

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit,
2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the
3 City of New York, on the 23rd day of November, two thousand twenty-two.

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5 PRESENT: DENNIS JACOBS,
6 RICHARD C. WESLEY,
7 RAYMOND J. LOHIER, JR.,
8 *Circuit Judges.*

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

16
17 *Plaintiffs-Appellants,*

18
19 v.

No. 21-2212-cv

20
21 KATHY HOCHUL, GOVERNOR OF THE STATE

1 OF NEW YORK, IN HER OFFICIAL CAPACITY,
2 HOWARD A. ZUCKER, COMMISSIONER OF
3 THE NEW YORK STATE DEPARTMENT OF
4 HEALTH, IN HIS OFFICIAL CAPACITY,
5

6 *Defendants-Appellees.*
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10 FOR PLAINTIFFS-APPELLANTS: JESSICA L. RICHWALDER,
11 Disability Rights New York,
12 Rochester, New York (Britney
13 R. Wilson, New York Law
14 School Legal Services, Inc.,
15 New York, NY, *on the brief*)
16

17 FOR DEFENDANTS-APPELLEES: CLELAND B. WELTON II,
18 Assistant Solicitor General
19 (Barbara D. Underwood,
20 Solicitor General, Anisha S.
21 Dasgupta, Deputy Solicitor
22 General, Grace X. Zhou,
23 Assistant Solicitor General, *on*
24 *the brief*), for Letitia James,
25 Attorney General of the State
26 of New York, New York, NY
27

28 FOR AMICUS CURIAE NATIONAL
29 DISABILITY RIGHTS NETWORK: Bridget A. Clarke, Andrew J.
30 Dhuey, National Disability
31 Rights Network, Berkeley, CA
32

33 Appeal from a judgment of the United States District Court for the Eastern
34 District of New York (Gary R. Brown, *Judge*).

1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
2 AND DECREED that the judgment of the District Court is AFFIRMED.

3 Plaintiffs-Appellants appeal from a judgment of the United States District
4 Court for the Eastern District of New York (Brown, L.) dismissing their claims
5 pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). We assume
6 the parties' familiarity with the underlying facts and the record of prior
7 proceedings, to which we refer only as necessary to explain our decision to
8 affirm.

9 Plaintiffs-Appellants challenge New York's Ventilator Allocation
10 Guidelines ("Guidelines"), which address how to "ethically allocate limited
11 resources (i.e., ventilators) during a severe influenza pandemic while saving the
12 most lives." App'x 57. They allege that the Guidelines, which in some
13 circumstances contemplate the reallocation of ventilators from chronic ventilator
14 users to other patients, violate Title II of the Americans with Disabilities Act, 42
15 U.S.C. §§ 12101 et. seq., Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and
16 Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116. Defendants-
17 Appellees moved to dismiss on the grounds that Plaintiffs-Appellants lacked
18 standing, and in the alternative that their claims were unripe, barred by the

1 statute of limitations, and moot. The District Court granted the motion to
2 dismiss, finding in part that Plaintiffs-Appellants lacked standing to bring their
3 claims. We agree.

4 To establish standing, “a plaintiff must show (i) that he suffered an injury
5 in fact that is concrete, particularized, and actual or imminent; (ii) that the injury
6 was likely caused by the defendant; and (iii) that the injury would likely be
7 redressed by judicial relief.” TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203
8 (2021). Here, Plaintiffs-Appellants have not alleged a sufficiently concrete,
9 actual, and imminent injury. The challenged Guidelines are by their terms
10 “voluntary and non-binding.” App’x 261, 264, 283 n.116. The New York State
11 Department of Health did not “issu[e] them as binding regulations for hospitals”
12 or “request[] that they be drafted as new legislation.” App’x 265. The
13 Department refrained from doing so because “these clinical ventilator allocation
14 protocols remain untested in an actual disaster emergency” and therefore must
15 be “designed with flexibility to adjust to changing clinical information” and
16 facilitate “timely revisions to the ventilator allocation protocol contained in the
17 Guidelines.” App’x 265. Moreover, in the letter preceding the substantive
18 provisions of the Guidelines, the New York State Commissioner of Health

1 stresses that the Guidelines “are by no means final” and expresses the “hope that
2 these Guidelines will never need to be implemented.” App’x 57.

3 We are of course sensitive to the concern that people who rely on
4 ventilators for their survival should not be discriminated against by any
5 emergency preparedness plan. But Plaintiffs-Appellants have alleged only
6 “possible future injury” rather than any “certainly impending” injury. Clapper
7 v. Amnesty Int’l USA, 568 U.S. 398, 409 (2013) (cleaned up). The possibility that
8 the Guidelines may be adopted and implemented in the future in a way that later
9 harms Plaintiffs-Appellants does not satisfy Article III’s requirement of a
10 certainly impending, concrete injury. See ACLU v. Clapper, 785 F.3d 787, 801
11 (2d Cir. 2015).

12 Because Plaintiffs-Appellants lack standing to bring all of their claims, we
13 do not address their remaining arguments. As the State acknowledges,
14 however, this does not mean that Plaintiffs-Appellants “could never sue to
15 challenge an allegedly discriminatory emergency plan. Plaintiffs simply must
16 wait until there is a concrete basis to allege that such a plan may actually be

1 implemented.” Appellees’ Br. at 3.

2 For the foregoing reasons, the judgment of the District Court is

3 AFFIRMED.

4 FOR THE COURT:
5 Catherine O’Hagan Wolfe, Clerk of Court