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21-2212-cv

United States Court of Appeals

for the

Second Circuit

NOT DEAD YET, NMD UNITED, DISABILITY RIGHTS NEW YORK, MICHELLE BROSE, MIKE VOLKMAN, JESSICA TAMBOR, PERI FINKELSTEIN, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellants

– v. –

KATHY HOCHUL, Governor of the State of New York, in her official capacity, HOWARD A. ZUCKER, Commissioner of the New York State Department of Health, in his official capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

In their Complaint challenging the New York State Department of Health Ventilator Allocation Guidelines ("Guidelines"), which explicitly provide for the reallocation of their life-sustaining personal medical equipment,[1] Chronic Ventilator Users alleged that the Guidelines deprived them of a nondiscriminatory emergency preparedness plan in violation of the Americans with Disabilities Act ("ADA"). (A-11 ¶ 2, A-33 ¶ 151). That complaint, and the facts alleged in support of it, must be accepted as true at this stage of litigation.

Chronic Ventilator Users are actually and imminently injured by the State-created emergency preparedness plan and their injury is redressable by the State. The State contends that Chronic Ventilator Users "simply must wait until there is a concrete basis to allege that the plan may actually be implemented." Appellees' Br. 3. However, Chronic Ventilator Users cannot risk their lives to challenge the discriminatory Guidelines, nor does the law require them to wait.

Furthermore, the State cannot distance itself from the Task Force it conceptualized and convened, and upon which the Commissioner of the State Department of Health serves as chair in order to avoid responsibility for the

[1] The State takes issue with Chronic Ventilator Users' claim that the State "has specifically directed the removal and reallocation of Chronic Ventilator Users' life-sustaining devices in an emergency." Appellees' Br. 29. However, a plain reading of the Guidelines themselves confirms this fact. (A-99, A-101).

Guidelines. As such, the State is responsible for and capable of granting Chronic Ventilator Users' request to amend or rescind the Guidelines.

Additionally, Chronic Ventilator Users' claims are constitutionally and prudentially ripe and fit for judicial review. The current Guidelines, as published on the New York State Department of Health Website, pose a current, ongoing hardship to Chronic Ventilator Users, particularly in light of the ongoing Covid-19 pandemic. There is no time more urgent than now to have clear, effective and nondiscriminatory emergency preparedness plans.

Finally, Chronic Ventilator Users' claims are timely under the continuing violation doctrine because they are subject to an ongoing discriminatory policy. Alternatively, the repeated violations doctrine applies to Chronic Ventilator Users' claims because they are injured each day the discriminatory policy remains in place.

ARGUMENT

POINT I

CHRONIC VENTILATOR USERS HAVE STANDING

A. CHRONIC VENTILATOR USERS HAVE ALLEGED A COGNIZABLE INJURY IN FACT AND THEIR WELL-PLED FACTS MUST BE ACCEPTED AS TRUE AT THIS STAGE OF LITIGATION

To establish standing, a plaintiff must suffer an injury-in-fact, that is (1) the "invasion of a legally protected interest" that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical," (2) "fairly…traceable to the challenged action of the defendant," and (3) likely redressable by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). It is well-established that a court must accept the facts alleged in the complaint as true. *See Levy v. Southbrook Intern. Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001). Chronic Ventilator Users have pled that the Guidelines are the State's emergency preparedness plan.[2] (A-11 ¶¶ 1-2). The Guidelines direct the removal of ventilators during a pandemic. (A-18 ¶ 45). Hospitals are inclined to use the Guidelines (A-16 ¶ 34), and Chronic Ventilator Users have been deterred from seeking medical care during an emergency. (A-20 – A-24 ¶¶ 60, 73, 81, 96). Chronic Ventilator Users'

[2] Despite the State's quarrel with Chronic Ventilator Users' amicus stating that the Guidelines represent that they are "the State of New York's plan for how ventilators are to be allocated during a pandemic," Appellees' Br. 26 n.13, in the Letter from the Commissioner of Health that appears at the start of the document, the Guidelines characterize themselves as "part of our emergency preparedness efforts." (A-57).

claims satisfy all three elements of the standing test, and the State cannot dispute Chronic Ventilator Users' facts.

B. CHRONIC VENTILATOR USERS' INJURY IS ACTUAL AND IMMINENT, NOT CONJECTURAL OR HYPOTHETICAL

Chronic Ventilator Users allege that the State-created Guidelines deprive them of a nondiscriminatory emergency preparedness plan – a benefit afforded to non-disabled citizens – in violation of the ADA, *see Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 414 (S.D.N.Y. 2012), Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act.[3] Despite acknowledging this allegation of injury, the State contends that Chronic Ventilator Users "have not alleged any Article III injury." Appellees' Br. 22. While the State argues that Chronic Ventilator Users have not established "an actual or imminent loss of access" to their ventilators, Appellees' Br. 22, the relevant injury is the deprivation of a nondiscriminatory emergency preparedness plan. That injury is not just "imminent," but present and ongoing. *See also Logerfo v. City of New York*, No. 17-CV-00010-JMA-AYS, 2020 WL 2307649, at *5 (E.D.N.Y. May 8, 2020) ("Indeed, the Court 'would be in no better position later than now to resolve the claims presented' because 'to conclude otherwise would be perverse, as it would

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[3] *See, e.g.*, *McElwee v. Cnty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012); *see also Vega-Ruiz v. Montefiore Med. Ctr.*, No. 17-CV-1804-LTS-SDA, 2019 WL 3080906 n. 3 (S.D.N.Y. July 15, 2019) (describing the pleading analysis for Section 1557, Section 504, and ADA claims as being treated identically).

mean that [plaintiff] could bring [her] claim only after' suffering an extreme emergency") (internal citations omitted)); *Bauer v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003) ("The more drastic the injury that government action makes more likely, the lesser the increment in probability necessary to establish standing.").

The State argues that "a pre-enforcement challenge cannot be based on an 'imaginary or speculative' fear of ultimate harm." Appellees' Br. 23, (citing *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979)). However, as Chronic Ventilator Users have explained, their harm is not speculative. They are injured by the lack of a nondiscriminatory emergency preparedness plan. Chronic Ventilator Users have sufficiently alleged that harm.

C. CHRONIC VENTILATOR USERS CANNOT AND NEED NOT WAIT FOR THE GUIDELINES TO BE IMPLEMENTED

The State attempts to introduce facts about the implementation of the Guidelines. Appellees' Br. 25. However, the law does not permit the State to plead their own facts in the context of a motion to dismiss. *See Ferrante v. Capitol Reg'l Educ. Council,* No. 3:14-CV-00392-VLB, 2015 WL 1445206, at *6 (D. Conn, Mar. 30, 2015) (finding that it was impermissible to attempt to introduce facts into defendant's motion to dismiss, as plaintiff's complaint did not allege those facts); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1424–25 (3d Cir. 1997) (finding that the district court's reliance on defendant's proffered affidavit is improper on a motion to dismiss where the court cannot look beyond

the facts alleged in the complaint). The State contends that Chronic Ventilator Users have not alleged a basis to conclude that the State adopted or implemented the Guidelines. Appellees' Br. 25. Even assuming, for purposes of argument, that Chronic Ventilator Users were required to make such an allegation, a fact-based question about the internal workings of the State is best-suited for discovery—not the motion to dismiss stage. *See, e.g.*, *Minto v. Molloy Coll.*, No. 16-CV-276-KAM-AYS, 2021 WL 1394329, at *11 (E.D.N.Y. Jan. 21, 2021), *report and recommendation adopted*, No. 16-CV-276, 2021 WL 804386 (E.D.N.Y. Mar. 3, 2021) (declining to opine on defendants' critique of plaintiffs' facts and stating that "fact-finding is improper in the context of a motion to dismiss.").

The State agrees that "a plaintiff is not required to expose himself to actual injury before bringing suit." Appellees' Br. 23. Yet, it does so while simultaneously arguing that Chronic Ventilator Users "simply must wait" for the Guidelines to be implemented in order to challenge them. Appellees' Br. 3. This argument refuses to acknowledge that the "actual or imminent loss of access" to their ventilators, which the State contends is required for standing, would mean an actual or imminent loss of Chronic Ventilator Users' lives.

Furthermore, the State contends that Chronic Ventilator Users' reliance on *American Civil Liberties Union v. Clapper* ("*ACLU*"), 785 F.3d 787 (2d Cir. 2015), is misplaced and that the Court in *ACLU* found standing because the

allegedly unlawful policy had already been applied to the plaintiffs. Appellees' Br. 24 n.11. However, the government in *ACLU* argued that the injury stemmed from the government's reviewing the information collected. 785 F.3d at 801. The plaintiffs, on the other hand, challenged the program itself—the collecting of data. *Id.* The court agreed with the plaintiffs. *Id.* Similarly, Chronic Ventilator Users are challenging the Guidelines themselves as facially discriminatory – not the application of the Guidelines.

D. CHRONIC VENTILATOR USERS' CLAIMS ARE FAIRLY TRACEABLE TO THE STATE

1. THE STATE CANNOT DISTANCE ITSELF FROM THE GUIDELINES

Chronic Ventilator Users' injury is "fairly traceable to the challenged action of [the State]," and not as the State contends, Appellees' Br. 30, "the result of the independent action of some third party." *Lujan*, 504 U.S. at 560. The State spends much of its filing attempting to put as much distance as possible between itself and the Guidelines, alleging that the document is the product of the New York State Task Force on Life and the Law ("Task Force"), not the State itself. Appellees' Br. 4-6, 30.

The State and the Task Force are joint collaborators with respect to the development of the Guidelines. For support for these statements, the Court need only look to the Guidelines themselves. (A-54). The New York State Department

of Health is listed immediately after the New York State Task Force on Life and the Law as an author, then-Commissioner of the Department of Health Howard Zucker is listed as a member of the Task Force, and the "Letter from the Commissioner of Health" reads "The Department [of Health], *together with* the New York State Task Force on Life and the Law, is releasing the 2015 Ventilator Allocation Guidelines." (A-54 – A-57) (emphasis added). The Guidelines go on to state:

> "The Department of Health is *empowered to issue* voluntary, non-binding guidelines for health care working and facilities; such guidelines are readily implemented and provide hospitals with an ethical and clinical framework for decision-making." (A-67) (emphasis added);
>
> "Voluntary guidelines *issued by the Department of Health* for ventilator allocation provide evidence for an acceptable modified medical standard of care during the dire circumstances of a pandemic." (A-67) (emphasis added);
>
> "The Department of Health *and* the Task Force will continue to publicize the Guidelines…." (A-96) (emphasis added);
>
> "[T]he New York State Task Force on Life and the Law (the Task Force) *and* the New York State Department of Health (the Department of Health), undertook a comprehensive project *to draft* clinically sound and ethical ventilator allocation guidelines (Pediatric Guidelines)." (A-141) (emphasis added);
>
> "[T]he Task Force *and* the Department of Health *undertook a comprehensive project* to develop clinically sound and ethical guidance as part of an undertaking to expand the Ventilator Allocation Guidelines (the Guidelines)" (A-152) (emphasis added).

Furthermore, this type of state action by a non-state entity is arguably analogous to claims brought under 42 U.S.C. § 1983 in which the government can be held liable for the actions of private entities performing state functions. *See, e.g.*, *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 312-13 (2d Cir. 2003). "In order to satisfy the state action requirement, the allegedly unconstitutional conduct must be fairly attributable to the state." *Id.* (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)). This happens "if there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Id.* (citing *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal quotations omitted)). "State action may properly be found where the state exercises 'coercive power' over, is 'entwined in [the] management or control' of, or provides 'significant encouragement, either overt or covert' to, a private actor, or where the private actor 'operates as a willful participant in joint activity with the State or its agents,' is 'controlled by an agency of the State,' has been delegated a 'public function' by the state, or is 'entwined with governmental policies.'" *Id.* (citing *Brentwood Acad.*, 531 U.S. at 295). Thus, the State and the Task Force are clearly inextricably intertwined.

E. THE STATE'S REDRESSABILITY ARGUMENT IS WAIVED AND INCORRECT

1. THE STATE'S REDRESSABILITY ARGUMENT IS WAIVED

By its own admission, the State – for the first time ever – argues that Chronic Ventilator Users' claims are not redressable by the State "because the guidelines were not created by the Governor or by the DOH Commissioner *alone*, but by the Task Force." Appellees' Br. 29–30 (emphasis added). As a result, the State claims that "it is the Task Force, not defendants, that has the power to withdraw or to amend its publications." Appellees' Br. 30. It asserts that it can raise this argument for the first time on appeal because it is an issue of subject matter jurisdiction. Appellees' Br. 29. However, this limited statement of the law ignores that generally "a federal appellate court does not consider an issue not passed upon below," and "retain[s] broad discretion" on what matters it will consider. *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000); *see also Ferrante*, No. 3:14-CV-00392-VLB, 2015 WL 1445206, at *6 ("The court does not consider this argument, as it is impermissibly raised for the first time in defendant's reply brief, and there is no reason why it could not have been raised in the initial motion to dismiss").

Additionally, a court is more likely to hear an issue for the first time on appeal "where the issue is purely legal and there is no need for additional fact-

finding." *Baker*, 239 F.3d at 420, The State's argument here is entirely based on what it alleges is the relationship between the named State entities and the Task Force. Chronic Ventilator Users would require additional factfinding in order to establish the veracity of these allegations. It is not a matter of pure law that there is no relationship between the State and the Task Force sufficient to enable the State to redress Chronic Ventilator Users' injury. Thus, this argument should be waived.

Alternatively, should the Court choose to exercise its discretion to consider this argument, the State should not be permitted to avoid responsibility for the Guidelines. It cites only the executive order that first established the Task Force in 1984 in support of its newfound position that only the Task Force can withdraw or amend the Guidelines. Appellees' Br. 30. However, the order does not discuss amendment or withdrawal at all. *See* 9 N.Y.C.R.R. § 4.56. Thus, the State can address the claims in this litigation and provide the requested relief. The State created these Guidelines, and the State can amend them.

2. CHRONIC VENTILATOR USERS' INJURY DOES NOT DEPEND ON THE ACTIONS OF INDEPENDENT THIRD PARTIES

Chronic Ventilator Users' injury is not dependent on speculation concerning the judgment of independent decisionmakers. Appellees' Br. 27. Courts have found that "[t]here is no redressability where such depends on an independent actor who

retains broad and legitimate discretion [that] the *courts cannot presume either to control or to predict.*" *Neary v. Weichert,* 489 F. Supp. 3d 55, 67 (E.D.N.Y. 2020) (emphasis added) (internal citation and quotation omitted). Here, in contrast, the Guidelines themselves acknowledge that healthcare providers want to follow them, (A-91), and healthcare providers have indicated the same. (A-16). This Court can, and should, predict that healthcare facilities would follow guidance issued by DOH, the entity that regulates them. Thus, this case "does not rest on mere speculation about the decisions of third parties" and instead relies on the "predictable effect of Government action on the decisions of third parties." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019).

The Guidelines explicitly acknowledge that hospitals have "expressed a preference for State guidance over drafting their own policies," and use this fact as a basis to "strongly recommend" that all health care providers adopt and follow the Guidelines in a pandemic. (A-265). The State cannot have it both ways: it cannot both promulgate discriminatory Guidelines that it expects health care providers will follow and then shield itself from liability under the guise that they are merely guidelines.

Alternatively, if as the State contends, the Guidelines have no chance of ever being implemented and it has "repeatedly and publicly disavowed" this possibility, Appellees' Br. 13, it is questionable why the State would leave it to chance that a

health care provider would follow the Guidelines published by the Department of Health. Additionally, the State offers no explanation as to why it will not afford Chronic Ventilator Users their requested relief in order to avoid this occurrence: an unequivocal statement that Chronic Ventilator Users will never be extubated without having another ventilator readily available for their use, as Plaintiff-Appellant Disability Rights New York previously requested. (A-28).

POINT II

CHRONIC VENTILATOR USERS' CLAIMS ARE RIPE

Chronic Ventilator Users' claims are both constitutionally and prudentially ripe for review.[4]

A. CHRONIC VENTILATOR USERS' CLAIMS ARE CONSTITUTIONALLY RIPE

Chronic Ventilator Users' claims are constitutionally ripe for the same reasons they have standing.[5] *See Davis v. New York State Bd. of Elections*, 689 F. App'x 665, 668 (2d Cir. 2017) ("Constitutional ripeness, which is an overlapping

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[4] Contrary to the State's claims, *see* Appellees' Br. 33 n.18, Chronic Ventilator Users have never suggested that "ripeness analysis…is an either-or matter." Appellants' Br. 19 (emphasis added) ("The same legal analysis that leads to the conclusion that Chronic Ventilator Users have standing leads to the conclusion that their claims are constitutionally ripe…. *In addition*, Chronic Ventilator Users maintain that the proper inquiry for analyzing their claims is prudential ripeness.").

[5] Thus, Chronic Ventilator Users incorporate their standing arguments, *see supra* p. 3, for the purposes of their constitutional ripeness argument.

doctrine, is best thought of as a specific application of the actual injury aspect of Article III standing.") (internal citation and quotations omitted).

B. THE GUIDELINES ARE A FINAL POLICY DOCUMENT FIT FOR JUDICIAL REVIEW

Chronic Ventilator Users' claims are also prudentially ripe. Prudential ripeness concerns "when a court should entertain a lawsuit, not whether it may entertain the suit. The prudential ripeness inquiry focuses on 'whether the alleged policy at this stage is sufficiently definite and clear to permit sound review by this Court[.]'" *Roman Cath. Archdiocese of New York v. Sebelius*, 907 F. Supp. 2d 310, 333 (E.D.N.Y. 2012) (quoting *New York Civ. Liberties Union v. Grandeau*, 528 F.3d 122, 131 (2d Cir. 2008)).

The State argues that the Guidelines are "ill-suited for judicial review at this time" because the Guidelines state that they are "by no means final" and are "intended to be updated and revised[.]" Appellees' Br. 34. However, the mere fact that the Guidelines could be updated eventually does not mean they are not final. *See Scenic Am., Inc. v. United States Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016) ("Although the Guidance does state that the [agency] 'may provide further guidance in the future as a result of additional information' [it] might receive . . . The fact that a regulation might be interpreted again at some point in the indeterminate future cannot, by itself, prevent the initial interpretation from being

final"). It also does not prevent Chronic Ventilator Users from challenging them now.

Furthermore, while the State argues that it is "unnecessary" to adjudicate Chronic Ventilator Users' claims now, Chronic Ventilator Users contend that it is necessary because they wrote a letter and filed an administrative complaint before filing suit, and the State refused to address their concerns through any other medium.[6]

Next, the State disputes Chronic Ventilator Users' argument that their claims are ripe because they are facially discriminatory. Appellees' Br. 35. The State cites *Nat'l Park Hosp. Ass'n v. Dep't of Interior,* 538 U.S. 803, 812 (2003), in support of its contention that a facial challenge that presents a purely legal question is unripe in the absence of a concrete dispute. Appellees' Br. 35. However, the Court in *National Park Hospital Association* held that although the issue presented was a purely legal issue, "further factual development would significantly [aid the court in deciding] the legal issues presented." *Id.* at 812 (internal citation and quotations omitted). On the contrary, no further factual development is necessary – or, for that

[6] While the State asserts without citation that Plaintiff-Appellant Disability Rights New York's complaint with the Office for Civil Rights of the U.S. Department of Health and Human Services was dismissed via an unpublished letter, Appellees' Br. 15, n.8, Disability Rights New York never received notice of dismissal or a copy of a letter denoting the same.

matter, permitted – at this motion to dismiss stage to assist the Court in its decision with respect to Chronic Ventilator Users' claims.

Finally, the State asserts that Chronic Ventilator Users "misread" the law review article in which several of the Guidelines' authors suggest that the Task Force purposefully crafted the Guidelines as guidelines in order to avoid a legal challenge. Appellees' Br. 34 n. 19. However, Chronic Ventilator Users stand by their interpretation.[7]

The State mistakenly relies on *Paraquad, Inc. v. St. Louis Hous. Auth.*, 259 F.3d 956, 958-60 (8th Cir. 2001) to argue that the Guidelines are a "nonfinal draft," Appellees' Br. 35. In *Paraquad*, plaintiffs challenged a housing plan which was not complete because "demolition [had] not yet started, drawings [were] still in the preliminary phase, and no new construction ha[d] begun." *Id.* at 959. In contrast, the Guidelines were published in November 2015. (A-12). They detail considerable and wide-ranging public outreach efforts made prior to their

[7] *See* Valerie Gutmann Koch, J.D. & Beth E. Roxland, J.D., M. Bioethics, *Unique Proposals for Limiting Legal Liability and Encouraging Adherence to Ventilator Allocation Guidelines in an Influenza Pandemic*, 14 DEPAUL J. HEALTH CARE L. 467, 484–85 (2013) ("However, proof of compliance with the Guidelines might still constitute presumptive (rebuttable) or non-conclusive evidence of the legal standard of care - a defense to a claim of negligence. Guidelines for appropriate treatment protocols during public health emergencies developed by organizations may be 'useful in litigation for the purpose of determining whether health professionals acted appropriately and are entitled to immunity.' Thus, the Guidelines may serve as departmentally promulgated '*soft law*,' providing strong evidence of an established standard of care that could reasonably be expected of health care providers in a disaster emergency") (internal citation omitted) (emphasis added).

finalization, including publication of the 2007 Draft Guidelines in the State Register and on the Department of Health's website with instructions on how to submit comments, presenting the Draft Guidelines at medical and bar associations and community meetings, and soliciting public comments at the national level. (A-80-82). The Guidelines are published on the Department of Health's website. (A-12). The Department is no longer accepting public comment, and it has declined to make changes to the Guidelines when asked. (A-28). Thus, the Guidelines are a final document fit for judicial review.

POINT III

CHRONIC VENTILATOR USERS' CLAIMS ARE NOT TIME BARRED

A. CHRONIC VENTILATOR USERS ALLEGED AN ONGOING DISCRIMINATORY POLICY UNDER THE CONTINUING VIOLATIONS DOCTRINE

The State claims that Chronic Ventilator Users did not allege that the State engaged in any non-time-barred acts of discrimination in furtherance of their discriminatory policy. Appellees' Br. 38. This is incorrect. First, at the motion to dismiss stage, Chronic Ventilator Users are only required to *allege* the existence of a discriminatory policy in order for the continuing violations doctrine to apply. *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999) (holding it was "premature" to dismiss based on continuing violation theory because a "mere allegation of the existence of such a continuing policy would be sufficient…"); *see*

also Fitzgerald v. Henderson, 251 F.3d 345, 362 (2d Cir. 2001) (concluding that requiring the plaintiff to show a formal policy or widespread discrimination was premature because the plaintiff had not had an opportunity to conduct discovery). Chronic Ventilator Users have alleged that the Guidelines are a discriminatory policy. (A-11 ¶ 2, A-33 ¶¶ 151). Nevertheless, Chronic Ventilator Users still alleged the existence of a non-time-barred act of discrimination in furtherance of the discriminatory policy. Chronic Ventilator Users alleged that they wrote a letter to then-Governor Cuomo in March of 2020 asking that he issue an unequivocal statement that Chronic Ventilator Users would not have their ventilators taken without another one being readily available for their use, and the Governor did not respond. (A-28)**.** These allegations are more than sufficient to survive a motion to dismiss. *Harris*, 186 F.3d at 250.

The State contends that "inaction or acquiescence" is not enough to qualify as a non-time-barred act in furtherance of a discriminatory policy. Appellees' Br. 38. However, the State primarily relies on out-of-circuit cases in support of this contention. Appellees' Br. 38-9. It cites only one Second Circuit case in support of this point, Appellees' Br. 47. However, this Court's precedents overwhelmingly suggest otherwise. *See*, *e.g.*, *Harris*, 186 F.3d at 250 (holding it was possible a plaintiff could demonstrate some discriminatory act that did occur within the limitations period because it was unclear whether the failure-to-promote was a one-

time decision or whether plaintiff's superiors continuously failed to act thus furthering a continuing discriminatory policy); *see also Fitzgerald*, 251 F.3d at 364 (stating that the Postmaster's inaction in the face of plaintiff's complaints could demonstrate an ongoing policy of permitting sexual harassment); *Id.* at 362 (the continuing violation doctrine applies where discrimination has persisted "unremedied for so long" such that "inaction may reasonably be viewed as tantamount to a policy or practice of tolerating such discrimination."); *Shomo v. City of New York*, 579 F.3d 176, 182 (2d Cir. 2009) (holding that the complaint alleged an ongoing discriminatory policy where Department of Corrections medical and security staff failed to assist plaintiff with daily living activities, failed to transfer him to special infirmary housing, and failed to provide him with recommended treatments); *Lucente v. County of Suffolk*, 980 F.3d 284, 309 (2d Cir. 2020) (holding that plaintiffs sufficiently alleged an ongoing discriminatory policy of "ignoring and/or inadequately addressing" an officer's sexual misconduct towards incarcerated women).

The State also cites *DeSuze v. Ammon*, 990 F.3d 264, 271-72 (2d Cir. 2021) in support of its claim that "merely lingering effects of past action" are insufficient to trigger the continuing violations doctrine. Appellees' Br. 38. In *DeSuze*, residents of an affordable housing complex challenged the municipal and federal approval of their landlord's application for rent increases. *Id.* at 267. The plaintiffs

filed their lawsuit a decade after the rent increases were approved and argued that their claims were timely under the continuing violations doctrine. *Id.* at 267. This Court found that the continuing violations doctrine did not apply because "*each* of [the plaintiff's claims] accrued independently through a discrete approval process, and *each* approval occurred more than three years before the Tenants filed suit[.]" *Id.* at 272 (emphasis added). Therefore, a continuing violation "'[could not] be established merely because the [plaintiff] continues to feel the effects of a time-barred…act.'" *Id.* at 272 (quoting *Harris*, 186 F.3d at 250).

In contrast, Chronic Ventilator Users did not have multiple, separate approval processes during which to file this lawsuit. Thus, *DeSuze* does not apply here. Chronic Ventilator Users challenged the Guidelines when their risk of being used was no longer remote due to the ongoing global pandemic and after giving the State an opportunity to address their concerns without litigation. Nevertheless, the State chastises Chronic Ventilator Users for *both* filing their claims prematurely and filing their claims too late. Similarly, the State criticizes Plaintiff Not Dead Yet for taking "no legal action" despite knowing about the Guidelines since they were published in 2015. Appellees' Br. 14 n.7. The State's rationale would leave Chronic Ventilator Users with no recourse.

The State also cites *Pulte Homes of N.Y. LLC v. Town of Carmel*, 736 F. App'x 291, 293-94 (2d Cir. 2018) in support of its argument that a government

official's refusal to address some preexisting alleged harm is not a new affirmative act for purposes of the continuing violation doctrine. Appellees' Br. 40. However, *Pulte* does not hold that "a government official's refusal to address some preexisting alleged harm is not a new affirmative act." Appellees' Br. 40; *See Pulte Homes of N.Y. LLC,* 736 F. App'x 291,at 293-94. Furthermore, the purported "government action" at issue in *Pulte* is a town's refusal to return construction fees assessed on a developer's housing complex. *Id.* at 292-93. The continuing violations doctrine applies "upon a showing of compelling circumstances." *Remigio v. Kelly*, No. 04-CIV-1877-JGK-MHD, 2005 WL 1950138, at *8 (S.D.N.Y. Aug. 12, 2005) (citing *Nakis v. Potter*, No. 01-CIV-10047-HBP, 2004 WL 2903718, at n.2 (S.D.N.Y. Dec.15, 2004) (internal quotations omitted)). A compelling circumstance exists where, as here, "there is a[n] express, openly espoused policy [that is] alleged to be discriminatory." *Remigio*, No. 04-CIV-1877-JGK-MHD, 2005 WL 1950138, at *8 (internal citation and quotations omitted). The "compelling circumstance" of the State's refusal to address a plan providing for the reallocation of Chronic Ventilator Users' personal life-sustaining devices is not comparable to a town's refusal to return developer fees. Thus, *Pulte* does not apply.

Finally, the State incorrectly states that *Harris*, does not apply to Chronic Ventilator Users' claims because "a complaint 'must allege *both* the existence of

an ongoing policy of discrimination *and* some non-time-barred acts taken in furtherance of that policy'" and that Chronic Ventilator Users' complaint "does not meet this requirement." Appellees' Br. 39 (emphasis supplied in original) (internal citation omitted). Chronic Ventilator Users have alleged *both* that the Guidelines are an ongoing discriminatory policy *and* that the State committed a non-time-barred act in furtherance of that discriminatory policy when it did not respond to Chronic Ventilator Users' letter. (A-28). Thus, the continuing violation doctrine applies to Not Dead Yet and all Chronic Ventilator Users' claims.

B. CHRONIC VENTILATOR USERS' CLAIMS ARE TIMELY UNDER THE REPEATED VIOLATIONS DOCTRINE AND ARE NOT WAIVED.

First, while admittedly and simultaneously waiving an argument that is central to the resolution of this matter by raising it for the first time in reply on appeal, *see supra* pp. 9-10 the State contends that Chronic Ventilator Users waived the repeated violations doctrine by failing to raise it in the district court. Appellees' Br. 41. However, as Chronic Ventilator Users previously stated, federal appellate courts "retain broad discretion to consider issues not raised initially in the District Court," and are "more likely to exercise…discretion…" where the issue is purely legal and there is no need for additional fact-finding.'" *Baker*, 239 F.3d at 420. Unlike the State's redressability argument, which depends, at least in part, on the specific nature of the relationship between the State and the Task Force, whether

the repeated violations doctrine applies to Chronic Ventilator Users' claim of discrimination based on being deprived of the benefit of a nondiscriminatory emergency preparedness plan is just such the pure question of law that is suitable for the exercise of federal appellate discretion.

The State next argues that Chronic Ventilator Users "never explain" how the Guidelines constitute a repeated violation. Appellees' Br. 41. However, as Chronic Ventilator Users have previously stated, Appellants' Br. 25, "[a] public entity repeatedly violates [the ADA and Section 504 of the Rehabilitation Act (RA)] each day that it fails to remedy a non-compliant service, program, or activity." *Hamer*, 924 F.3d at 1103. Thus, "a qualified individual with a disability is excluded from the participation in, denied the benefits of, and subjected to discrimination under the service, program, or activity each day that she is deterred from utilizing it due to its non-compliance." *Id.*

The plaintiff in *Hamer* was a wheelchair user who alleged that he was denied access to many of the City's sidewalks and curb cuts because they did not comply with Title II of the ADA and Section 504. *Id.* at 1097.

Similarly, Chronic Ventilator Users have alleged that they are denied access to a nondiscriminatory emergency preparedness plan in violation of Title II of the ADA and Section 504. Chronic Ventilator Users are injured each day that the discriminatory Guidelines are in effect. Just as the City in *Hamer* repeatedly

violated the ADA and Section 504 each day that it failed to bring the City's curb cuts and sidewalks into compliance, 924 F.3d at 1103, the State repeatedly violates the ADA and Section 504 each day that it fails to amend or rescind the discriminatory Guidelines.

Finally, the State attempts to argue that the repeated violations doctrine does not apply to Chronic Ventilator Users' claims because the Guidelines are not the law or policy of the State. Appellees' Br. 42. Therefore, the State contends the Guidelines do not exclude Chronic Ventilator Users from any state program. Appellees' Br. 42. Ironically, it does this while simultaneously opening its brief by describing the Guidelines as "a policy recommendation for the Legislature and the Executive Branch to consider as they develop law and regulations to guide the public health response," Appellees' Br. 1. Moreover, as Chronic Ventilator Users have previously stated, the State cannot effectively distance itself from responsibility for the Guidelines that it created and encourages hospitals to follow. *See supra* pp. 7,11. Thus, this argument fails, and the repeated violations doctrine applies to Chronic Ventilator Users' claims.

CONCLUSION

Based on the foregoing, as well as the arguments put forth in Appellants' brief filed on December 27, 2021, Chronic Ventilator Users' claims have standing, are ripe for judicial review, and are not time barred. Chronic Ventilator Users respectfully request that the judgment below be reversed, the Complaint be reinstated, and this action proceed to a determination of the merits of Chronic Ventilator Users' claims.

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