12-4412

To Be Argued By:
ALICIA M. SIMMONS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4412

DISABLED IN ACTION, a nonprofit organization,
UNITED SPINAL ASSOCIATION, a nonprofit organization,,

Plaintiffs-Appellees,

(*caption continued on inside cover*)

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

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

JOCELYN SAMUELS,
Acting Assistant Attorney General

DENNIS J. DIMSEY,
SASHA SAMBERG-CHAMPION,
Attorneys, Appellate Section Civil Rights Division Department of Justice

PREET BHARARA,
United States Attorney for the Southern District of New York, Attorney for the United States of America as Amicus Curiae
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2697

ALICIA M. SIMMONS,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys, Of Counsel.

—v.—

BOARD OF ELECTIONS IN THE CITY OF NEW YORK, FREDERIC M. UMANE, in his official capacity as President of the Board of Elections in the City of New York,

Defendants-Appellants.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4412

DISABLED IN ACTION, A NONPROFIT ORGANIZATION, UNITED SPINAL ASSOCIATION, A NONPROFIT ORGANIZATION,

Plaintiffs-Appellees,

—v.—

BOARD OF ELECTIONS IN THE CITY OF NEW YORK, FREDERIC M. UMANE, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,[1]

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

---

[1] Pursuant to Fed. R. App. P. 43(c)(2), Frederic M. Umane is automatically substituted as defendant-appellant in place of former Board of Elections President Julie Dent.

Introduction and Interest of the United States

Pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States respectfully submits this amicus curiae brief in support of the order entered by the United States District Court for the Southern District of New York (Deborah A. Batts, J.) on August 8, 2012, granting partial summary judgment in favor of plaintiffs-appellees United Spinal Association and Disabled in Action (collectively, "United Spinal") with respect to liability, and the order entered by the district court on October 18, 2012, providing relief to United Spinal.

This appeal raises two principal issues: the liability of the Board of Elections in the City of New York and its President (collectively, the "BOE") under Title II of the Americans with Disabilities Act (the "ADA") and section 504 of the Rehabilitation Act of 1973 for designating and operating polling places in New York City with pervasive barriers to access; and the relief that the district court may enter to remedy these violations. The United States participates in this case as amicus curiae in support of affirmance of the district court's orders, based on its involvement in the proceedings below and its strong interest in the correct interpretation of these statutes and in the enforcement of the ADA against state and local governmental entities. The Department of Justice ("DOJ") has the authority to issue regulations implementing Subtitle A of Title II of the ADA, to assess the BOE's compliance with Title II and DOJ's Title II implementing regulations, to issue findings, and,

where appropriate, to negotiate and secure voluntary compliance. *See* 42 U.S.C. § 12134; 28 C.F.R. Part 35, Subpart F. The United States also has statutory authority to bring an action under the Rehabilitation Act and Title II of the ADA against a state or local government for discrimination on the basis of disability. 29 U.S.C. § 794a; 42 U.S.C. § 12133; *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002); *National Black Police Ass'n, Inc. v. Velde*, 712 F.2d 569, 575-76 (D.C. Cir. 1983). Accordingly, the United States appeared before the district court to argue for entry of the remedies set forth in the order entered on October 18, 2012, and the district court's remedial order was substantially based on the proposal submitted by the United States.

The district court correctly entered summary judgment in favor of United Spinal based on undisputed evidence of the BOE's failure to address barriers to access at New York City polling places. These barriers to access included steep ramps, missing handrails or guardrails on ramps, locked or heavy interior doors, blocked interior pathways, and missing signs identifying accessible entrances. Evidence of these barriers at over seventy percent of surveyed New York City polling places during a four-year period established the BOE's liability under the ADA. After the district court properly granted summary judgment in favor of United Spinal, the court entered appropriate relief aimed at remedying the violations identified at polling places. The district court had broad authority to enter relief in this matter, and the BOE's appeal does not challenge the substance of the remedies entered by the district court.

For all these reasons, the United States respectfully urges this Court to affirm the orders entered by the district court.

Issues Presented for Review

1. Whether the district court correctly held that the BOE violated the ADA and the Rehabilitation Act based on undisputed evidence of barriers to access identified at over seventy percent of surveyed New York City polling places.

2. Whether the district court properly entered an order imposing a remedial plan designed to eliminate the barriers to access identified at New York City polling places.

Statement of Facts

A. New York Voting Laws

New York law charges each county board of elections, including the Board of Elections in the City of New York, with designating its polling places. *See* N.Y. Elec. Law § 4-104(1). The BOE is responsible for identifying and designating poll sites that are accessible to voters with disabilities throughout New York City. (JA 84, 1404).

Under New York law, voters with disabilities in New York City may vote by several means: (1) in person on election day, at the assigned polling place; (2) in person on election day, at an alternative, accessible polling place with the same ballot, if one exists; or (3) by absentee ballot if the voter is unable to appear at the assigned polling place. *See* N.Y. Elec. Law

§§ 5-601, 8-400. "A physically disabled voter whose polling place is located in a building that is not accessible shall be entitled to vote in any other election district whose polling place is located in a building which is accessible," so long as the candidates and ballot proposals on the ballot are the same as those that would be on the ballot in the voter's assigned polling place. *Id.* § 5-601(1). In order to vote at an alternative polling location, the voter must submit a written application to transfer his or her registration record at least fourteen days before the election, and may identify the election district to which the voter would like to transfer his or her records. *Id.* § 5-601(2). Ten days before the election, the Board of Elections must provide the voter with "information specifying the number and location of the election district to which his records have been transferred or that there is no election district to which such records may properly be transferred which is located in an accessible polling place." *Id.* § 5-601(7). "If the board determines that there is no election district in an accessible polling place to which such voter's record may properly be transferred for a particular election, it shall treat the application of such voter as an application for an absentee ballot for such election . . . ." *Id.* § 5-601(8). Separately, a voter who is "unable to appear personally at the [assigned] polling place . . . because of . . . physical disability" may obtain an absentee ballot. *Id.* § 8-400(1)(b). A voter must apply for an absentee ballot by mail at least seven days before the election, or by hand at least one day before the election. *Id.* § 8-400(2)(c).

B. Barriers to Access at New York City Polling Places

The Center for Independence for the Disabled, New York ("CIDNY") surveyed the accessibility of New York City polling places on election days in 2008 through 2011, and observed barriers to access present at a random sampling of these polling places each year.

In the 2008 general election, CIDNY inspected 65 polling places in New York City. (JA 321, 417-21). Fifty-four of the polling places inspected had at least one barrier to access: 29 locations, or 45 percent, had entryway barriers; 29 locations, or 45 percent, had exterior signage barriers; 27 locations, or 41 percent, had interior access barriers and 25 locations, or 28 percent, had no ramp or a ramp that was inaccessible. (JA 321, 417-21). For example, at the Lands End II apartment building in Manhattan, the ramp had a steep slope and lacked continuous handrails, guardrails, or edge protection. (JA 418). Similar impediments created inaccessible ramps at P.S. 154 in Bronx, New York, P.S. 84 in Manhattan, New York, and Bridge Apartments in Manhattan, New York. (JA 417-21). In addition, an interior access door at the Lands End II apartment building was propped open with a traffic cone that blocked the entryway. (JA 418). Several polling places also lacked signs at the main entrances indicating the location of the accessible entrances. (JA 417-21).

In 2009, CIDNY inspected 51 polling places. (JA 324, 471-76). Forty-three of the polling sites inspected, or 84 percent, had at least one barrier to ac-

cess. Of the polling places inspected in 2009, 26, or 51 percent, had entryway barriers; 22, or 43 percent, had exterior signage barriers; 20, or 39 percent, had interior barriers to access; 11, or 22 percent, had interior signage barriers; and 9, or 17 percent, had ramp barriers. (JA 324, 471-76). For example, at the Lands End apartment building in Manhattan, the interior entrance doorway to the voting area was narrow, measuring only thirty inches. (JA 471). If a voter used a wheelchair wider than this entryway, there was a separate entryway to the voting area nearby; however, the door to that entrance was closed, locked, and had no door handle. Moreover, no one was available nearby to open the door. (JA 471). At Seward Park High School in Manhattan, the accessible entrance was locked; a poll monitor was not present near the accessible entrance to assist in opening the door. (JA 471). Additionally, the accessible entrance had a ramp that lacked handrails, edge protection, and a level landing at the top of the ramp. (JA 471). At the polling cite located at 5 Tudor City Place in Manhattan, the entrance door was closed and difficult to open. No door monitor was present at the entrance, and no one opened the door after the CIDNY inspector pressed the doorbell three times. (JA 474). At several other polling locations, there were no signs indicating the location of the accessible entrance and no signs directing voters from the accessible entrance to the polling area. (JA 471-76).

In September 2010, CIDNY inspected 53 sites. (JA 325, 517-22). Forty-two of the polling sites inspected, or 80 percent, had at least one barrier to access. (JA 325, 517-22). Of the polling places inspected

in September 2010, 22, or 42 percent, had entryway barriers; 22, or 42 percent, had exterior signage barriers; 18, or 34 percent, had interior barriers to access; 8, or 15 percent, had interior signage barriers; and 7, or 13 percent, had ramp barriers. (JA 325, 517-22). For example, the accessible entrances for the polling places at P.S. 13 and P.S. 100 were locked on election day, and there were no doorbells at the entrances. (JA 520-21).

In November 2011, CIDNY inspected 55 New York City polling places. Forty-six of the polling places inspected by CIDNY, or 84 percent, had at least one barrier to access. Of the polling places inspected in November 2011, 17, or 31 percent, had entryway barriers; 17, or 31 percent, had exterior signage barriers; 39, or 71 percent, had interior barriers to access; 7, or 13 percent, had interior signage barriers; and 9, or 16 percent, had ramp barriers. (JA 329, 651-58). For example, the polling places at P.S. 51 and St. Clare School in Queens, New York, did not have signs at the inaccessible main entrances identifying the location of the accessible entrances. (JA 653, 655). CIDNY also observed in November 2011 that the accessible entrance at the St. Clare School was locked. (JA 655). Similarly, at the polling places in J.H.S. 190 and P.S. 144 in Queens, New York, a heavy second door at the main entrance was closed and the window was too high for security personnel to see if someone needed assistance opening the door. (JA 654-55). CIDNY observed at several of the polling places it inspected in November 2011 that the ballot marking device, an electronic device that allows voters with vision or mobility impairments to vote independently,

was placed in a location that did not allow sufficient space for a wheelchair user to access the device. (JA 651-58). And at P.S. 19 in Queens, New York, the accessible entrance was locked and the doorbell was not functioning; although the BOE was contacted about this problem at 7:00 a.m., the problem was not remedied when CIDNY inspected the polling place at 1:45 p.m. (JA 657).

The BOE acknowledges that two of its polling places are inaccessible. (JA 1230, 1236). Voters assigned to these inaccessible sites are afforded the opportunity to vote at sites that the BOE claims are accessible. (JA 1236).

C. United Spinal's Litigation

United Spinal initiated this action by filing a complaint against the BOE on July 26, 2010, alleging that the BOE discriminated against individuals with disabilities in violation of the ADA and the Rehabilitation Act by operating polling places with barriers to access that obstruct voters with mobility and vision impairments. (JA 4, 23-47). After discovery, on March 16, 2012, United Spinal filed a motion for partial summary judgment, seeking declaratory relief with respect to liability. (JA 12).[2]

---

[2] United Spinal filed a motion for a preliminary injunction on October 1, 2010, but the district court denied the motion. (JA 8, 10).

1. The Court's August 8, 2012, Order

On August 8, 2012, the district court entered an order (the "Summary Judgment Order") granting United Spinal's summary judgment motion. (Special Appendix ("SPA") 1-32). The district court held that the undisputed evidence demonstrated that the BOE violated the ADA and the Rehabilitation Act by maintaining a voting program with inaccessible polling places and failing to offer reasonable remedies to address the barriers to access. (SPA 23). To support this holding, the district court pointed to the surveys conducted by CIDNY that identified "pervasive and recurring barriers to accessibility on election days at poll sites designated by the BOE." (SPA 23). The district court determined that the BOE failed to present evidence challenging the existence of these barriers to access. (SPA 23). The district court rejected the BOE's argument that it accommodated voters with disabilities by offering to transfer them to a nearby accessible polling place and by addressing barriers as the BOE become aware of them. (SPA 28). The district court also rejected the BOE's argument that the ADA and Rehabilitation Act claims must be dismissed because United Spinal failed to identify voters with disabilities who were actually deprived of the right to cast a ballot. (SPA 21).

2. The Court's October 18, 2012, Order

After it entered the Summary Judgment Order, the district court held three conferences with the parties concerning the appropriate remedy. (JA 15, 17). After the third conference, the district court entered

an order dated October 18, 2012 (the "Remedial Order") that provides relief for the violations it recognized in the Summary Judgment Order. (SPA 33-47). In addition to requiring the BOE to ensure the accessibility of polling places in New York City (SPA 35), the Remedial Order contains three key components. First, the Remedial Order requires the BOE to designate a poll worker at each polling site as the on-site ADA coordinator responsible for monitoring and documenting accessibility complaints received at that site. (SPA 35-37). Second, the BOE must contract with a third-party expert to conduct accessibility surveys of polling sites. (SPA 40). The third-party expert must also issue recommendations noting whether and how a polling site can be modified to be accessible on election days. (SPA 41-42). The BOE must implement the third-party expert's recommendations unless it successfully challenges them in the district court. (SPA 43-44). For polling sites at non-public locations that cannot be modified temporarily, the BOE must recommend a site to which the polling place can be relocated. (SPA 42-43). Third, the Remedial Order requires Assembly District Monitors ("AD Monitors"), who are responsible for reviewing the accessibility of polling places, to visit every poll site at least twice each election day to assess its accessibility. (SPA 38-40). The AD Monitors must also document the results of their visits, including whether any temporary modifications recommended by the third-party expert were implemented. (SPA 38-40).

The BOE did not seek a stay of the Remedial Order, either before the district court or in this Court. This appeal followed.

ARGUMENT

POINT I

The BOE's Voting Program Violates Title II of the ADA

A. The ADA's Legal Standards Applicable to Public Entities

1. Exclusion from Participation in a Public Entity's Programs or Services

The district court correctly held that the BOE's failure to designate and operate accessible polling places in New York City violated Title II of the ADA, 42 U.S.C. § 12132. The statute provides that,

> [s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

As the district court correctly explained, to establish a violation of the ADA, United Spinal must show that "(1) plaintiffs are 'qualified individuals' with a disability; (2) defendants are subject to the ADA; and (3) plaintiffs were denied the opportunity either to participate in or to benefit from defendants' services, programs, or activities, or were otherwise discrimi-

nated against by defendants, by reason of plaintiffs' disabilities." (SPA 20); *accord Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003). Under the Rehabilitation Act, United Spinal must also show that the BOE is a recipient of federal funds. *Henrietta D.*, 331 F.3d at 272. Because the parties did not dispute the first or second elements, or that the BOE is a recipient of federal funds, the analysis need only focus on the third element: whether the evidence demonstrates that United Spinal's members were denied the opportunity to participate in or benefit from, or otherwise were subject to discrimination by, the BOE's voting program. (SPA 20).

That element requires consideration of whether the public entity granted individuals with disabilities "'meaningful access to the benefit that the [public entity] offers.'" *Henrietta D.*, 331 F.3d at 273 (quoting *Alexander v. Choate*, 469 U.S. 287, 301 (1985)). A person with a disability may be deprived of meaningful access to a public benefit or program due to the discriminatory effects of architectural barriers. *See Tennessee v. Lane*, 541 U.S. 509, 531 (2004) ("Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress [in the ADA] required the States to take reasonable measures to remove architectural and other barriers to accessibility."); *Choate*, 469 U.S. at 306-07 (Rehabilitation Act focused on barriers to access, among other things, in addressing refusals to provide meaningful access); *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 913 (6th

Cir. 2004); *see also* 42 U.S.C. § 12101(a)(5) (describing congressional interest in ameliorating barriers).[3]

The public program at issue here is the BOE's voting program. In enacting Title II, Congress clearly intended to eliminate discrimination in voting by ensuring physical access to polling places for individuals with disabilities. "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights," such as the right to vote. *Lane*, 541 U.S. at 524. Congress specifically found that discrimination against individuals with disabilities persists in many critical areas, including voting. 42 U.S.C. § 12101(a)(3); *see also* S. Rep. No. 101-116, at 110 (1989) (citing testimony about state discrimination in making polling places accessible and forcing votes by absentee ballot before key candidate debates). Congress, therefore, clearly enacted Title II with the in-

---

[3] DOJ's Technical Assistance Manual defines "architectural barriers" as the "physical elements of a facility that impede access by people with disabilities," and include "[i]mpediments caused by the location of temporary or movable structures, such as furniture, equipment, and display racks . . . ." ADA Title III Technical Assistance Manual, § III-4.4100. Both Title II and Title III recognize the removal of architectural barriers as a method of achieving access to facilities for people with disabilities. *See Ability Center*, 385 F.3d at 907; *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 6 (1st Cir. 2000).

tent to eliminate discrimination in voting by ensuring physical access to polling places for individuals with disabilities.

2. Public Entities' Duty to Make Programs Readily Accessible

The Justice Department has promulgated regulations that clarify public entities' responsibilities pursuant to Title II's broad anti-discrimination requirement. *See* 42 U.S.C. § 12134(a) (authorizing such regulations). Among those regulations is 28 C.F.R. § 35.130(b)(4), which provides that public entities "may not, in determining the site or location of a facility, make selections" that "have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination" under a public program. *Accord id.* § 41.51(b)(4) (same, under Rehabilitation Act). Additionally, the regulations require a public entity to ensure that its facilities are accessible to and usable by people with disabilities. *Id.* § 35.149-.151. With regard to existing facilities, a public entity must operate each service, program, or activity, so that when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities. *Id.* § 35.150(a).[4] A public entity may comply with that

[4] Additional requirements for program access are imposed if a facility is newly constructed or altered after January 26, 1992. 28 C.F.R. § 35.151. The record in this case is not clear if any polling place used by the BOE was subject to those heightened requirements.

requirement by "such means as redesign or acquisition of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, . . . alteration of existing facilities and construction of new facilities, . . . or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities." *Id.* § 35.150(b)(1). "All together, 'the program access requirement of Title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases.'" *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 (1st Cir. 2000) (quoting 56 Fed. Reg. 35,694, 35,708 (July 26, 1991)).

Both the ADA and the Rehabilitation Act impose affirmative duties on public entities to remove barriers to access for people with disabilities, and otherwise to ensure they are not excluded from public programs and are not discriminated against. *See Parker*, 225 F.3d at 8 (public university "must act affirmatively to eliminate barriers on the premises that would otherwise serve to deny persons with disabilities access to services, programs, or activities"); *see also Henrietta D.*, 331 F.3d at 274-75 (ADA and Rehabilitation Act require "affirmative accommodations" and "'some degree of positive effort to expand the availability'" of programs to people with disabilities (quoting *Dopico v. Goldschmidt*, 687 F.2d 644, 653 n.6 (2d Cir. 1982); some quotation marks omitted); *Wisconsin Community Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006) (28 C.F.R. § 35.130(b)(7), requiring public entities to modify their policies when needed, "clearly contem-

plates that prophylactic steps must be taken to avoid discrimination"); *Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 575 (5th Cir. 2002) ("A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability.").

B. The District Court Correctly Held That the BOE Violated Title II

1. Voters with Disabilities Were Excluded from the BOE's Voting Program

In light of those principles, the district court correctly ruled that the BOE's voting program is in violation of the ADA. As the district court held, the undisputed evidence presented by United Spinal demonstrates that the BOE violated the ADA by selecting inaccessible sites as polling places and by failing to ensure that polling places were accessible by voters with disabilities. The CIDNY surveys identified, and the BOE failed to dispute, the existence of barriers to access that rendered New York City polling places inaccessible to voters with disabilities. These barriers to access included inadequate or missing signs directing people with disabilities to accessible entrances; inaccessible or missing ramps and handrails; and inaccessible entryways and interior pathways. District courts have held that similar barriers to access rendered voting programs in their entirety not readily accessible to and usable by individuals with disabilities. *See, e.g.*, *People of New York ex rel. Spitzer v. County of Delaware*, 82 F. Supp. 2d 12,

14, 18 (N.D.N.Y. 2000) (holding that plaintiffs had likelihood of success in proving that Delaware County polling places with inaccessible entrances and interior hallways constituted inaccessible polling places).

The BOE failed to take steps to make its voting program readily accessible to and usable by voters with disabilities, as required under the ADA. The BOE suggests that its voting program is readily accessible to voters with disabilities because voters are allowed to transfer their polling places under limited circumstances or to vote by absentee ballot. (Brief for Defendants-Appellees ("BOE Br.") 34 n.5, 37). However, to transfer to a new polling place, a voter with a disability must undertake to identify the assigned polling place as inaccessible, and must do so at least fourteen days before the election, at a time when the polling place will presumably not be set up for voting and may indeed be closed to the public. *See* N.Y. Elec. Law. § 5-601(1)-(2) (requiring application to transfer to be submitted at least fourteen days in advance). Moreover, barriers to access that occur on election day, such as a locked accessible entrance, would not be known by a voter in advance. Transfer is entirely unavailable if there is no polling place in which the candidates and ballot propositions are the same as in the voter's assigned election district. *Id.* To obtain an absentee ballot, a voter with a disability must similarly determine in advance if the assigned polling place is inaccessible, such that the voter is "unable to appear personally at the polling place . . . because of . . . physical disability," again at a time when the polling place is likely not configured for voting and may be closed entirely. *Id.* § 8-400(1)(b), (2)(c) (application

for absentee ballot must be mailed seven days before election or delivered directly one day before).

New York law thus improperly puts the burden on an individual with a disability to identify inaccessible polling places in advance of election day and under circumstances that may not permit such identification. Moreover, an absentee voter excluded from a physical polling place may be deprived of an important civic experience. *Cf.* 28 C.F.R. § 35.150(b)(1) (requiring public entity to employ methods to offer program "in the most integrated setting appropriate"). And an absentee ballot may not meet the needs of all voters with disabilities, for instance, those with visual impairments or other disabilities affecting their ability to read printed documents. Thus, the BOE's attempted methods for achieving program access do not provide people with disabilities with meaningful access to the voting program, as they impose unnecessary and onerous burdens on the voter.

Nor was United Spinal required to identify and prove the feasibility of other methods by which the BOE could achieve program access. The BOE relies on *Henrietta D.*, 331 F.3d at 272, to argue that United Spinal was required both to identify an alternative site for every inaccessible polling place, and to "determine" and "demonstrate" that the proposed site is available, accessible, and suitable. (BOE Br. 35). However, *Henrietta D.* concerned a public entity's duty to accommodate people with disabilities in their efforts to obtain public assistance—a context in which the needed accommodations would be far from appar-

ent.[5] In contrast, where, as here, architectural barriers serve to exclude people with disabilities from a public service or program, there should be no need for a plaintiff to suggest the obvious: that the service or program be provided unencumbered by those barriers. *See Lane*, 541 U.S. at 531 (states must "take reasonable measures to remove architectural and other barriers to accessibility"); *Lonberg v. City of Riverside*, 571 F.3d 846, 852 (9th Cir. 2009) (remedy for access barriers is "actual removal of barriers that prevent meaningful access"); *Ability Center*, 385 F.3d at 910 ("[T]o avoid denying the individual of the bene-

---

[5] In support of imposing a slight burden on the plaintiffs, *Henrietta D.* cited only an employment case. *See* 331 F.3d at 280 (citing *Borkowski v. Valley Central School District*, 63 F.3d 131, 138 (2d Cir. 1995)). It is well settled that in employment cases the burden rests on the employee to identify a plausible cost-effective accommodation, *see McElwee v. County of Orange*, 700 F.3d 635, 640 n.2 (2d Cir. 2012), but that requirement is not established in other contexts, *see American Council of the Blind v. Paulson*, 525 F.3d 1256, 1266-67 (D.C. Cir. 2008) (precedent imposing burden on employee to demonstrate existence of reasonable accommodation "does not strictly govern claims under section 504" of Rehabilitation Act, as ADA Title I, regarding employment, "contains terms that do not appear in section 504"; declining to decide issue). Even in employment cases an employee need not identify or request an accommodation if his or her need is obvious. *Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185, 1197 (10th Cir. 2007).

fits of the public services at issue, the public entity must remove the impeding architectural barriers. This illustration makes clear that Title II demands that, in certain instances, public entities take affirmative actions to provide qualified disabled individuals with access to public services."). Indeed, the program access regulation itself provides that the public entity has the responsibility for "choosing among available methods for meeting the requirements of this section," 28 C.F.R. § 35.150(b)(1), and bears the burden to demonstrate that it cannot make a program readily accessible because doing so "would result in a fundamental alteration in the nature of a service, program or activity or in undue financial and administrative burdens," *id.* § 35.150(a)(3). Finally, placing the burden on the BOE to identify the best means of providing program access comports with the typical rule that the burden rests on the party with more ready access to the pertinent proof. *see Henrietta D.*, 331 F.3d at 277-78; *Yang v. McElroy*, 277 F.3d 158, 163 (2d Cir. 2002).

In any event, even if United Spinal bears a minimal burden of identifying methods to make polling places readily accessible, it has met that burden by proposing methods for achieving program access, such as designating an individual at each polling site to monitor accessibility issues, or engaging a third party to assess accessibility needs. (SPA 31).

2. United Spinal Did Not Need To Identify Voters with Disabilities Who Were Unable to Vote

The BOE argues that United Spinal cannot sustain its ADA and Rehabilitation Act claims because it failed to identify any person who was "unable to cast a vote at a poll site due to accessibility issues." (BOE Br. 30-33). But as the district court correctly recognized, the BOE must provide voters with disabilities meaningful access to its voting program beyond the mere ability to cast a ballot. (SPA 21). Title II protects more than just the end result of a public entity's program or service; instead, it requires public entities to ensure that people with disabilities do not suffer unnecessary discrimination in the process of participating in those programs and services. "A violation of Title II . . . does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity. The regulations specifically require that services, programs, and activities be 'readily accessible.'" *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (upholding Title II allegation based on inaccessible wheelchair ramps at courthouse, even though plaintiffs were able to attend trials); *see Lane*, 541 U.S. at 514 (Title II plaintiff alleged he was able to attend court hearings by crawling up two flights of stairs). As the D.C. Circuit has held, the fact that people with disabilities may have developed "coping mechanisms and alternate means of participating" in a program does not eliminate the program's denial of meaningful access. *American Council of the Blind v. Paulson*, 525 F.3d 1256, 1269-70 (D.C. Cir. 2008).

United Spinal sufficiently alleged a Title II violation by identifying voters with disabilities who experienced significant difficulty accessing their assigned polling place, in light of barriers at those locations. For example, during the September 2010 election, Denise McQuade, a wheelchair user, encountered "a ramp that was extremely steep—like a ski slope" at the entrance of her assigned polling place. (JA 728). McQuade was not able to push herself up or down the ramp without losing control of her wheelchair. (JA 728). Because McQuade was accompanied by her husband, she was able to traverse the steep ramp with his assistance, and accordingly was able to vote. (JA 728). Ultimately, however, McQuade "was afraid to go back to try and vote there during subsequent elections" and "decided it would be safer . . . to use an absentee ballot, than to try and enter the polling place again," even though she "prefers to vote alongside [her] neighbors and with [her] community." (JA 729). McQuade was thus deprived of meaningful access to the voting program, notwithstanding the assistance provided by her husband at the September 2010 election. *See American Council of the Blind*, 525 F.3d at 1269 (Rehabilitation Act "ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons").

3. The Barriers to Access at Issue Violated the ADA

The BOE argues that certain of the barriers to access identified by CIDNY constitute "transient barriers," and should not be considered when determining the accessibility of polling places absent evidence that

it was on notice of those barriers. (BOE Br. 4, 39). This argument is flawed on both legal and factual grounds.

First, the BOE does not identify which of the barriers identified in the CIDNY surveys constitute "transient barriers." The BOE defines "transient barriers" as "temporary ones that can arise or dissipate without notice." (BOE Br. 39). Notably, the BOE provides no legal support for its concept of "transient barriers," a term not found in the ADA, the Rehabilitation Act, those statutes' implementing regulations, or the case law. Perhaps more important, the BOE fails to identify which or how many of the barriers to access observed by CIDNY fit within its definition of "transient barriers." Without such information, the BOE has not shown that its voting program provides meaningful access—indeed, by failing to note which of the many barriers at issue in this case it considers "transient," the BOE has forfeited any argument in this regard. *See Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quotation marks omitted)).

The ADA's implementing regulations recognize that "isolated or temporary interruptions in service or access due to maintenance or repairs" may not constitute violations. 28 C.F.R. § 35.133(b). Similarly, the preamble to that regulation stated that "temporary obstructions or isolated instances of mechanical failure would not be considered violations." 56 Fed. Reg. at 35,707. However, "obstructions [that] persist be-

yond a reasonable period of time" are prohibited under the ADA and its regulations. *Id.* The question of whether a particular obstruction—for instance, in the BOE's entirely hypothetical example, "a schoolchild at a school-based poll site blocking a ramp with his or her backpack" (BOE Br. 39)—is a violation therefore depends on the particular facts. But by failing to identify particular barriers it considers "transient," or even to assert that anything similar to the wayward schoolchild actually existed in this case, the BOE has provided no facts on which a court could determine if the obstruction is "isolated," "temporary," or persisted "beyond a reasonable period."

The BOE also argues incorrectly that its liability hinges on whether it received notice of the "transient" barriers at polling sites, and seeks to impose a duty on voters with disabilities or others to make "an effort to notify" the BOE. (BOE Br. 39). But it was the BOE's obligation to take affirmative steps to ensure that polling places were accessible, an obligation that inherently requires it to identify and address barriers to access in its program. *See Delano-Pyle*, 302 F.3d at 575; 28 C.F.R. § 35.149-.151 (public entity must ensure no discrimination or exclusion from programs or services due to facilities that are inaccessible or unusable); 56 Fed. Reg. at 35,707 ("Failure of the public entity to ensure that accessible routes are properly maintained and free of obstructions" violates ADA regulations). More generally, a plaintiff alleging an overall lack of program accessibility, such as United Spinal here, need not inform the defendant of the barriers prior to raising a claim under the ADA. *See Brown v. County of Nassau*, 736 F. Supp. 2d 602, 618

(E.D.N.Y. 2010) (*citing Bacon v. City of Richmond*, 386 F. Supp. 2d 700, 707 (E.D. Va. 2005) (holding that plaintiffs need not inform defendant of inadequate accessibility of facilities under Title II)). Knowing that some voters have disabilities, as it must in a city of eight million people, the BOE therefore knew that its polling places must be made—and must be kept—accessible. *See Robertson v. Las Animas County Sheriff's Dept.*, 500 F.3d 1185, 1197 (10th Cir. 2007) (public entity knows of need for an accommodation "because it is 'obvious'"); *Kiman v. New Hampshire Dep't of Corrections*, 451 F.3d 274, 283 (1st Cir. 2006) (same); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) (same).

In any event, the BOE cannot argue that it lacked notice of the barriers repeatedly observed by CIDNY during the inspections it conducted between 2008 and 2011. During elections in all four years, CIDNY observed the same categories of barriers impeding access to polling places. (JA 321, 324-25, 329, 417-21, 471-76, 517-22, 651-58). CIDNY's survey reports were made available to the BOE after each inspection. (JA 88-89, 1412). Moreover, as the district court noted, "ample" undisputed evidence exists of calls made to the BOE regarding accessibility issues, with no resolution noted. (SPA 30; JA 262-69). Thus, the BOE was not only aware that voters with disabilities used the polling places it selected, it also was on notice of the existence of impediments prohibiting voters with disabilities from obtaining meaningful access to these polling places.

POINT II

The District Court Properly Entered Relief in the Remedial Order

The district court correctly entered relief in the Remedial Order aimed at remedying the BOE's ADA and Rehabilitation Act violations. When entering partial summary judgment in favor of United Spinal, the district court observed that the barriers to access prevalent at New York City polling places ranged from missing signs to inaccessible ramps to obstructed pathways. (SPA 23). The Remedial Order addressed the ADA violations by (1) requiring the BOE to designate an on-site ADA coordinator at each polling place to document and address accessibility complaints received at that site; (2) requiring AD Monitors to visit every poll site at least twice each election day to assess the accessibility of the poll site; and (3) creating a system under which a third-party expert evaluates the accessibility of the BOE's polling places. (SPA 33-47).

In its opening brief, the BOE does not challenge the propriety of any specific provision in the Remedial Order; instead, it contests only the district court's general authority to enter relief in this action. (BOE Br. 41-43). Specifically, the BOE argues that the district court should have allowed it to fashion its own remedial plan.

But there is no basis in fact for the BOE's argument. The district court provided the BOE with multiple opportunities to propose a remedial plan. On August 15, 2012, the district court invited the parties,

including the BOE, to identify potential remedies. (JA 1665-66). Thereafter, at the court conferences held on August 27, September 12, and October 15, 2012, the parties discussed proposed remedies with the district court. (JA 15-16; Supplemental Appendix ("SA") 1-152). Some of the proposals noted by the BOE, such as the assignment of poll site coordinators at each polling place, were incorporated into the Remedial Order. (SA 4; SPA 35-37). Only after having given the BOE three opportunities to submit a complete remedial plan did the district court enter the Remedial Order.

In any event, nothing in the ADA, the Rehabilitation Act, or any other authority requires a district court to defer to a public entity's proposed remedy. The cases cited by the BOE to support its position (BOE Br. 41-43) at most demonstrate that district courts should not reject workable plans offered by state authorities in favor of overly intrusive remedies that require extensive judicial supervision. *See Dean v. Coughlin*, 804 F.2d 207, 214-15 (2d Cir. 1986) (district court "went too far and too fast in imposing upon the state correctional facility its own ideas of how a prison dental clinic should be organized and administered rather than giving appropriate deference to the State's Plan," though even plaintiffs conceded plan's "basic adequacy"); *Todaro v. Ward*, 565 F.2d 48, 54 (2d Cir. 1977) (district court properly imposed "specific and limited relief" rather than "countenanc[ing] an abdication of responsibility" by state prison).

Contrary to the BOE's argument, the district court's authority to enter relief in favor of United

Spinal is broad. "[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute," including Title II of the ADA and section 504 of the Rehabilitation Act. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992). Moreover, the legislative history of Title II of the ADA indicates that Congress intended the "'full panoply of remedies'" to be available. *Henrietta D.*, 331 F.3d at 289 n.18 (quoting legislative history).

Accordingly, this Court should affirm the relief entered by the district court in the Remedial Order.

CONCLUSION

The orders of the district court should be affirmed.

Dated: New York, New York
August 14, 2013

Respectfully submitted,

PREET BHARARA,
United States Attorney for the Southern District of New York, Attorney for the United States as Amicus Curiae.

ALICIA M. SIMMONS,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys, Of Counsel.

JOCELYN SAMUELS,
Acting Assistant Attorney General
DENNIS J. DIMSEY,
SASHA SAMBERG-CHAMPION,
Attorneys, Appellate Section, Civil Rights Division, Department of Justice

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6,899 words in this brief.

PREET BHARARA,
United States Attorney for the Southern District of New York

By: ALICIA M. SIMMONS,
Assistant United States Attorney