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Civil Rights and Disability Justice Clinic: BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS: 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. Case 21-2212.

New York Law School

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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RULE 26 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Disability Rights New York discloses that it is not a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Not Dead Yet discloses that it is not a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant NMD United discloses that it is not a publicly held corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellants Michelle Brose, Mike Volkman, Jessica Tambor, Peri Finkelstein, and organizational plaintiffs Not Dead Yet, NMD United, and Disability Rights New York (collectively "Chronic Ventilator Users") brought this civil rights action against Defendants-Appellees then New York State Governor Andrew Cuomo and New York State Commissioner of Health Howard Zucker (collectively "the State") in their official capacities to challenge the New York State Department of Health Ventilator Allocation Guidelines ("Guidelines"). (A-11).[1] The District Court had jurisdiction over the subject matter of the action pursuant to 28 U.S.C. § 1331.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291 as a right from a final order of the district court dismissing Chronic Ventilator Users' claims.

Chronic Ventilator Users filed their timely Notice of Appeal in the United States District Court for the Eastern District of New York on September 10, 2021, less than thirty (30) days after the August 13, 2021, entry date of the subject order. Fed. R. App. 4(a)(1)(A). Chronic Ventilator Users file this brief in support of their appeal within ninety-one (91) days of the scheduling request.

[1] "A-" followed by numbers refers to pages in the Joint Appendix filed with this brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court committed reversible error by dismissing Chronic Ventilator Users' claims for lack of standing and ripeness when they are denied access to a nondiscriminatory emergency preparedness plan; and
2. Whether the district court erred by concluding that Chronic Ventilator Users are time barred from challenging the New York State Department of Health's Ventilator Allocation Guidelines, the State's emergency preparedness plan for the COVID-19 pandemic.

STATEMENT OF THE CASE

On October 7, 2020, in the midst of the ongoing SARS-CoV-2 ("COVID-19") pandemic in which ventilators are a vital source of treatment, Chronic Ventilator Users and the organizations that represent them challenged the New York State Department of Health's ("DOH") emergency preparedness plan for the allocation of ventilators. New York State's plan, the Ventilator Allocation Guidelines, directs the removal and reallocation of personal, life-sustaining ventilators under certain circumstances when a chronic ventilator user enters a hospital setting. The complaint included claims for relief under Title II of the Americans with Disabilities Act ("ADA") (A-30); Section 504 of the Rehabilitation Act of 1973 ("Section 504") (A-33); and Section 1557 of the Affordable Care Act ("ACA") (A-35) and was filed against then-New York State Governor Andrew Cuomo and New York State Commissioner of Health Howard Zucker in their official capacities.

In November 2015, the State, through the New York State Task Force on Life and the Law ("Task Force") and DOH, published the Guidelines to address the allocation of limited resources during a pandemic. (A-57). While the Guidelines were initially created in anticipation of a respiratory pandemic, the Guidelines became prominent in March 2020 at the onset of the COVID-19 pandemic. Ventilators quickly became the key to treating COVID-19, which can

cause severe respiratory distress. The Guidelines establish a process for acute medical facilities to determine who will receive a ventilator when there is a shortage at a facility. (A-57). The Guidelines use a multi-step process with a Sequential Organ Failure Assessment ("SOFA") score to determine which patients will have access to a ventilator during triage. (A-73, A-116). Chronic ventilator users automatically have worse SOFA scores because their disabilities significantly impair the functioning of key organ systems such as the lungs, among others. (A-116–A-117). The Guidelines direct hospitals to take chronic ventilator users' personal ventilators upon their arrival into a hospital and place them into the general ventilator allocation pool for distribution to those with better SOFA scores. (A-99, A-101). This forced extubation of their personal ventilators would be fatal for Chronic Ventilator Users.

In March 2020, Plaintiff-Appellant DRNY began to receive inquiries from people who expressed concerns that they could lose access to their personal ventilators should they seek acute health care during the COVID-19 pandemic. (A-28). In response, DRNY contacted the Governor about these complaints. (A-28). DRNY requested that the State issue an unequivocal statement that chronic ventilator users would never be extubated without having another ventilator readily available for their use. (A-28). The State did not respond or issue any such statement. (A-28).

DRNY filed a complaint with the Office for Civil Rights at the U.S. Department of Health and Human Services. (A-28). After those attempts at a resolution failed, Chronic Ventilator Users filed suit. (A-28).

The State filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that Chronic Ventilator Users lacked standing, their claims were unripe, barred by the applicable statute of limitations, and moot. (A-49). In accordance with the Honorable Gary R. Brown, District Judge for the U.S. District Court for the Eastern District of New York's, court rules, the parties submitted letter motions summarizing their arguments and had a telephonic pre-motion conference on December 3, 2020, to determine whether it was necessary to submit full briefings of the issues. (A-39–A-48). Judge Brown ruled from the bench and denied-in-part the State's motion to dismiss on ripeness and mootness grounds and directed the parties to brief the standing and statute of limitations issues. (A-43). The parties filed full briefings on the remaining issues on January 19, 2021.

In a Memorandum of Decision & Order dated August 13, 2021, the District Court for the Eastern District of New York granted the State's motion to dismiss. (A-329). The court held that the plaintiffs did not demonstrate standing because the risk of injury was not certainly impending, the implementation of the Guidelines by third-party hospitals "depend[ed] on 'speculation about the decisions of independent actors,'" there were "significant questions about redressability and

ripeness" for these same reasons (A-328), and "plaintiffs fail[ed] to allege a single 'event timely challenged' that would warrant" the application of the continuing violation doctrine. (A-329). On September 10, 2021, Chronic Ventilator Users filed a Notice to Appeal the District Court's Decision & Order, entered on August 13, 2021. (A-330).

SUMMARY OF THE ARGUMENT

The State's Guidelines are facially discriminatory under the ADA, Section 504, and the ACA because they deny Chronic Ventilator Users access to a non-discriminatory State emergency preparedness plan. Emergency preparedness plans are designed to coordinate how both state and private actors will operate during an emergency. The State's Guidelines are an emergency preparedness plan for responding to a respiratory pandemic – such as COVID-19. The Guidelines resulted from extensive work and consultation with experts, and they explicitly state that they were carefully crafted and intended for health care providers to use. (A-265).

The Guidelines state that during a pandemic emergency, where care is being rationed, the personal ventilators of chronic ventilator users will be removed and reallocated in acute medical care settings based on a SOFA score. (A-73, A-116). However, the SOFA scoring system inherently disadvantages Chronic Ventilator Users. (A-116–A-17).

The Guidelines use only clinical factors to evaluate a patient's likelihood of survival and to determine if the patient may have access (or continued access) to ventilator therapy. (A-104). The Guidelines explicitly acknowledge that this policy will deter chronic ventilator users from seeking medical care and could be fatal to them. (A-100, A-101).

Chronic Ventilator Users have standing because they are injured by the existence of these Guidelines, which also makes their claims constitutionally ripe. The district court committed reversible error by concluding that their injury is speculative until they can demonstrate that their ventilators are being removed and reallocated. (A-328). Chronic Ventilators Users need not wait until they face this life-threatening circumstance to challenge the State's Guidelines because they are injured by the lack of access to a non-discriminatory emergency preparedness plan – a benefit provided to nondisabled New Yorkers – in violation of the ADA. *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 414 (S.D.N.Y. 2012). This injury is present, ongoing, not speculative, and is redressable by a favorable ruling.

This injury also gives rise to claims which are prudentially ripe, as the court would be in no better position later than it is now to issue a decision. *Davis v. New York State Bd. of Elections*, 689 F. App'x 665, 668 (2d Cir. 2017). The Guidelines are fit for judicial review because they pose a present hardship to the Chronic Ventilator Users each day the discriminatory policy is not amended or rescinded, particularly during the ongoing COVID-19 pandemic. *See New York C.L. Union v. Grandeau*, 528 F.3d 122, 132 (2d Cir. 2008).

Lastly, under the continuing violation doctrine, Chronic Ventilator Users' claims are not time barred because until the State rescinds or amends the

Guidelines, Chronic Ventilator Users are subject to an ongoing discriminatory policy. *See Fitzgerald v. Henderson*, 251 F.3d 345, 362 (2d Cir. 2001). Thus, the district court incorrectly held that Chronic Ventilator Users were time barred, lacked standing, and that their claims were not ripe.

ARGUMENT

STANDARD OF REVIEW

On this appeal from the grant of a motion to dismiss under Fed. R. Civ. P. 12, the standard of review is *de novo*. *See Thompson v. Cty. of Franklin*, 5 F.3d 245, 249 (2d Cir. 1994) ("If the district court based its finding that a party lacks standing on either the complaint alone or the complaint supplemented by undisputed facts gleaned from the record, our review is *de novo*."); *Castafna v. Luceno*, 744 F.3d 254, 256 (2d Cir. 2014) ("We review *de novo* a district court's grant of a motion to dismiss, including legal conclusions concerning the court's interpretation and application of a statute of limitations.") (internal quotations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Mantikas v. Kellogg Co.*, 910 F.3d 633, 636 (2d Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (internal quotation marks omitted)). At the motion to dismiss stage, the court "must accept all factual allegations as true and draw all inferences in plaintiff's favor" and may only dismiss a case if the plaintiff "can prove no set of facts that would entitle him to relief." *Levy v. Southbrook Intern. Investments, Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001); *see also United States ex rel. Chorches for Bankr. Est. of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 95 (2d Cir. 2017) (discussing the liberal construction of complaints).

POINT I

CHRONIC VENTILATOR USERS HAVE STANDING

Chronic Ventilator Users' claims are concrete, particular and not speculative. They are injured by the state-created emergency preparedness plan, which directs that resources be allocated in a discriminatory fashion during a pandemic – including the ongoing COVID-19 Pandemic.

Citing "distributive justice," the Guidelines specifically direct the removal of a person with a disability's personal ventilator for reallocation to another person – a fact the State has not refuted. (A-96). The Guidelines acknowledge that reallocation of personal ventilators is "problematic because it may not provide equitable health care to persons with disabilities." (A-100). Nevertheless, the Guidelines specifically allow for the reallocation of personal ventilators should ventilator-dependent individuals who reside in the community, rather than in institutions, arrive at an acute care facility. (A-101). Therefore, Chronic Ventilator Users have been and are being "deprived of benefits afforded to other citizens," namely a nondiscriminatory emergency plan. *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 414 (S.D.N.Y. 2012).

To establish standing, "[a] plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578

U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1999)). The alleged injury must be a "concrete and particularized, actual or imminent invasion of a legally protected interest." *Lujan*, 504 U.S. at 555. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561 (internal quotations omitted).

This Court has prohibited public entities from "affording to persons with disabilities services that are 'not equal to that afforded others' or 'not as effective in affording equal opportunity.'" *Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir. 2003). Unequal treatment is a type of injury that has "long been recognized as judicially cognizable." *See Hassan v. City of New York*, 804 F.3d 277, 289-90 (3d Cir. 2015), *as amended*, (Feb. 2, 2016) (quoting *Saenz v. Roe*, 526 U.S. 489, 505 (1999)); *see also Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 657 (1993)).

The district court deviated from well-established case law when it concluded that Chronic Ventilator Users' claims are speculative until the life-threatening moment when their ventilators are removed. The Supreme Court has established that Chronic Ventilator Users need "not await the consummation of threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers Nat'l Union*,

442 U.S. 289, 298 (1979). This foundational standing concept has been cited by every Circuit Court.[2]

This Court has also held that a plaintiff "need not attempt to overcome an obvious barrier" or engage in a "futile gesture of attempting to gain access" to establish injury cognizable under the ADA. *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 188-89 (2d Cir. 2013) (citing *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1135 (9th Cir. 2002). For the same reasons, Chronic Ventilator Users need not wait until a hospital is rationing ventilators in order to challenge an emergency preparedness plan that directs the removal of their personal ventilators. The fact that the State has specifically directed the removal and reallocation of Chronic Ventilator Users' life-sustaining devices in an emergency establishes an injury cognizable under the ADA, Section 504 and the ACA.[3]

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[2] *See Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 227 (2d Cir. 2006); *Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1251 (11th Cir. 2021); *Mil.-Veterans Advoc. v. Sec'y of Veterans Affs.*, 7 F.4th 1110, 1122 (Fed. Cir. 2021); *Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 242 (4th Cir. 2019); *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018); *Goode v. Gioria*, 590 F. App'x 120, 121 (3d Cir. 2014); *Parrish v. Dayton*, 761 F.3d 873, 876 (8th Cir. 2014); *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 582 (6th Cir. 2012); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 473 (7th Cir. 2012); *Lampton v. Diaz*, 661 F.3d 897, 902 (5th Cir. 2011); *Kansas Jud. Rev. v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008); *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 206 (1st Cir. 2002); *Am. Libr. Ass'n v. Barr*, 956 F.2d 1178, 1200 (D.C. Cir. 1992).

[3] "Although there are subtle differences between these disability acts, the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 of federally assisted programs and activities." *Henrietta D. v.*

The district court in *Brooklyn Center* considered an analogous claim against the City of New York's emergency preparedness plan which discriminated against people with disabilities. 290 F.R.D. at 412. Following Hurricane Irene, the plaintiffs alleged a systemic failure to address the needs of people with disabilities in New York City emergency and disaster planning. *Id.* The court rejected New York City's request to dismiss the action for lack of standing. *Id.* at 414. The court explained that a plaintiff is not required to prove their allegations at the motion to dismiss stage:

> The gravamen of plaintiffs' claims is, first and foremost, that they have been, and continue to be, deprived of benefits afforded to other citizens—namely, the benefits of an adequate emergency preparedness program. Plaintiffs' allegations may or may not be true—that will be determined at trial—but they are sufficient at this stage to establish plaintiffs' standing.

Id.

For the same reasons, Chronic Ventilator Users are not required, at this stage of the proceeding, to prove that the Guidelines harmed them. Instead, they have sufficiently alleged concrete and particularized injury caused by the State. The Guidelines are discriminatory on their face because they deprive Chronic Ventilator Users of a nondiscriminatory emergency preparedness plan in the midst

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Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003); 42 U.S.C. § 18116(a) (extending the standards under the Rehabilitation Act to the Affordable Care Act).

of a global respiratory pandemic. Therefore, Chronic Ventilator Users have standing.

A. CHRONIC VENTILATOR USERS' CLAIMS ARE NOT SPECULATIVE

The COVID-19 Pandemic is real and the rationing of health care has and continues to happen. Since the dismissal of this action, in response to another variant of COVID-19, the State's Governor once again declared a State of Emergency and directed the National Guard to aid skilled nursing facilities facing staffing shortages. COVID-19 continues to surge, leading hospitals to suspend elective surgeries and to an increased risk of medical device shortages. It would be perverse to conclude that Chronic Ventilator Users cannot challenge a discriminatory emergency preparedness plan in the midst of a worldwide pandemic or that they must wait until their ventilators have been removed and they are dead. *See Brooklyn Ctr*, 290 F.R.D. at 415.

The district court erroneously compared this case to *Clapper v. Amnesty Int'l USA*, where petitioners lacked standing to challenge the Foreign Intelligence Surveillance Act because their claims were based on the possibility of future surveillance, which was found to be too speculative. 568 U.S. 398, 410 (2013). While "allegations of possible future injury are not sufficient" to confer standing, a "certainly impending" and presently ongoing injury does. *Id*. at 409. There is no

speculation that the Guidelines are discriminatory on their face: they permit the reallocation of personal ventilators – a fact that the State has not refuted.

Instead, the district court erred by not adopting the standard set by this Court in *American Civil Liberties Union v. Clapper* ("*ACLU*"), 785 F.3d 787 (2d Cir. 2015). Like this case, *ACLU* addressed petitioner's challenge to a program on its face – that is, a challenge to the government's policy of collecting metadata. *Id.* at 792. In response, the government argued that injury does not occur until the government actually reviews the information that it collected. *Id.* at 800. This Court rejected this argument, finding that no more than a showing of potential illegality on its face was necessary. If the program itself is unlawful, then a plaintiff has been injured. *Id.* at 801.

Like in *ACLU*, Chronic Ventilator Users allege that the Guidelines are unlawful. The promulgation of a benefit of government (an emergency preparedness plan) to non-disabled people, while excluding people with disabilities, is enough to state an injury resulting from the unequal provision of benefits under the ADA. Also like *ACLU*, the Chronic Ventilator Users' "alleged injury requires no speculation whatsoever as to how events will unfold." 785 F.3d at 801. The Guidelines have already been published, and the contemplated respiratory pandemic that triggers them is ongoing.

Similarly, the policy that Chronic Ventilator Users are challenging directly impacts them as they are injured by the existence of the discriminatory Guidelines. In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021), the Supreme Court limited the plaintiffs who could challenge a discriminatory policy to only plaintiffs who have been concretely harmed by a defendant's statutory violation, and the Court drew a line between parties who are within a state, challenging a state practice and those residing in another state who seek to challenge a violation. *Id.* at 2205-06. While the risk in *Ramirez* was too speculative to support standing, here no speculation is needed to conclude that the Guidelines directly govern Chronic Ventilator Users' access to critical care during an ongoing pandemic.

Finally, any determination that Chronic Ventilator Users' injury turns on speculation about the decisions of independent actors severely underestimates the importance and influence of the Guidelines. The Guidelines themselves acknowledge that health care providers want to follow them and look to them for "consistent statewide policies." (A-91). The Guidelines also encourage health care providers to follow them and go as far as to state that they "will be implemented by the appropriate governmental authorities." (A-91). Thus, the district court erred by failing to recognize that health care facilities would follow the Guidelines issued by DOH, the entity that regulates them.

B. CHRONIC VENTILATOR USERS' INJURY IS REDRESSABLE

Chronic Ventilator Users' injuries would be redressed if the State amended the Guidelines. It is well established that "[i]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation omitted). "Redressability is easily established in a case where ... the alleged injury arises from an identifiable discriminatory policy." *See Hassan*, 804 F.3d at 293 (internal citations omitted). Here, Chronic Ventilator Users are challenging discriminatory Guidelines and a favorable decision directing that the State amend these Guidelines would remedy the present wrong.

The fact remains that under the current emergency preparedness plan, Chronic Ventilator Users would face a substantial risk of forcible extubation if they were to seek acute medical care in a time of triage. Chronic Ventilator Users are not required to jeopardize their lives to prove this risk and doing so is not necessary for the court to redress their claims.

Additionally, the district court's finding that the complaint failed to cite actual adoption or implementation of the Guidelines, (A-327), was inappropriate at this stage in the litigation because fact-finding had not yet begun. *See, e.g.*, *Minto v. Molloy Coll.*, No. 16CV276KAMAYS, 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."). Chronic Ventilator Users were not required to prove in their Complaint that the Guidelines had been implemented in order to properly plead that their claims would be redressed by the Guidelines being amended or rescinded.

POINT II

CHRONIC VENTILATOR USERS' CLAIMS ARE RIPE AND FIT FOR JUDICIAL REVIEW

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. Because their injury is actual and imminent as explained at length above, their claim is constitutionally ripe. *See Davis v. New York State Bd. of Elections*, 689 F. App'x 665, 668 (2d Cir. 2017) ("Constitutional ripeness, which is an overlapping doctrine, is best thought of as a specific application of the actual injury aspect of Article III standing.") (internal quotations omitted).

In addition, Chronic Ventilator Users maintain that the proper inquiry for analyzing their claims is prudential ripeness. Prudential ripeness concerns whether a case has been brought prematurely. *See Grandeau*, 528 F.3d at 131. "When a court declares that a case is not prudentially ripe, it means that the case will be better decided later and that the parties will not have constitutional rights undermined by the delay." *Id*.

The Guidelines themselves show their comprehensiveness and finality, which indicates they are fit for judicial review and presently causing Chronic Ventilator Users harm without judicial intervention. (A-61) (discussing the "incorporat[ion of] comments, critiques, feedback, and values from numerous stakeholders, including experts in the medical, ethical, legal, and policy fields" involved in the development of the Guidelines); *see also Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967) (Determining whether an action is prudentially ripe "requir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.").

The Guidelines resulted from extensive work and consultation with experts, show the comprehensive process the Task Force engaged in to develop its plan, and explicitly state that they were carefully and strategically crafted and are intended to be implemented. (A-65, A-79, A-91, A-96). Two members of the Task Force stated that the State elected to call this plan a set of Guidelines in an attempt to avoid a legal challenge. *See* Valerie Gutmann Koch & Beth E. Roxland, *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 (2013) ("Law and regulations, due to their static and binding nature, are not an ideal delivery system for clinically-detailed recommendations, particularly in rapidly-changing circumstances, such as a pandemic. Consequently,

voluntary, non-binding guidelines based on "sound ethical and clinical principles" would be the best means of ensuring an effective ventilator allocation system, while avoiding unforeseen consequences. Accordingly, New York chose to issue its draft recommendations for ventilator allocation in the form of guidelines").

Despite this attempt to subvert judicial review, Chronic Ventilator Users' claims are ripe. The court will be in no better a position to issue a decision on Chronic Ventilator Users' claims at the moment when hospitals start removing their ventilators. Delaying this inquiry until that moment undermines Chronic Ventilator Users' civil rights because they are placed in a position of mortal jeopardy that their non-disabled peers are not.

The Guidelines are facially discriminatory, meaning no party needs to take any additional action to make the claims ripe because the alleged violation of rights has already taken place. *Meaney v. Vill. of Johnson City*, 2010 WL 1633371, at *5 (N.D.N.Y. Apr. 21, 2010). The Guidelines do not need to be implemented and no chronic ventilator user needs to be forcibly extubated for the Court to determine whether the Guidelines, as they are written and exist at this time, unlawfully discriminate against Chronic Ventilator Users. *Id.* The application of a discriminatory policy to a plaintiff is a hardship in itself. *Id*. at *6. The claim becomes ripe even before the implementation of the Guidelines because the Complaint asserts injury based on the Guidelines on their face, not as applied.

The Guidelines apply directly to Chronic Ventilator Users, and the State has not disputed the fact that there are entire sections of the document devoted to explaining how individuals like Chronic Ventilator Users would be treated differently from anyone else who seeks acute medical care during the ongoing pandemic. (A-99–A-101). The Guidelines clearly and explicitly target ventilator dependent individuals who reside in the community. (A-101). Chronic Ventilator Users are at grave risk every day that the Guidelines remain in place.

As described above, Chronic Ventilator Users will continue to suffer grave harm should the court delay that review. The Guidelines were created with the intent that they would be followed by the entities they target, and because they are facially discriminatory the Court would not benefit from further factual development in its decision making. Chronic Ventilator Users' claims are therefore fit for judicial review.

POINT III

CHRONIC VENTILATOR USERS' CLAIMS ARE NOT TIME BARRED

Chronic Ventilator Users are only required to *allege* the existence of a discriminatory policy to overcome a statute of limitation challenge at the motion to dismiss stage, *see Fitzgerald v. Henderson*, 251 F.3d 345, 362 (2d Cir. 2001); *see also Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir. 1999), and Chronic Ventilator Users have done just that.

By stating that "the Guidelines deprive people with disabilities of a nondiscriminatory emergency preparedness plan and risk placing chronic ventilator users in potentially life-threatening situations," Chronic Ventilator Users have alleged that the Guidelines are a discriminatory policy that inherently disadvantages people with disabilities. (A-11). They also allege that these Guidelines are the State's current emergency preparedness plan for the COVID-19 Pandemic and that in March 2020 the State refused to revoke the portion of the Guidelines that permit the extubation of Chronic Ventilator Users. (A-28).

A. CHRONIC VENTILATOR USERS' CLAIMS ARE TIMELY UNDER THE CONTINUING VIOLATION DOCTRINE

Under the continuing violation doctrine, Chronic Ventilator Users are not time barred from bringing their claims because they "experience[] a continuous practice and policy of discrimination," therefore, "…the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." *Fitzgerald*, 251 F.3d at 359. The State has refused to amend the Guidelines, so Chronic Ventilator Users continue to experience harm from the State's discriminatory emergency preparedness plan. The continuing violation theory also applies to instances of inaction or acquiescence. *See Harris*, 186 F.3d at 250; *see also Lucente v. County of Suffolk*, 980 F.3d 284, 309 (2d Cir. 2020); *Shomo v. City of New York*, 579 F.3d 176, 182 (2d Cir. 2009); *Fitzgerald*, 251 F.3d at 364. The State's failure to respond to DRNY's letter and efforts to remove the

subject discriminatory language from the Guidelines is a timely act of discrimination in furtherance of the policy. *See Fitzgerald*, 251 F.3d 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.").

Finally, district courts have applied the continuing violation doctrine "upon a showing of compelling circumstances." *Remigio v. Kelly*, 2005 WL 1950138, at *8 (S.D.N.Y. Aug. 12, 2005) (citing *Nakis v. Potter*, 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*, 2005 WL 1950138, at *8 (internal citation and quotations omitted). Chronic Ventilator Users can think of no more "compelling circumstances" than an ongoing pandemic in which Guidelines published by the DOH authorize the reallocation of their life-sustaining assistive devices based on their disabilities and underlying conditions.

Notably, the district court concluded both that the Chronic Ventilator Users lacked standing because their injury has not yet occurred and that Chronic Ventilator Users' claims are time barred because the lawsuit should have been filed when the Guidelines were created. (A-328). This conclusion presents a catch-22: Chronic Ventilator Users would only be afforded standing by proving they had

been forcibly extubated under the Guidelines before a pandemic ever triggered the Guidelines. Chronic Ventilator Users challenged the Guidelines when their risk of injury was no longer remote due to the ongoing global pandemic. However, their claims were then time barred because they needed to challenge the Guidelines before there was a pandemic at all. This logic leaves Chronic Ventilator Users with no options for pursuing their claims.

B. THE REPEATED VIOLATIONS DOCTRINE IS ALSO APPLICABLE TO CHRONIC VENTILATOR USERS' CLAIMS

Some jurisdictions have also embraced the repeated violations doctrine in the context of ADA Title II claims. *See Hamer v. City of Trinidad*, 924 F.3d 1093, 1103 (10th Cir. 2019). "A public entity repeatedly violates [the ADA and Section 504] each day that it fails to remedy a non-compliant service, program, or activity. Accordingly, 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.*

Chronic Ventilator Users are currently experiencing discrimination under the Guidelines each day. They are expressly deprived of benefits afforded to their non-disabled peers, and they are deterred from seeking acute health care as a result. (A-13). This injury has recurred and continues to recur each day of this pandemic that the State refuses to amend or rescind the discriminatory Guidelines.

Courts have based the rationale for the repeated violations doctrine on the statutory purposes of the ADA and Section 504: to eradicate discrimination against individuals with disabilities, see 42 U.S.C. § 12101(b)(1); see generally 29 U.S.C. § 701, actualize "full participation" and "full inclusion and integration," 42 U.S.C. § 12101(a)(7); 29 U.S.C. § 701(a)(6)(B), and address discrimination that individuals with disabilities "face[] day-to-day" and "continually encounter," 42 U.S.C. § 12101(b)(4); 29 U.S.C. § 701(a)(5). Because the language of the ADA and Section 504 was written in the present tense, a plaintiff suffers an injury under the two statutes when they are currently experiencing discrimination. *Hamer*, 924 F.3d at 1104.

CONCLUSION

Based on the foregoing, 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.

Dated: December 27, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,581 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in the Times New Roman font, size 14.

Dated December 27, 2021

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SPECIAL APPENDIX

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SPA-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiffs,

- against -

ANDREW CUOMO, Governor of the State of New York, in his official capacity, and HOWARD A. ZUCKER, Commissioner of the New York State Department of Health, in his official capacity,

Defendants.

----------X

JUDGMENT
CV 20-4819 (GRB)(AKT)

A Memorandum and Order of Honorable Gary R. Brown, United States District Judge, having been filed on August 13, 2021, granting defendants' motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure, dismissing the case, and directing the Clerk to close the case, it is

ORDERED AND ADJUDGED that plaintiffs Not Dead Yet, NMD United, Disability Rights New York, Michelle Brose, Mike Volkman, Jessica Tambor, and Peri Finkelstein take nothing of defendants Andrew Cuomo and Howard A. Zucker; that defendants' motion to dismiss is granted; that the case is dismissed; and that this case is closed.

Dated: August 13, 2021
Central Islip, New York

DOUGLAS C. PALMER
CLERK OF THE COURT
BY: /S/ JAMES J. TORITTO
DEPUTY CLERK