

VIA EMAIL

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March 31, 2021

Re: Request for Accommodations for Public Participation in the 2021 Texas Legislative Session

Dear President Patrick, President Pro Tempore Birdwell, and Speaker Phelan:

The undersigned organizations write to request immediate action to resolve the well-documented health and safety concerns at the Texas Capitol resulting from the ongoing COVID-19 pandemic. Insufficient public-health protocols at the Capitol have rendered attending legislative proceedings unsafe for the general public and potentially deadly for more vulnerable people, including individuals with disabilities, senior citizens, and persons who are otherwise at heightened risk of adverse consequences from COVID-19. These Texans wish to make their voices heard on issues of crucial importance to them, including legislation that will affect their ability to vote. However, the unsafe environment at the Capitol precludes them from exercising their rights to fully participate in the legislative process. Accordingly, as this letter explains, the Legislature's failure to ensure a safe environment at the Capitol or to provide an option for remote testimony violates federal law. We hope to work with you to ensure a safe environment, including through the expanded use of remote technology, that will allow Texas residents to participate in the legislative process without imperiling their health.

COVID-19 Is a Threat to Public Health

As you are no doubt aware, the COVID-19 pandemic has had a devastating impact on Texas. The state has grappled with nearly 2.8 million coronavirus cases and over 48,200 virus-related fatalities

since the start of the pandemic.¹ New virus cases emerge every day, with the seven-day average standing at 3,774 cases per day.²

Moreover, with a loosening of restrictions³ and the proliferation of new COVID variants,⁴ experts caution that a fourth wave is imminent.⁵ The Director of the Centers for Disease Control and Prevention (CDC) recently warned of “impending doom” if the recent uptick in cases is not reversed through public-health measures, including continued mask wearing and social distancing.⁶ Although vaccines are part of the equation, many individuals in Texas have not yet been able to receive a vaccination and may not be able to for some time.⁷ Some individuals may not be eligible for the vaccine, either due to a medical condition or lack of data in trial testing,⁸ while others will choose to remain unvaccinated.⁹ Accordingly, public-health officials recommend that vaccinated individuals wear masks and take other precautions in public places or around unvaccinated individuals.¹⁰

The Texas Legislature’s current COVID-19 protocols—which do not require universal mask wearing or social distancing—are plainly insufficient. Members of the public are not required to wear masks

¹ Texas Coronavirus Map and Case Count, N.Y. Times, <https://perma.cc/SCU6-ECMY> (last visited Mar. 29, 2021).

² *Id.*

³ Paul J. Weber & Tammy Webber, *Texas and Other States Ease COVID-19 Rules Despite Warnings*, Associated Press (Mar. 2, 2021), <https://apnews.com/article/texas-other-states-ease-covid-19-restrictions-a9fc214690270fe617864abc772ecce>.

⁴ Pien Huang, *U.S. Is in a Race Between Vaccines and Variants, Says Public Health Expert*, NPR (Mar. 28, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/03/28/982086058/u-s-is-in-a-race-between-vaccines-and-variants-says-public-health-expert>; Cory Stieg, *Covid Variants Could Fuel ‘Another Avoidable Surge’ — Here’s Where They’re Cropping up and What You Need to Know*, CNBC (Mar. 24, 2021), <https://www.cnbc.com/2021/03/24/covid-variants-could-fuel-another-surge-heres-what-you-need-to-know.html>; CDC, *Emerging SARS-CoV-2 Variants* (Jan. 28, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/scientific-brief-emerging-variants.html> (referencing additional variants from South Africa and Brazil).

⁵ Jonathan Levin, *Covid Hospital Cases Rise in 25 States as CDC Sees Fourth Wave*, Bloomberg (Mar. 29, 2021), <https://www.bloomberg.com/news/articles/2021-03-29/covid-hospital-cases-rise-in-25-states-and-patients-are-younger>; Dr. Catherine Schuster-Bruce, *Fauci Blames a New ‘Surge’ in US COVID-19 Cases on Variants, Travel During Spring Break, and States Prematurely Pulling Back Restrictions*, Business Insider (Mar. 29, 2021), <https://www.businessinsider.com/fauci-covid-surge-variants-spring-break-looser-state-rules-2021-3>.

⁶ Laurel Wamsley, *CDC Director Fears ‘Impending Doom’ If U.S. Opens Too Quickly*, NPR (Mar. 29, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/03/29/982302294/cdc-director-fears-impending-doom-if-u-s-opens-too-quickly>.

⁷ Anna Canizales, *All Adults in Texas Are Now Eligible for the COVID-19 Vaccine. But There Still Aren’t Enough Doses for Everyone.*, Tex. Tribune (Mar. 29, 2021), <https://www.texastribune.org/2021/03/29/texas-covid-vaccine-eligibility-supply/>; Stephanie Whitfield & Ciara Rouege, *Expect a Long Wait for Your Coronavirus Shot, Despite Texas Opening Vaccines to All Next Week*, KHOU 11 (Mar. 24, 2021), <https://www.khou.com/article/news/health/coronavirus/coronavirus-vaccine-hub-waitlist/285-3ecd565f-1e54-4e81-99b8-9ce15413d1aa>.

⁸ CDC, *Vaccine Considerations for People with Underlying Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/underlying-conditions.html> (last updated Mar. 12, 2021); Elizabeth Pratt, *Who Can and Can’t Safely Get the COVID-19 Vaccine*, Healthline (Jan. 3, 2021), <https://www.healthline.com/health-news/who-can-and-cant-safely-get-the-covid-19-vaccine>.

⁹ Jim Henson & Joshua Blank, *Vaccine Hesitancy in Texas More Than a Republican Issue*, Waco Tribune-Herald (Mar. 25, 2021), https://wacotrib.com/opinion/columnists/jim-henson-joshua-blank-vaccine-hesitancy-in-texas-more-than-a-republican-issue/article_f708fed6-8d91-11eb-9254-6f9e1478705f.html (“[O]nly 56% of Texans responded that vaccines are generally both safe and effective.”)

¹⁰ CDC, *Interim Public Health Recommendations for Fully Vaccinated People*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (last updated Mar. 8, 2021); Hilary Brueck, *Fauci: Vaccinated People Shouldn’t Dine Indoors or Go to the Theater Quite Yet*, Business Insider (Feb. 22, 2021), <https://www.businessinsider.com/fauci-vaccinated-people-should-not-indoor-dine-go-to-theaters-2021-2>.

when visiting the Texas Capitol, including in public areas and certain committee rooms.¹¹ Although the Texas Senate and House “require members to wear masks, . . . there are exceptions to when their faces must be covered.”¹² Regardless, individuals who have attended legislative sessions in-person have reported little to no enforcement of these provisions. Even though the Senate requires a negative COVID-19 test for anyone who wishes to enter the chamber or the gallery or attend a committee hearing, a negative test “is not mandatory to enter the building itself,” nor does the policy apply to the rest of the Capitol building.¹³ And the Texas House is actively considering rolling back the limited safeguards that exist in that chamber.¹⁴

Insufficient COVID-19 Protocols Are Deterring Public Participation in the Legislative Process

The Legislature’s failure to implement sufficient COVID-19 protocols at the Capitol has deterred vulnerable groups from participating in the legislative process. Individuals with disabilities or preexisting health conditions and older citizens are at the highest risk for significant complications or death related to COVID-19.¹⁵ Such risks are not hypothetical: COVID-19-positive individuals have already been inside the Capitol this session, and several lawmakers have fallen ill and needed to quarantine.¹⁶ People in high-risk groups who wish to testify or attend hearings are therefore forced to choose between exercising their fundamental rights to participate in the legislative process and protecting their health.

Proposed changes to health care protections, educational rights, and voting access are all on the 2021 legislative agenda.¹⁷ But the people who will be among the most directly affected by this and other

¹¹ Cassandra Pollock, *Masks Won’t be Required at State Capitol — but Lawmakers Face Stricter Rules in House, Senate Chambers*, Tex. Tribune (Mar. 10, 2021), <https://www.texastribune.org/2021/03/10/texas-capitol-mask-requirements-legislature/>; Rules 8A, 19A of the 87th Legislative Session House Rules Manual, <https://house.texas.gov/media/pdf/House-Rules-of-Procedure-87.pdf>.

¹² *Id.*

¹³ *Senate Implements COVID-19 Protocols* (Jan. 13, 2021), <https://senate.texas.gov/news.php?id=20210113a>.

¹⁴ Robert T. Garrett, *Push is on in Texas House by GOP Member to Remove Mask Mandate, Relax COVID Restrictions*, Dallas Morning News (Mar. 27, 2021), <https://www.dallasnews.com/news/politics/2021/03/27/push-is-on-in-texas-house-by-gop-member-to-remove-mask-mandate-relax-covid-restrictions/>.

¹⁵ CDC, *People at Increased Risk*, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (last updated Mar. 15, 2021). A number of common medical conditions—including, for example, diabetes, cancer, and heart disease—place adults at increased risk of severe illness from COVID-19. CDC, *People with Certain Medical Conditions*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html (last updated Mar. 29, 2021). Older adults are at greater risk of serious illness or death from COVID-19. CDC, *Older Adults*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last updated Mar. 17, 2021).

¹⁶ Alex Samuels & Cassandra Pollock, *Texas House Member Tests Positive for Coronavirus During First Week of Legislative Session, Forcing Other State Lawmakers into Quarantine*, WHAS 11 (Jan. 15, 2021), <https://www.whas11.com/article/news/politics/texas-house-member-tests-positive-for-coronavirus-during-first-week-of-legislative-session/269-a6dcb2f2-a97e-48bc-954e-36b8ac646221>; Cassandra Pollock, Patrick Svitek & Alex Samuels, *‘If We’re all Sick, We Can’t Legislate’: Coronavirus Cases at Texas Capitol Put Lawmakers Further on Edge*, Tex. Tribune (Jan. 25, 2021), <https://www.texastribune.org/2021/01/25/texas-capitol-coronavirus/>.

¹⁷ See, e.g., Rep. James White, *State Representative James White Files Bill to Expand Access to Healthcare for More Texans* (Feb. 8, 2021), <https://house.texas.gov/news/press-releases/?id=7308>; Coalition of Texans with Disabilities, Special Education & Schools, <https://txdisabilities.org/special-education> (last visited Mar. 29, 2021); Gromer Jeffers, Jr., *Texas is Largest Battleground in Struggle over Voting Rights, Secure Elections*, Dallas Morning News (Mar. 15, 2021),

legislation are being excluded from meaningful engagement in the legislative process.¹⁸ People with disabilities, older adults, and other health-vulnerable advocates are guaranteed the same right as all Texans to be heard on these issues. With such critical items at the forefront of the legislative agenda, and the speed with which important bills are moving through the Legislature, action must be taken now to ensure that individuals with disabilities and older Texans can participate fully and equally in the legislative process.

Advocates have raised these concerns several times to no avail. Most recently, on March 29, Disability Rights Texas, League of Women Voters of Texas, the Texas NAACP, and other organizations sent a letter to the House Elections Committee, calling for at-risk individuals to be permitted to give remote testimony at a hearing concerning crucial legislation affecting their voting rights. Some of these same groups wrote to the committee on March 22 with similar requests. Advocacy organizations also shared similar concerns with each of the recipients of this letter before this legislative session began in letters dated December 9, 2020, and December 22, 2020. None of those letters has received a response.

The Legislature’s Insufficient COVID-19 Protocols Violate Federal Law

In addition to imperiling the public’s health, the Legislature’s inadequate COVID-19 protocols and failure to provide a remote-testimony option violate a number of federal laws—including the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the First Amendment to the U.S. Constitution.

ADA and Rehabilitation Act

Title II of the ADA, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), protect the rights of individuals with disabilities by guaranteeing equal access to government activities and prohibiting discrimination on account of their disabilities. These protections are broad and are intended to encompass all operations of a covered public entity. *See* 29 U.S.C. § 794(b); *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (en banc). By failing to provide a safe environment or a remote option for the public to attend, observe, and participate in legislative sessions, the legislature may be violating the rights of disabled individuals with preexisting conditions that put them at greater risk of severe illness from COVID-19.¹⁹

Title II of the ADA states that “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

<https://www.dallasnews.com/news/politics/2021/03/16/texas-is-largest-battleground-in-struggle-over-voting-rights-secure-elections/>.

¹⁸ Ashley Lopez, *Voting Groups Warn Texas Lawmakers Aren’t Making It Easy For People Who Want A Say In Redistricting This Year* (Jan. 14, 2021), <https://www.kut.org/politics/2021-01-14/voting-groups-warn-texas-lawmakers-arent-making-it-easy-for-people-who-want-a-say-in-redistricting-this-year>; Dan Rosenzweig-Ziff, “We Need to be at the Table”: Texans with Disabilities Worry Changes in Legislative Process During the Pandemic Could Shut Them Out, *Tex. Tribune* (Dec. 28, 2020), <https://www.texastribune.org/2020/12/28/texas-disabilities-legislative-coronavirus/>.

¹⁹ The U.S. Equal Employment Opportunity Commission (EEOC) has opined that for individuals with disabilities that place them at a higher risk of severe illness, reasonable accommodations to mitigate that risk or “reduce chances of exposure” are required under the ADA. EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated Dec. 16, 2020).

activities of a public entity, or be subjected to discrimination by any entity.” 42 U.S.C. § 12132. “The ADA is a broad mandate of comprehensive character and sweeping purpose intended to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life.” *Frame*, 657 F.3d at 223 (internal quotation marks and citation omitted); *Rizzo v. Children’s World Learning Centers, Inc.*, 173 F.3d 254, 261 (5th Cir. 1999) (noting Congress’s intent in implementing the ADA was “[t]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”).

Title II requires that public entities make reasonable modifications to their policies, practices, and procedures where necessary to avoid discrimination, unless doing so “would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.” 28 C.F.R. §§ 35.164, .149. This requirement extends to accommodations needed to enable participation in public activities, including government meetings and legislative sessions. *See, e.g., Nat’l Ass’n of the Deaf v. Florida*, No. 18-12786, 2020 WL 6575040, at *6 (11th Cir. Nov. 10, 2020) (applying Title II of the ADA to require captioning of legislative videos for deaf individuals). The “failure to provide reasonable accommodation can constitute discrimination.” *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002); *see Feist v. Louisiana, Dep’t of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 452 (5th Cir. 2013). The existence of an ADA “violation depends on whether . . . the demanded accommodation is in fact reasonable and therefore required. If the accommodation is required the defendants are liable simply by denying it.” *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 455 (5th Cir. 2005).

Title II’s protections mirror those of Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability in programs that receive federal financial assistance. “Congress intended to extend the protections of the Rehabilitation Act to cover all programs of state or local governments when it passed the ADA” and, for that reason, “[t]he remedies, procedures and rights available under title II are those available under Section 504.” *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 676 (5th Cir. 2004) (citation omitted); *see also Bennett-Nelson*, 431 F.3d at 454 (“[T]he rights and remedies afforded plaintiffs under Title II of the ADA are almost entirely duplicative of those provided under § 504 of the Rehabilitation Act.”). To the extent the legislature has received federal funds, this would require compliance with Section 504.²⁰

First Amendment

The Texas Legislature’s refusal to adopt sufficient health protocols or to enable remote participation in public hearings in the midst of the COVID-19 pandemic also has the effect of chilling the First Amendment rights of individuals, including disability-rights advocates, who wish to participate in the legislative process.

The right to freedom of speech and to petition elected officials for redress of grievances is enshrined in the First Amendment to the U.S. Constitution. *See* U.S. Const. amend. I; *see also* Tex. Const. art. I, § 27 (“The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.”). The Supreme Court has characterized “[t]he right

²⁰ *See generally* Elizabeth Thompson, *Texas to Get \$27 Billion from \$1.9 Trillion COVID Relief Bill*, Dallas Morning News (Mar. 5, 2021), <https://www.dallasnews.com/news/politics/2021/03/05/texas-could-get-27-billion-from-19-trillion-covid-relief-bill/>; Univ. of Tex. at Austin, *Federal Funding for State and Local Governments in Texas*, <https://sites.utexas.edu/covid19relief/funding-for-state-and-local-jurisdictions/> (last visited Mar. 29, 2021).

of the people peaceably to assemble, for the purpose of petitioning Congress for a redress of grievances” as essential to “[t]he very idea of a government republican in form.” *United States v. Cruikshank*, 92 U.S. 542, 547 (1875). The Petition Clause “was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble.” *McDonald v. Smith*, 472 U.S. 479, 485 (1985). The Founders’ vision that citizens be able “to communicate their will through direct petitions to the legislature and government officials” is central to the First Amendment’s protections. *Id.*

By failing to enable at-risk individuals to participate safely or remotely in public hearings, the Texas Legislature is forcing individuals to choose between exercising their First Amendment rights and protecting their health and safety, placing an impermissible restraint on speech. The Supreme Court has long considered political and ideological speech to be at the core of the First Amendment, including speech concerning “politics, nationalism, religion, or other matters of opinion.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Moreover, any selective or inconsistent application of these requirements or protections on the basis of the speaker’s viewpoint would violate equal protection principles that are “closely intertwined with First Amendment interests.” *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”).

The Legislature Is Obligated to Grant Reasonable Accommodations Allowing for Individuals with Disabilities and Other Vulnerable Groups to Participate Equally

In light of the above, we request that the Texas Legislature take steps to implement public-health protocols that ensure that individuals with disabilities and other vulnerable groups are able to provide in-person testimony and observe legislative sessions and committee hearings at the State Capitol building safely and in a manner that minimizes the risk of exposure to COVID-19.

In addition, we seek a reasonable accommodation that provides the option for individuals with disabilities and other vulnerable individuals to testify remotely and to observe legislative business via remote technology. The Texas House and Senate already possess the technology necessary to facilitate remote testimony and have used it this session. At the March 25 committee hearing, for instance, Dallas County District Attorney John Creuzot spoke remotely for over 30 minutes regarding election prosecutions.²¹ The House and Senate Redistricting Committees also have heard virtual testimony without issue.²²

We would like to work with you to identify appropriate steps for implementing such reasonable accommodations to ensure that individuals with disabilities are able to participate fully in the legislative process, whether in person at the Capitol or via remote technology. For example, individuals with

²¹ Tex. House of Rep., Committee Broadcast Archives, Elections (Mar. 25, 2021, 8:06 AM), <https://house.texas.gov/video-audio/committee-broadcasts/> (invited guest permitted to present testimony and answer questions remotely, beginning at 1:45 minute mark and concluding at 37:58 minute mark); Chuck Lindell, *For the second time this week, partisan fight derails GOP election bill, this time in the Texas House*, Austin Am.-Statesman (Mar. 25, 2021), <https://www.statesman.com/story/news/2021/03/25/texas-house-voting-bill-election-fraud-hearing-derailed/6996895002/>.

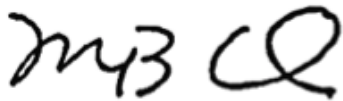
²² See, e.g., Tex. House of Rep., Redistricting Committee, Notice of Public Hearing, <https://capitol.texas.gov/tlodocs/87R/schedules/html/C0802021040110001.HTM> (Members of the public may testify virtually before the House Redistricting Committee’s April 1 hearing by “request[ing] an invitation to provide testimony virtually” using a web link).

disabilities who are at greater risk of severe complications from COVID-19 and older individuals would require public-health protocols to be followed both in the committee rooms and in other public portions of the Capitol building adjacent to those rooms. For the provision of remote technology to be an effective option, committees would need to adequately publicize the method for signing up for remote testimony, ensure the technology works properly, and guarantee that those who sign up to provide remote testimony receive equitable treatment during the hearing (e.g., a person testifying remotely should be given the same amount of speaking time as a person testifying in-person, and persons testifying remotely should not all be scheduled for the end of the hearing).

The active participation of all citizens is imperative for democracy to work. All Texans benefit from the participation of a diverse coalition of people in the legislative process, including individuals with disabilities, persons of all ages, and advocates with other health concerns. During this session, critical legislation on voting, healthcare, and disability rights, among other issues, are on the agenda. These issues affect all Texas residents, but have unique implications for vulnerable populations.

For these reasons, we request that you take prompt action to implement our requested reasonable accommodations during the remainder of the 2021 legislative session and any special sessions held this year. Please notify us by Wednesday, April 7, 2021 whether you are willing to grant our requested accommodations or discuss these issues further, so that we can determine whether further legal action is necessary to ensure all individuals are able to safely participate in the legislative process. Thank you for your attention to this matter.

Sincerely,



Mary B. McCord
Executive Director

Institute for
Constitutional Advocacy and Protection

GEORGETOWN LAW



Mimi Marziani
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EVERY TEXAN

A handwritten signature in blue ink, appearing to read "Dennis Borel".

Dennis Borel
Executive Director

