UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Robert R. Cushing, et al.,	*	
	*	
Plaintiffs,	*	
v.	*	Case No. 1:21-cv-00147-LM
	*	
Sherman Packard, Speaker of the New Hampshire House of Representatives,	*	
	*	
Defendants.	*	
	*	

MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO MOTION FOR TEMPORARY RESTRAINING ORDER

Sherman Packard, Speaker of the New Hampshire House of Representatives, submits the following memorandum of law in support of his objection to the plaintiffs' emergency motion for temporary restraining order and/or preliminary injunction. For the reasons that follow, the Court should deny that motion.

STANDARD OF REVIEW

A request for a temporary restraining order is assessed under the same four-factor that governs preliminary injunctions. *See RW Norfolk Holding, LLC v. CBRE, Inc.*, 2017 DNH 231, at *4 (*McCafferty*, J.). To be entitled to a temporary restraining order, "a plaintiff must show (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in the plaintiff's favor, and (4) service of the public interest." *March v. Mills*, 867 F.3d 46, 52–53 (1st Cir. 2017) (citation and quotation marks omitted). Temporary injunctive relief is an "extraordinary and drastic remedy that is never awarded as of right." *Peoples Fed. Sav. Bank v. People's United Bank*, 672 F.3d 1, 8 (1st Cir. 2012) (same omissions).

This is all the more true in this case, as the plaintiffs "do[] not seek a traditional, prohibitory preliminary injunction, but instead ask[] for a mandatory preliminary injunction, which requires affirmative action by the non-moving party in advance of trial . . . ." *Braintree Labs, Inc., v. Citigroup Glob. Markets Inc.*, 622 F.3d 36, 40–41 (1st Cir. 2010). "Because a mandatory preliminary injunction alters rather than preserves the status quo, it normally should be granted only in those circumstances when the exigencies of the situation demand such relief." *Id.* at 41 (citation and quotation marks omitted).

BACKGROUND

The relevant background to this opposition is detailed in the Declaration of House Chief of Staff Aaron Goulette ("Goulette Decl.") and the Declaration of Paul Smith ("Smith Decl."), who is the Clerk of the New Hampshire House of Representative, filed in support of the defendant's objection to the plaintiff's motion for temporary restraining order and/or preliminary injunction. Due to time constraints, the defendant will not repeat that background here, but instead incorporates it herein by reference in its entirety and will cite to the Goulette and Smith Declarations throughout the argument as appropriate.

ARGUMENT

I. The plaintiffs are not likely to succeed on the merits.

"To demonstrate likelihood of success on the merits, plaintiffs must show more than mere possibility of success—rather they must establish a strong likelihood that they will ultimately prevail." *Sandicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d. 1, 10 (1st Cir. 2012) (citations and internal quotation marks omitted). "[P]roving likelihood of success on the merits is the 'sine qua non' of a preliminary injunction." *Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, Inc.*, 794 F.3d 168, 173 (1st Cir. 2015) (citation and quotation marks omitted).

"If the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *Id.* (citation and quotation marks omitted). For the following reasons, the plaintiffs have not made a strong showing that they are likely to succeed on their claims in this case.

A. Absolute legislative immunity bars the plaintiffs' claims.

"It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998). Legislative immunity is "a component of federal common law," *Nat'l Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 629 (1st Cir. 1995), that is "essentially coterminous with the absolute immunity accorded members of Congress under the Speech or Debate Clause of the United States Constitution," *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 29 (1st Cir. 1996). "Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by fear of personal liability." *Bogan*, 523 U.S. at 52. Indeed, "the time and energy required to defend against a lawsuit are of particular concern" in the context of "part-time citizen-legislator[s]" for whom "prestige and pecuniary rewards may pale in comparison to the threat of civil liability." *Id.* (citations omitted). Put differently, legislative immunity "allows [legislators] to focus on their public duties by removing the costs and distractions attending lawsuits" and "shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011).

Absolute legislative immunity "implicates principles of comity and federalism." *Romero-Barcelo*, 75 F.3d at 28 (quotation marks and ellipsis omitted). It extends to "'suits for either prospective relief or damages,'" *Nat'l Ass'n of Soc. Workers*, 69 F.3d at 630 (quoting

Supreme Court of Virginia v. Consumers Union of U.S., Inc. ("*Consumers Union*"), 446 U.S. 719, 731 (1980)), regardless of whether the defendant is named in his or her individual or official capacity, *see Consumers Union*, 446 U.S. at 734 (applying legislative immunity to state supreme court justice named in his official capacity); *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 88 (2d Cir. 2007) ("[C]laims for injunctive relief against defendant state officials, sued in their official capacity, may be barred by the doctrine of legislative immunity . . . ."); *Scott v. Taylor*, 405 F.3d 1251, 1254 (11th Cir. 2005) ("[The] state legislator defendants enjoy legislative immunity protecting them from a suit challenging their actions taken in their official legislative capacities and seeking declaratory or injunctive relief."); *Larsen v. Senate of Com. of Pa.*, 152 F.3d 240, 253, 253 n. (3d Cir. 1998) (same conclusion); *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991) (same conclusion); *Alia v. Mich. Supreme Ct.*, 906 F.2d 1100, 1102 (6th Cir. 1990) (same conclusion). Thus, absolute legislative immunity does not depend on the role of the defendant, but rather "attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan*, 523 U.S. at 54 (citations and quotation marks omitted).

"Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* A court accordingly may not inquire into a legislator's "subjective intent in resolving the logically prior question of whether [his] acts were legislative." *Id.* A court must instead determine "whether, stripped of all considerations of intent and motive, [the challenged] actions were legislative." *Id.* If they were, then the inquiry ends and legislative immunity bars suit. *See id.*

"As a rule, a legislature's regulation of the atmosphere in which it conducts its core legislative activities—debating, voting, passing legislation, and the like—is part and parcel of the legislative process, and, hence, not subject to judicial veto." *Nat'l Ass'n of Social Workers*, 69

F.3d at 635. Whether to allow remote access to sessions of the New Hampshire House of Representatives falls squarely within this rule. Under New Hampshire law, "[i]t is well established that the authority to adopt procedural rules for passing legislation is demonstrably committed to the legislative branch by Part II, Articles 22 and 37 of the State Constitution." *Starr v. Governor*, 154 N.H. 174, 178 (2006) (citation omitted). "Part II, Article 22 of the State Constitution vests in the house of representatives the power to 'settle the rules of proceeding in their own house.'" *Id.* (quoting N.H. Const. pt. II, art. 22). "[T]he legislature, alone, has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure." *Id.* (citation omitted).

The House has invoked its discretion to prohibit remote participation in floor sessions. While the House Rules themselves do not speak directly to this issue, House Rule 65 sets an "order of precedence" for determining the "procedures of the New Hampshire House," under which the 2020 edition of *Mason's Manual of Legislative Procedure* follows the State Constitution, the House Rules, and "[c]ustom, usage and precedent" in terms of precedential weight. *See* Smith Decl. ¶¶ 6-11; 2021-2022 House Rules, House Rule 65, available at http://gencourt.state.nh.us/house/abouthouse/houserules.htm. There is no constitutional provision that addresses remote participation in floor sessions by members of the House. Smith Decl. ¶ 8. There is no rule of the New Hampshire House that permits remote participation in floor sessions by members of the House. *Id.* ¶ 9. There is no custom, usage, or precedent regarding remote participation in floor sessions by members of the New Hampshire House. *Id.* ¶ 20. Therefore, the Mason's Manual of Legislative Procedure (Ed. 2020) governs the issue of remote participation in floor sessions by members of the House. *Id.* ¶ 21.

Section 786 of the 2020 edition of *Mason's Manual of Legislative Procedure* expressly states: "Absent specific authorization by the constitution or adopted rules of the body, remote participation in floor sessions by members of the legislative body is prohibited." Smith Decl. ¶ 13 and Exhibit A thereto. Incorporation of *Mason's Manual of Legislative Procedure* into the House Rules did not occur by accident. The full House voted to incorporate the 2020 edition of the manual into the 2021-2022 House Rules on January 6, 2021, by a vote of 316-4. Smith Decl. ¶ 12. In other words, the full House of Representatives expressly decided by an overwhelming majority that when the State Constitution, House Rules, and custom, usage, and precedent did not dictate a specific parliamentary procedure, the 2020 edition of *Mason's Manual of Legislative Procedure* would control that procedure.

Such is the case here. While the New Hampshire Supreme Court recently opined that "holding a session remotely, either in whole or in part, whereby a quorum could be determined electronically, would not violate Part II, Article 20," *Opinion of the Justices*, __ N.H. __, 2020 WL 6750797, at *7 (Nov. 17, 2020), it noted that "it is within the competency of the house to prescribe [the] method which shall be reasonably certain to ascertain the presence of a quorum," *id.* (citation, quotation marks, and ellipsis omitted). The court contemplated that the House could do so under its constitutional authority "to adopt its own rules of proceedings." *Id.* (citing N.H. Cont. pt. II, art. 22). Notably, the court did not reach whether virtual participation in House proceedings might violate other provisions in the State Constitution, *see id.* at *2, let alone hold or suggest that the Constitution *required* remote participation in such proceedings.

The House Rules likewise do not specifically authorize remote participation in floor sessions. If anything, the House Rules contemplate that floor sessions will occur in person. For instance, House Rule 9 states that "[w]hen the House is called to order, members shall take their

seats and shall activate their voting stations immediately" and that "[w]hen they leave their seats for any reason they shall deactivate their stations." House Rule 14 states that "[w]hile the Speaker is putting a question or addressing the House, no one shall walk out or across the House" and that "[w]hile a member is speaking, no one shall pass between that member or the other members of the House, nor shall anyone engage in private conversation." Rule 22 states, among other things, that "[n]o member shall vote in any case if the member is not present when the question is put." Rule 22(c) states that "[w]henever a roll call vote is requested and properly seconded, members shall enter the chamber to take their seats and the question shall then be put to the House." Rule 24 states that "[n]o member shall leave his or her seat while the voting machine is in use and until the Speaker announces the result of the vote." These rules, among others, reflect a general understanding that House members will be physically present when business is conducted before the full House.

Custom, usage, and precedent also reflect this general understanding. The COVID-19 pandemic has now disrupted House business for the better part of a year. Yet at no point during that period, including when the plaintiffs' political party had control of the House, has a full session of House occurred remotely. Goulette Decl. ¶ 9. There is therefore no custom, usage, or precedent for remote participation in such a session that might trump the clear prohibition of such participation found in Section 786 of *Mason's Manual of Legislative Procedure*.

The prohibition accordingly guides the legislative procedure at issue in this case. As noted, it was incorporated into the House Rules by an overwhelming majority of the full House. While the House Rules can be amended up to and including the next legislative session, any amendment requires a majority vote. House Rule 66; House Rule 67(f). Thereafter, suspending or rescinding a House Rule requires the support of a two-thirds majority. House Rule 54; House

Rule 55. In any case, altering the current prohibition on remote participation in floor sessions requires the full House to vote. This reality is reflected by the fact that remote participation in House *committee* meetings was expressly authorized by a rule amended. House Rule 67(d). It is further confirmed by the fact that remote participation in floor sessions has twice been put to a vote before the full House, and each time failed to garner majority support. Goulette Decl. ¶¶ 24, 25.

"Where, as here, a legislative body adopts a rule, not invidiously discriminatory on its face, . . . that bears upon its conduct of frankly legislative business, . . . the doctrine of legislative immunity must protect legislators and legislative aides who do no more than carry out the will of the body by enforcing the rule as part of their official duties." *Nat'l Ass'n of Social Workers*, 69 F.3d at 631 (citations omitted). Such actions are "'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters [committed to their jurisdiction.]'" *Id.* at 632 (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)) (bracketing in original). On this basis, the First Circuit held that absolute legislative immunity bars an action against the Speaker of the Rhode Island House of Representatives challenging the enforcement of a house rule that "purports to ban both lobbyists and lobbying from the floor of the House while the House is in session . . . ." *Id.* at 624–25. The court noted that "[i]n our republican system, different institutions of government occupy different spheres," and that "[w]ithin its own domain, the legislative branch of a state government is entitled to a reasonable measure of independence in conducting its internal affairs." *Id.* at 635.

The First Circuit's decision in *National Association of Social Workers* is binding authority and controls the outcome of this case. But even if it did not, there is ample persuasive support for the proposition that absolute legislative immunity bars challenges to the enactment or enforcement of a legislative body's rules. For instance, the Seventh Circuit held that legislative immunity barred a lawsuit against the Illinois House Speaker and Senate President challenging the denial of media credentials under Illinois House and Senate Rules. *See Reeder v. Madigan*, 780 F.3d 799, 800–01 (7th Cir. 2015). The D.C. Circuit similarly held that the "enforcing internal rules of Congress validly enacted under authority specifically granted to the Congress and within the scope of the authority appropriately delegated to it" is entitled to immunity under the Speech of Debate Clause. *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1351 (D.C. Cir. 1975). At least one District Court in the First Circuit has reached a similar conclusion. *See Carlow v. Mruk*, 425 F. Supp. 2d 225, 234–39 (D.R.I. 2006) (holding that a moderator's enforcement of a rules of order controlling participation in town meetings was legislative in nature and barred by absolute legislative immunity). And the United States District Court for the District of Columbia recently held that the Speech or Debate Clause barred constitutional challenges to a House Resolution allowing Members of the House of Representatives to designate proxies to cast votes on their behalf during COVID-19. *See McCarthy v. Pelosi*, 480 F. Supp. 3d 28, 30, 37–39 (D.D.C. 2020).

While the District of Idaho recently reached a different conclusion on claims superficially similar to those in this case, that decision is readily distinguishable. *See Selene v. Legislature of State of Idaho*, No. 1:21-CV-00021-DCN, 2021 WL 230040 (D. Idaho Jan. 22, 2021). In *Selene*, the court noted that the decision to provide the requested accommodation was "Speaker Bedke's, Pro Tem Winder's, and those of the committee chairs to make as they administrate committee

and other legislative meetings." *Id.* at *5. The court observed that those decisions are "not open to vote, debate, and do not otherwise carry legislative character or any of the hallmarks of traditional legislation." *Id.* The court nonetheless suggested that "placing each particular decision related to accommodation to a legislative debate and vote[] might present a different scenario regarding legislative immunity for Speaker Bedke and Pro Tem Winder." *Id.* at *5 n.5. Here, the New Hampshire House Rules, by incorporating the 2020 Edition of *Mason's Manual of Legislative Procedure* into them, prohibit remote participation in floor sessions and those rules can only be amended, suspended, or rescinded by a full vote of the House itself. Thus, unlike in Idaho, any decision whether to let the plaintiffs participate in floor sessions remotely is inherently legislative in nature.

In their memorandum in support of their motion for a temporary restraining order, the plaintiffs argue that there is not in fact any House Rule that prohibits remote participation in sessions of the full House. But that is not the end of the analysis. The House Rules incorporate into them the provisions of the 2020 edition of *Mason's Manual of Legislative Procedure* to the extent they are silent and treat those procedures as House Rules. Moreover, any dispute over the operation of the House Rules is neither pleaded in this case nor within this Court's power to resolve by declaration or otherwise. The plaintiffs do not seek a declaration as to how the House Rules operate, and the Eleventh Amendment would bar this Court from rendering such a declaration even if requested. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-06 (1984). Indeed, it is unclear whether the plaintiffs could receive such a declaration even if they sought it in state court. *See Starr*, 154 N.H. at 178 ("The legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the

constitution." (citation, quotation marks, and bracketing omitted)). And while the plaintiffs suggest that the State Constitution requires that they be allowed to participate in legislative sessions remotely, that claim is likewise barred by the Eleventh Amendment for the reasons stated below. *See Pennhurst State Sch. & Hosp.*, 465 U.S. at 105-06. To the extent the plaintiffs contend that the application of *federal* legislative immunity to their claims in this case turns on antecedent questions of *state* law this Court may not reach, then their federal claims are not currently ripe for adjudication in the first place. *See Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) ("[T]he Supreme Court has reinforced that [the] ripeness doctrine seeks to prevent the adjudication of claims relating to 'contigent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

The plaintiffs also argue in their memorandum that the Supremacy Clause permits this Court to reach their federal claims. Again, they are incorrect. As noted above, legislative immunity is "a component of *federal* common law." *Nat'l Ass'n of Social Workers*, 59 F.3d at 629 (emphasis added). Courts have consistently applied legislative immunity to bar federal civil rights claims, including those brought under the ADA and Rehabilitation Act. *See, e.g.*, *Bogan*, 523 U.S. at 49 (claims under § 1983); *Leapheart v. Williamson*, 705 F.3d 310, 311–12 (claims under Title VII and the ADEA); *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996) (claims brought under Title VII, ADEA, and § 1983); *McCleary-Evans v. Md. Dep't of Transp.*, 631 F. App'x 178, 178 (4th Cir. 2016) (per curiam) (claims under ADA and Rehabilitation Act)[1]; *Ciarpaglini v. Quinn*, No. 13 C 50213, 2014 WL 1018146, at *2 (N.D. Ill. Mar. 17, 2014) (claims under ADA, Rehabilitation Act, and Social Security Act); *Am. Ass'n of People With*

[1] In *McCleary-Evans*, the Fourth Circuit affirmed "for the reasons stated by the district court." 631 F. App'x at 178. The district court specifically held that the plaintiff's ADA and Rehabilitation act claims were barred by legislative immunity. *See McCleary-Evans v. Maryland Dep't of Transp.*, No. CIV.A. ELH-12-1550, 2015 WL 1285325, at *23 (D. Md. Mar. 20, 2015).

Disabilities v. Smith, 227 F. Supp. 2d 1276, 1297 (M.D. Fla. 2002) (claims under ADA and Rehabilitation Act). Indeed, even courts that *deny* the application of legislative immunity to ADA and Rehabilitation act claims still apply the doctrine to the claim in question. *See, e.g.*, *Marshall v. New York State Pub. High Sch. Athletic Ass'n, Inc.*, 374 F. Supp. 3d 276, 293 (W.D.N.Y. 2019) (concluding, at the pleading stage, that the allegations involved non-legislative acts). In short, defense counsel have found no support for the proposition that legislative immunity does not apply to ADA or Rehabilitation Act claims.

In sum, the full New Hampshire House incorporated into its rules a clear prohibition on remote participate in floor sessions. That prohibition can only be amended, suspended, or rescinded through another vote of the full New Hampshire House. Such measures have twice been put to a vote, and twice failed to garner sufficient support to pass. Goulette Decl. ¶¶ 24, 25. This case therefore falls squarely within the general rule that "a legislature's regulation of the atmosphere in which it conducts its core legislative activities—debating, voting, passing legislation, and the like—is part and parcel of the legislative process, and, hence, not subject to judicial veto." *Nat'l Ass'n of Social Workers*, 69 F.3d at 635. The Speaker is accordingly entitled to absolute legislative immunity on all of the plaintiffs' claims. *See id.*

B. The Eleventh Amendment bars the plaintiffs' state-law claim.

"As a general matter, states are immune under the Eleventh Amendment from private suit in federal courts, absent their consent." *Wojcik v. Mass. State Lottery Comm.*, 300 F.3d 92, 99 (1st Cir. 2002) (citation and quotation omitted). "[A] suit against a state official in his or her official capacity is not a suit against the official but rather a suit against the official's office." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citation omitted). "As such, it is no different from a suit against the State itself." *Id.* (citation omitted). Moreover, while the *Ex*

parte Young doctrine provides "permits suits to proceed against state officers in their official capacities to compel them to comply with federal law," *Vaquiera Tres Monjitas v. Irizarry*, 587 F.3d 464, 478 (1st Cir. 2009) (citation omitted), it does not apply to claims alleging violations of state, rather than federal, law, *see Pennhurst State Sch. & Hosp.*, 465 U.S. at 105-06.

In this case, the plaintiffs name the Speaker solely in his official capacity. ECF Doc. No. 1 ¶ 15. In Count IV, they assert a claim against the Speaker under Article 11 of the New Hampshire Constitution. *See id.* ¶¶ 128–133. That claim asserts only a violation of state law. It is accordingly barred by the Eleventh Amendment. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 105–06.

C. The plaintiffs are unlikely to succeed on their Fourteenth Amendment claim.

In Count III, the plaintiffs allege violations of the Fourteenth Amendment "based upon discrimination that disparately affects [them] due to their disabilities." ECF Doc. No. 1 ¶ 126. Claims under the Fourteenth Amendment based on disability discrimination are subject to rational-basis review. *See Toledo v. Sanchez*, 454 F.3d 24, 33–34 (1st Cir. 2006); *see also City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 435 (1985). Thus, constitutional claims based on disability discrimination fail "so long as the [challenged] actions are rationally related to some legitimate governmental purpose" and are not solely based on "irrational prejudice." *Toledo*, 454 F.3d at 33 (citations and quotation marks omitted).

There is no suggestion in this case that the Speaker harbors some irrational prejudice with respect to the plaintiffs' disabilities. At most, the plaintiffs contend that the Speaker has denied their requests for accommodations based on partisan motives. This is not enough to animate a Fourteenth Amendment claim. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2503 (2019) ("A permissible intent—securing partisan advantage—does not become constitutionally

impermissible, like racial discrimination, when that permissible intent 'permissible intent 'predominates.'"). Moreover, the record reveals numerous rational bases for the Speaker's decision not to allow remote participation, including his well-founded belief that he cannot unilaterally provide such an accommodation under the House Rules and the logistical challenges in facilitating that participation. *See* Goulette Decl. ¶¶ 30–46. The plaintiffs are accordingly not likely to succeed on their Fourteenth Amendment claim.

D. The plaintiffs are not likely to succeed on their ADA or Rehabilitation Act claims.

"A plaintiff seeking relief under Title II must establish: (1) that he is a qualified individual with a disability; (2) that he was excluded from participating in, or denied the benefits of a 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 his disability." *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 283 (1st Cir. 2006) (citation and quotation marks omitted). "In cases where the alleged violation involves the denial of a reasonable modification/accommodation, the ADA's reasonable accommodation requirement usually does not apply unless triggered by a request." *Id.* (citation and quotation marks omitted). For the purposes of this objection, the Speaker does not dispute that the plaintiffs have qualifying disabilities for which they have requested accommodations. Nevertheless, the plaintiffs are unlikely to succeed on the merits of the ADA and Rehabilitation Act claims for several reasons.

"Federal regulations implementing Title II require public entities to 'make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.'" *Id.* (quoting 28 C.F.R. § 35.130(b)(7)). "[W]hile a covered entity must make reasonable

accommodations, it does not have to provide a disabled individual with every accommodation he requests or the accommodation of his choice." *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 187 (2d Cir. 2015) (citation and quotation marks omitted). "A 'reasonable accommodation' is one that gives the otherwise qualified plaintiff with disabilities 'meaningful access' to the program or services sought." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 282 (2d Cir. 2003). "'[I]n no event is the entity required to undertake measures that would impose an undue financial or administrative burden . . . or effect a fundamental alteration in the nature of the service.'" *Forestier Fradera v. Municipality of Mayaguez*, 440 F.3d 17, 21 (1st Cir. 2006) (quoting *Tennessee v. Lane*, 541 U.S. 509, 532 n.5 (2004))

The only accommodation the plaintiffs have requested in this case is that they be permitted to participate in the House floor session remotely. They have put forward any reasonable plan for how that can be logistically accomplished given how the House is staffed and operates. Their proposal for a hybrid solution contains "possible processes". Did does not identify a particular technology that will work for the size and scope of the House, permit participation in debate and voting remotely, does not detail how any of its technical proposals may integrate with the House's existing voting technology, does not present a cost associated with the options, and does not indicate how many staff would be needed to implement it during a House sessions or what level of IT staff might be required to setup, monitor, and troubleshoot it. It also contains no timeline for implementation, while recognizing that advanced training could be helpful to implementation. The proposed hybrid solution sets forth what someone believes to be a "viable path forward," but otherwise does not show that this option constitutes a "reasonable" or even feasible accommodation.

In contrast, the House has taken substantial precautions to ensure that upcoming in-person sessions are safe for all representatives. Smith Decl. ¶ 28. For the upcoming session, the New Hampshire Sportsplex located in Bedford, New Hampshire will be used. *Id.* It is the largest indoor space the House has used to date for its sessions. *Id.* It will allow for up to 10 feet of distancing between people. *Id.* There will be separate entrances for Republicans and Democrats. *Id.* Two masks will be given to every person who comes. *Id.* Hand sanitizer will be given to every person who comes. *Id.* Bagged lunches touched only by the caterer will be given to every person who comes. *Id.* And other reasonable accommodations can be provided at the facility as requested. *Id.* These accommodations are reasonable and make in-person attendance safe and possible.

In sum, the Speaker has provided accommodations that would give them meaningful access to the in-person legislative session and continues to offer further reasonable accommodations that representatives may identify. However, the only accommodation the plaintiffs request (the ability to attend the House floor session remotely) is not reasonable and would impose undue administrative burdens that the Speaker and the House cannot overcome in advance of the upcoming session if that session is to be productive, meaningful, and conducted without error. Thus, the plaintiffs have not demonstrated that they have a strong likelihood of succeeding on the merits of their ADA and Rehabilitation Act Claims.

II. The plaintiffs have not demonstrated that they are likely to suffer irreparable harm absent an injunction.

"[I]n most cases, irreparable harm constitutes a necessary threshold showing for an award of preliminary injunctive relief." *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 79 (1st Cir. 2009) (citation and quotation marks omitted). "A finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future

may have in store." *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004) (citation omitted). Put differently, "speculative injury does not constitute a showing of irreparable harm." *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991) (citation, quotation marks, and bracketing omitted). As with the other factors, "the burden of demonstrating that the denial of interim relief is likely to cause irreparable harm rests squarely upon the movant." *Gonzalez-Droz*, 573 F.3d at 79.

The plaintiffs contend that they will suffer irreparable harm if not permitted to appear at the legislative session remotely because they "would be forced to either attend an indoor meeting of 400-plus people, or leave their constituents without a representative in the legislature." ECF Doc. No. 2-1 at 20. They contend that the first option puts them at "risk of serious illness or death," *id.*, while the second option leaves them unable "to represent their constituents," *id.* at 21. This argument is based on an assumption that the plaintiffs will, in fact, face a significantly heightened risk of serious illness or death if required to attend the legislative session in person. As discussed above, however, the plaintiffs have failed to demonstrate that the protective measures that will be in place for the legislative session will not sufficiently protect them, particularly when coupled with the individualized accommodations that will be available on site or any other accommodations that might specifically request for in-person attendance. The plaintiffs' concerns are therefore based on speculation and conjecture. Indeed, it is telling that the plaintiffs themselves cannot muster anything more than an equivocal statement that they "*may* stay home if they are not permitted to attend remotely," which they support with a single plaintiff's declaration. *Id.* at 21 (emphasis added).

The plaintiffs have further failed to demonstrate that this Court can redress the harms they allege, at least before next weeks' legislative session. As discussed above, the plaintiffs

have not demonstrated that their proposed accommodations are feasible at all, much less that they can be implemented in a matter of days. In contrast, the Speaker has supplied declarations demonstrating that it would be extraordinarily difficult, if not impossible, to implement the accommodations the plaintiffs request before the coming session. *See generally* Smith Decl; Goulette Decl. Additionally, even if this Court ordered a remote attendance option, and the Speaker attempt to implement that order, the membership of the House could challenge the Speaker's action, overrule him, and prevent him from implementing the remote option. Smith Decl. ¶ 20. A movant is not entitled to an injunction when it cannot demonstrate that the requested relief would actually redress the harm alleged. *See United States v. Bolton*, 468 F. Supp. 3d 1, 6 (D.D.C. 2020) (noting that the "horse [was] already out of the barn" on any injury the plaintiff might suffer such that the court could not redress it through injunctive relief, compelling the denial of the injunction under the irreparable harm prong).

Finally, the timing of this action also undermines the plaintiffs' claims of irreparable harm. While the plaintiffs contend that they could not have sought relief sooner than they did, they have been on notice since at least January 6, 2021, that the House had prohibited remote participation in floor sessions by adopting the 2020 edition of *Mason's Manual of Legislative Procedure*. Even before then, the plaintiffs knew or should have known that the House has not historically allowed remote participation in floor sessions and did not do so last year, notwithstanding the pandemic. Nevertheless, they waited until barely a week before the next session to bring this action and seek temporary and preliminary relief. The First Circuit has made clear that when plaintiffs "challenge long-standing" rules at the eleventh hour, their "claims of irreparable harm [are] undermined by the fact that their 'emergency [is] largely one of their own making.'" *Colon-Marrero v. Conty-Perez*, 703 F.3d 134, 139 (1st Cir. 2012) (quoting

Respect Maine PAC v. McKee, 622 F.3d 13, 16 (1st Cir. 2010)); *see also Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers) ("The applicants' delay in filing their petition and seeking a state vitiates much of the force of their allegations of irreparable harm."). So too in this case.

In sum, the plaintiffs have not met their burden under the irreparable-harm prong, and this stands as an independent basis to deny their motion.

III. The balance of equities and public interest favor denying the request for a temporary restraining order.

Under the third prong of the applicable analysis, a plaintiff must demonstrate "a balance of the equities in the plaintiff's favor . . . ." *March*, 867 F.3d at 52–53. The Court must consider "the hardship that will befall the nonmovant if the injunction issues contrasted with the hardship that will befall the movant if the injunction does not issue." *Boringquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 114 (1st Cir. 2006). "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). An unnecessary delay in seeking relief tips the balance of equities against a movant. *See id.*

As noted above, the plaintiffs knew that remote participation in floor sessions was expressly prohibited no later than January 6, 2021. Goulette Decl. ¶ 49. They likewise knew or should have known that the House has not historically permitted remote participation in floor sessions, including during the pandemic. They nonetheless waited until the eve of the legislative session to file their complaint and seek preliminary relief. In addition to undermining their claim of irreparable harm, this delay tips the balance of equities against granting the plaintiffs' motion.

Granting the plaintiffs' motion would also impose a substantial, and potentially insurmountable, hardship on the Speaker and the House. *See* Goulette Decl. ¶¶ 57–63; *see*

generally Smith Decl. These hardships outweigh the speculative harms the plaintiffs contend they will suffer should this Court decline to upend the status quo.

For similar reasons, it is not in the public interest to grant the plaintiffs their requested injunction. The public plainly has an interest in its legislature being able to attend to legislative business. Indeed, it is this precise interest that underpins and animates the doctrine of absolute legislative immunity. *See, e.g.*, *Bogan*, 523 U.S. at 52 ("Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by fear of personal liability.") If this Court grants the requested injunction, however, then it will likely impede the House's ability to conduct business next week. Goulette Decl. ¶¶ 57–63. Thus, the public interest also weighs against granting the plaintiffs' motion.

CONCLUSION

The plaintiffs have not met their burdens under any of the relevant factors. This Court should accordingly deny their request for a temporary restraining order.

SHERMAN PACKARD, SPEAKER OF THE HOUSE OF REPRESENTATIVES

By and through his attorneys

Date: February 18, 2021

/s/ Anthony J. Galdieri

Anthony J. Galdieri, N.H. Bar No. 18594
Daniel E. Will, N.H. Bar No. 12176
Samuel R. V. Garland, N.H. Bar No. 266273
Jennifer S. Ramsey, N.H. Bar No. 268964
New Hampshire Department of Justice
Civil Bureau
33 Capitol Street
Concord, NH 03301
(603) 271-3650

anthony.j.galdieri@doj.nh.gov
daniel.e.will@doj.nh.gov
samuel.rv.garland@doj.nh.gov
jennifer.s.ramsey@doj.nh.gov

Date: February 18, 2021

/s/ James S. Cianci

James S. Cianci, N.H. Bar No. 14183
Legislative Branch
33 North State Street
Concord, NH 03301
(603) 271-3683
James.cianci@leg.state.nh.us

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2021, I electronically filed the foregoing with the United States District Court for the District of New Hampshire by using the CM/ECF system. I certify that counsel for Plaintiffs are registered as ECF users and that they will be served via the CM/ECF system. Attorney Paul Twomey is, however, temporarily unable to access the ECF system and will be served by email to his regular email address, paultwomey@comcast.net.

/s/ *Anthony J. Galdieri*