintiffs are qualified individuals under the ADA. The Defendant — and through him the New Hampshire House of Representatives — is prohibited by the statute from discriminating against the Plaintiffs. Failure to provide a reasonable accommodation to qualified individuals such as the Plaintiffs constitutes discrimination. Despite repeated requests, Defendant has refused to provide the Plaintiffs with the reasonable accommodation of remote participation. As such, the Defendant has committed a past and continuing violation of the ADA and should be enjoined.

III. Plaintiffs Are at Immediate Risk of Irreparable Harm

Absent a preliminary injunction, Plaintiffs are at imminent risk of suffering irreparable harm. “In the classic meaning of the term, an injury is irreparable if it cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy.” *Northwest Bypass Group v. United States Army Corps of Engineers*, 470 F. Supp. 2d 30, 64 (D.N.H. 2007).

The risk of irreparable harm here is clear. Without the requested accommodation, the Plaintiffs would be forced to either attend an indoor meeting of 400-plus people, or leave their constituents without a representative in the legislature. Either option carries unacceptable risk of irreparable harm.

First, the “possible serious consequence of an infection if they are not permitted to telework” (or here, “tele-legislate”) would result in “irreparable harm to” the Plaintiffs. *Peeples*, 2020 U.S. Dist. LEXIS 169167, at *16. Given the Plaintiffs’ extremely serious underlying medical conditions, contracting COVID-19 could well be fatal. “Death is an ‘irremediable and unfathomable’ harm, and bodily injury is not far behind.” *Garcia v. Google, Inc.*, 743 F.3d 1258, 1268 (9th Cir. 2014) (quoting *Ford v. Wainwright*, 477 U.S. 399, 411 (1986)).

The risk of serious illness or death in this context is unfortunately not speculative. A large portion of the Republican caucus refuses to wear protective face coverings. Many do not believe the virus poses a serious danger, and mock those who follow recommendations from public health officials.

Due to many Republican members’ laissez-faire attitude toward the coronavirus and related safety precautions, any in-person gathering with those members carries increased risk. It is publicly known that several members of the Republican Caucus have contracted COVID-19. It caused the

death of former Speaker Dick Hinch and resulted in a lengthy hospitalization for at least one other. It has been widely speculated that Speaker Hinch (and others Republicans) contracted the virus from in-person meetings held by the GOP Caucus. Representative William Marsh, a medical doctor and GOP member of the House, publicly stated that “the responsibility for Mr. Hinch’s death lies on the shoulders of a group of Republican members who refused to take precautions like wearing masks and maintaining social distance, and who leaned on others to do the same.” *See supra* note 24.

Given the physical risks of attending in-person session, it is hardly surprising that the Plaintiffs may stay home if they are not permitted to attend remotely. *See, e.g.*, DECLARATION OF PAUL BERCH, at ¶ 7. Although they are all devoted public servants, the reality is that they should not have to risk their lives to perform a job which pays them \$100 per year.

Failure to grant an injunction, therefore, would result in the ultimate irreparable harm: the Plaintiffs’ inability to represent their constituents. The importance of the right of elected officials to represent their constituents — and the right of constituents to be represented in government — is discussed above and will not be retread here. Suffice to say: in a democratic republic, there is no right more precious than equal representation in government. *See Reynolds v. Sims*, 377 U.S. 533, 555, 567-68 (1964). It is self-evident that depriving citizens of New Hampshire from a voice in the legislature is an irreparable harm to both the legislator and his or her constituents. An injunction is necessary to prevent this irreparable harm from occurring.

IV. The Balance of the Hardships and the Public Interest Favor an Injunction

The last two prongs of the preliminary injunction test consider “the balance of the relative hardships[;] that is, the hardship to the nonmovant if enjoined as opposed to the hardship to the movant if no injunction issues” and the “effect, if any that an injunction or the lack of one may

have on the public interest.” *Russomano*, 960 F.3d at 52. (citation omitted). These two factors are related and may be considered together. *See Biogen Idec MA, Inc. v. Trs. of Columbia Univ.*, 332 F. Supp. 2d 286, 301 (D. Mass. 2004); *see also Planned Parenthood League v. Belloti*, 641 F.2d 1006, 1023 (1st Cir. 1981).

The above discussion relating to the merits and irreparable harm overlaps considerably with these final two elements. The hardships to the Plaintiffs are clear: the risk of death or inability to represent their constituents. On the other hand, an injunction would cause no significant hardship to the Defendant. Although remote attendance by the Plaintiffs would require some additional effort to monitor the remote attendees and count their votes, it would present a very manageable burden. Remote attendance and voting has been accomplished by the Senate and by the House itself in committee sessions. Further, the Defendant has already demonstrated the ability to coordinate and accommodate methods of attendance (i.e., the parking lot session) much more elaborate than a Zoom call. The hardship inquiry, therefore, firmly favors the Plaintiffs’ position.

Similarly, the public interest strongly supports the issuance of an injunction. As noted above, the right of the public to have representation in government is among the most fundamental guarantees in our state and federal constitutions. Furthermore, the public interest is served by enforcing a federal law which seeks to prevent discrimination against disabled persons. *See DeNovellis v. Shalala*, 135 F.3d 58, 72 (1st Cir. 1998).

CONCLUSION

For the foregoing reasons, this Court should issue a temporary restraining order and/o preliminary injunction requiring the Defendant to allow the Plaintiffs to attend sessions of the New Hampshire House of Representatives remotely.³⁴

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: 2/15/21

/s/ Paul Twomey

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Date: 2/15/21

/s/ Israel Piedra

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and

³⁴ The Plaintiffs also ask that the preliminary injunction be issued without a bond requirement. Federal Rule of Civil Procedure 65(c)'s bond requirement may be waived “in suits to enforce important federal rights or public interests.” *Crowley v. Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, & Packers*, 679 F.2d 978, 1000 (1st Cir. 1982) (citation omitted), *rev'd on other grounds*, 467 U.S. 526 (1984). As this suit is about enforcing the rights of people with disabilities under federal law to participate as duly-elected government representatives, and post a surety would be a hardship for the Plaintiffs, bond should be waived.

NEW HAMPSHIRE DEMOCRATIC PARTY

By its attorneys

Dated: 2/15/21

/s/ William E. Christie
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CERTIFICATE OF SERVICE

I certify that a copy of this Motion and the accompanying Memorandum of Law and attachments was forwarded by e-mail to James S. Cianci, Esq., House Legal Counsel, at james.cianci@leg.state.nh.us.

Date: 2/15/21

/s/ Paul Twomey
Paul Twomey, Esq.

**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:

DECLARATION OF ROBERT “RENNY” CUSHING

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a member of the New Hampshire House of Representatives.
2. I currently serve as Democratic Minority Leader of the House.
3. I am 68 years old and was diagnosed with Stage 4 prostate cancer in late July 2020, for which I am currently being treated with medications that have left me with a compromised immune system.
4. I have only left my home for non-medical reasons four times since being diagnosed – once on Veto Day, once to review the layout for Organization Day, the third to attend a session of the House on January 6, 2021, and lastly on February 6, 2021 to conduct a window visit with my mother, who was dying from COVID-19.

5. I was not able to attend Organization Day due to complications from my treatment.

6. I have been hospitalized four times since August at Massachusetts General Hospital due to infections occasioned by his suppressed immune system.

7. I have made my medical condition known to the Defendant and have requested remote attendance be authorized for all members of the House, including myself.

8. Following the issuance of the New Hampshire Supreme Court opinion authorizing remote sessions of the House, myself and other Democratic leaders immediately began calling for sessions of the House to be conducted remotely, or at least include the option for remote participation.

9. Republicans, however, opposed the idea of remote sessions.

10. Less than a day before Organization Day on December 2, 2020, Republican leadership revealed that an unspecified number of New Hampshire House Republicans had tested positive for COVID-19 after an indoor Republican caucus.

11. It appears that Republicans knew about this information in advance of Organization Day but did not inform Democratic leadership nor the body at large until the day before session.

12. In mid-December, Democratic members of the House sent written requests to the Defendant citing the Americans with Disabilities Act and requesting the reasonable accommodation of remote access.

13. In most cases no response was received at all; the accommodation of remote participation was never offered.

14. On January 6, 2021, the House met for Convening Day in a “drive in” style session, with members in cars which were spread out over several acres of parking lots.

15. I was elected by House Democrats as their candidate for Speaker of the House and therefore I reluctantly attended the “drive in” session of the House on January 6, 2021.

16. The enterprise involved considerable logistical challenges and expense, and included UNH workers, emergency personnel, State House staffers, a dedicated radio transmitter, many loudspeakers, and a portable video screen.

17. Most members did not have a sightline to the rostrum.

18. Malfunctions occurred with the remote-control “clickers” used for voting, and it was later determined that the votes of several members had not been counted.

19. There were no other methods employed by the Speaker to determine which members were present/voting or to confirm the authenticity of their votes.

20. Because of my medical condition, I attended with a family member in the car.

21. Attending the session exposed me to multiple potentially lethal interactions with others.

22. Many Democratic members of the House, including most of the Plaintiffs, did not attend the Convening Day session due to their disabilities.

23. Following Convening Day, members of the Democratic leadership continued to speak with the Speaker’s office regarding remote options for future session days. A letter, specifically referencing the ADA and Rehabilitation Act, was sent on January 29, 2021 from myself to the Defendant.

24. Another letter was sent on February 9, 2021 requesting the accommodation of remote attendance on behalf of disabled members.

25. Another letter was sent on February 12, 2021 requesting the accommodation of remote attendance on behalf of disabled members.

26. These letters were supplemented by additional information regarding options for remote participation used by other state legislatures around the country, including Vermont.

27. The Defendant, over the course now of several months, has claimed that he is “looking into” the possibility of remote participation.

28. However, there is no evidence that the Defendant has made any concrete steps towards allowing such an option, nor that he is even seriously considering it.

29. Other legislative bodies (or subsections thereof) within New Hampshire have regularly met and voted remotely, including boards of aldermen, county delegations, the state Senate, and the Democratic and Republican Caucuses of the New Hampshire House of Representatives (both party caucuses include approximately 200 members).

30. The standing committees of the House have been conducting legislative business in fully-remote or hybrid settings since April 2020.

31. These bodies have performed binding legislative acts remotely and without any genuine suggestions of illegitimacy or impropriety.

32. Due to the medical conditions noted above, any exposure to COVID-19 represents a direct and imminent threat to my life.

33. As such, without the accommodation of remote attendance, I will not be able to attend House sessions without a significant threat to my health.

34. I have reviewed the Complaint.

35. All facts alleged in the Complaint are true and accurate to the best of my knowledge and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of February 2021.

/s/ Robert Cushing
Robert “Renny” Cushing

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

Rep. Robert “Renny” Cushing
Rep. David Cote
Rep. Kendall Snow
Rep. Katherine Rogers
Rep. Paul Berch
Rep. Diane Langley
Rep. Charlotte DiLorenzo
New Hampshire Democratic Party

Civil Action No:

V

Rep. Sherman Packard
Speaker of the NH House of Representatives
(in his official capacity only)

DECLARATION OF PAUL BERCH

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a member of the New Hampshire House of Representatives.
2. I suffer from an extremely critical kidney disease and, upon the successful completion of a series of tests and exams, will be placed on a list waiting a kidney transplant.
3. Further, exposure to COVID-19 will likely remove organ transplant as an option for my treatment.
4. I have had a serious heart attack and triple by-pass graft surgery (CABG). I also have coronary heart disease.
5. I take a drug for another medical situation that suppresses my immune system.
6. Any exposure to COVID-19 consequently represents a direct and imminent threat to my life.

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

Rep. Robert “Renny” Cushing
Rep. David Cote
Rep. Kendall Snow
Rep. Katherine Rogers
Rep. Paul Berch
Rep. Diane Langley
Rep. Charlotte DiLorenzo
New Hampshire Democratic Party

Civil Action No:

V

Rep. Sherman Packard
Speaker of the NH House of Representatives
(in his official capacity only)

DECLARATION OF DAVID COTE

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a member of the New Hampshire House of Representatives.
2. I suffer from cerebral palsy, and so must wear leg braces for stability and use crutches to walk.
3. I suffer from epilepsy and high blood pressure.
4. I had a heart attack in 2018, which necessitated the implantation of 4 stents.
5. Any exposure to COVID-19 consequently represents a direct and imminent threat to my life.
6. As such, without the accommodation of remote attendance, I will not be able to attend House sessions without a significant threat to my life.
7. The Speaker is aware of my above-described disabilities and I have requested accommodation from him.

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

Rep. Robert “Renny” Cushing
Rep. David Cote
Rep. Kendall Snow
Rep. Katherine Rogers
Rep. Paul Berch
Rep. Diane Langley
Rep. Charlotte DiLorenzo
New Hampshire Democratic Party

Civil Action No:

V

Rep. Sherman Packard
Speaker of the NH House of Representatives
(in his official capacity only)

DECLARATION OF CHARLOTTE DILORENZO

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a member of the New Hampshire House of Representatives.
2. I have been diagnosed with coronary artery disease and Type 2 diabetes.
3. I had an Ischemic Stroke in 2013, which resulted in limited mobility.
4. I also have asthma, a chronic respiratory disease.
5. I had an asthma attack at the session held in the UNH parking lot on January 6, 2021, which attack was caused by the car fumes emanating for the vast number of cars present during the so-called “drive-in” session.
6. I am African American, which coupled with my age (71), means that I am at higher risk of dying from COVID-19 than most of the population according to the Centers for Disease Control and Prevention in a report updated on February 12, 2021.

**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

Civil Action No:

v.

Rep Sherman Packard
Speaker of the NH House of Representatives
(in his official capacity only)

DECLARATION OF KAREN EBEL

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a member of the New Hampshire House of Representatives and the Democratic Leader Pro Tempore.
2. I served as Deputy Speaker of the House during the 2018-2020 term.
3. In that role, I was involved in discussions regarding the meeting of the House and its committees during the pandemic and related logistics.
4. In spring/summer 2020, House leadership considered whether remote House sessions (i.e., via Zoom or similar) were permissible under the New Hampshire Constitution.
5. After consultation with House counsel, it was determined that there was too much doubt about constitutionality to convene a remote House session.

6. As such, alternative arrangements were made, and in June and September 2020, the House convened at the Whittemore Center in Durham (the University of New Hampshire ice hockey arena).

7. The General Court, including the House of Representatives, was awarded at least \$190,000 in federal CARES Act funds to pay for COVID-19 related expenses, such as “off-site” session expenses at UNH, Zoom subscriptions, IT equipment for remote work and sanitation.

8. During the spring and summer of 2020, the House conducted committee meetings (including executive sessions with voting) fully remotely, via Zoom.

9. The meeting of committees remotely was authorized by then-Speaker Shurtleff and without any specific authorization from the House Rules or the body at large.

10. Remote committee meetings have proved very successful and secure.

11. At the House session on September 16, 2020, I 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 determined electronically, violate Part II, Article 20 of the New Hampshire Constitution.”

12. The motion passed, but was overwhelmingly opposed by the Republican caucus.

13. While waiting for the Supreme Court opinion, House leadership continued to consider how to convene remote House sessions.

14. On November 3, 2020, the Republican Party gained the House majority.

15. The Supreme Court issued its opinion sanctioning remote House sessions on November 17, 2020.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of February 2021.

 /s/ Karen Ebel
Karen Ebel

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

Rep. Robert “Renny” Cushing
Rep. David Cote
Rep. Kendall Snow
Rep. Katherine Rogers
Rep. Paul Berch
Rep. Diane Langley
Rep. Charlotte DiLorenzo
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V

Rep. Sherman Packard
Speaker of the NH House of Representatives
(in his official capacity only)

DECLARATION OF DIANE LANGLEY

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a member of the New Hampshire House of Representatives.
2. I suffer from osteo arthritis and rheumatoid arthritis and require use of a power wheelchair.
3. I also suffer from heart disease and have a compromised immune system that is further complicated by my prescribed medications.
4. I have been hospitalized once in each of the past 5 years, with stays of between 3 to 12 weeks due to complications from the above-described medical conditions – cardiac arrest, cellulitis, and deep vein thrombosis (DVT).
5. My most recent hospitalization was in September 2020.
6. Any exposure to COVID-19 consequently represents a direct and imminent threat to my life.

7. As such, without the accommodation of remote attendance, I will not be able to attend House sessions without a significant threat to my life.

8. The Speaker is aware of my above-described disabilities and I have requested accommodation from him.

9. The Speaker has not granted my request.

10. I have reviewed the Complaint.

11. All facts alleged in the Complaint are true and accurate to the best of my knowledge and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of February 2021.

/s/ Diane Langley
Diane Langley

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

Rep. Robert “Renny” Cushing
Rep. David Cote
Rep. Kendall Snow
Rep. Katherine Rogers
Rep. Paul Berch
Rep. Diane Langley
Rep. Charlotte DiLorenzo
New Hampshire Democratic Party

Civil Action No:

V

Rep. Sherman Packard
Speaker of the NH House of Representatives
(in his official capacity only)

DECLARATION OF KATHERINE ROGERS

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a member of the New Hampshire House of Representatives.
2. I suffer from a degenerative joint disease and require adaptive aids to walk – a walker, cane, or wheelchair – depending on my level of pain and how far and long I must walk.
3. I have been prescribed pain medication but cannot drive after taking it.
4. I have suffered extreme pain since attending the session on January 6, 2021 and anticipate having to use a wheelchair more often because of that pain.
5. Any exposure to COVID-19 consequently represents a direct and imminent threat to my life.
6. I requested an accommodation from the Speaker for attendance at the January 6, 2021.

7. The Speaker is aware of my above-described disability and I have requested from him the above-noted accommodation.

8. The Speaker has not granted my request.

9. I have reviewed the Complaint.

10. All facts alleged in the Complaint are true and accurate to the best of my knowledge and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of February 2021.

/s/ Katherine Rogers
Katherine Rogers

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

Rep. Robert “Renny” Cushing
Rep. David Cote
Rep. Kendall Snow
Rep. Katherine Rogers
Rep. Paul Berch
Rep. Diane Langley
Rep. Charlotte DiLorenzo
New Hampshire Democratic Party

Civil Action No:

V

Rep. Sherman Packard
Speaker of the NH House of Representatives
(in his official capacity only)

DECLARATION OF KENDALL SNOW

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a member of the New Hampshire House of Representatives.
2. I suffer Guillain-Barre Syndrome, which causes temporary paralysis from the chest down.
3. Due to Guillain-Barre Syndrome, I was hospitalized for 3 months in 2017, including 18 days in the Intensive Care Unit and 8 days on a ventilator. I have residual symptoms, including lung vulnerability and limited mobility.
4. Any exposure to COVID-19 consequently represents a direct and imminent threat to my life.
5. As such, without the accommodation of remote attendance, I will not be able to attend House sessions.

6. The Speaker is aware of my above-described disability and I have requested accommodation from him.

7. The Speaker has not granted my request.

8. I have reviewed the Complaint.

9. All facts alleged in the Complaint are true and accurate to the best of my knowledge and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of February 2021.

/s/ Kendall Snow
Kendall Snow