

## **PROPOSED AGREEMENT**

WHEREAS, the Plaintiffs filed suit in the United States District Court for the District of New Hampshire in *Frye v. Gardner*, 20-cv-00751-SM (D.N.H. filed July 7, 2020), alleging under the Title II of the Americans with Disabilities Act of 1990 ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act") that certain elements of the Defendants' absentee registration and voting program as well as election- and voting-related portions of Defendants' website violate those statutes (the "Action").

WHEREAS, on August 28, 2020, the parties entered into a Final Term Sheet in order to resolve the issues presented in the Plaintiffs' Motion for Preliminary Injunction in the Action.

WHEREAS, on October 6, 2020, the Plaintiffs filed an Amended Complaint in the Action.

WHEREAS, on March 4, 2021, the Plaintiffs filed a Second Amended Complaint, which is the operative complaint in the Action.

WHEREAS, in order to resolve the issues presented in the Plaintiffs' Second Amended Complaint, the Defendants necessarily must rely on third-party vendors and/or consultants to make their website and its features accessible.

WHEREAS, the Defendants will use their best efforts to address and resolve the issues outlined in this agreement on or before February 28, 2022.

WHEREAS, the parties wish to ensure that the Defendants can use best efforts and devote as many resources as possible to address the issues outlined in this Agreement as soon as possible.

WHEREAS, neither this Agreement nor the performance of any act contemplated hereby shall be construed as an admission of or concession to any of the parties' positions, claims, or defenses in the Action.

WHEREAS, the parties wish to resolve, without further burden and expense, all disputes and controversies relating to and arising from the Plaintiffs' allegations in the Action.

NOW, THEREFORE, the Plaintiffs and the Defendants agree to the following terms:

### **I. DEFINITIONS**

1. The following terms shall have the following meanings with respect to this Agreement. All other terms shall be interpreted according to their plain and ordinary meaning.

2. "Absentee Voting Program" includes: (i) the provision of information about New Hampshire elections to voters; (ii) absentee voter registration; and (iii) the processes for

New Hampshire voters to request, receive, mark, and submit absentee ballots.

3. "Accessible," as it pertains to the Defendants' Absentee Voting Program, means allowing voters with Print Disabilities to register and vote absentee privately and independently, with the same convenience and ease of access as other voters; provided that the Defendants shall not be required to take any action that they can show constitutes an undue burden or fundamental alteration, as those terms are used in 28 C.F.R. § 35.164.

4. Unless otherwise provided in this Agreement, technical terms used in this Agreement have the same meaning as provided in the Web Content Accessibility Guidelines ("WCAG") 2.0 and 2.1 Level AA Success criteria published by the World Wide Web Consortium ("W3C"), available at [www.w3.org/TR/WCAG](http://www.w3.org/TR/WCAG).

5. "Defendants" means William M. Gardner, in his official capacity as the Secretary of State of New Hampshire; and the New Hampshire Department of State.

6. "Election Information Lookup Functions" means the following webpages:

- <https://app.sos.nh.gov/Public/PartyInfo.aspx>
- <https://app.sos.nh.gov/Public/PollingPlaceSearch.aspx>
- <https://app.sos.nh.gov/Public/ClerkDetails.aspx>
- <https://app.sos.nh.gov/Public/AbsenteeBallot.aspx>

7. "Plaintiffs" means Daniel Frye, Mary Jean Shiner, Jeffrey Dickinson, Daniel Hebert, the National Federation of the Blind, Inc., the National Federation of the Blind of New Hampshire, Inc., and Granite State Independent Living.

8. "Print Disabilities" means disabilities that interfere with the effective reading, writing, or use of printed material. This definition includes persons who are visually impaired, those with learning disabilities that interfere with the effective reading, writing, or use of printed material, as well those with a physical disability that interferes with holding and manipulating paper or a pen or pencil.

9. "State Election Electronic Absentee Ballot" means a ballot obtained by a voter with a Print Disability upon completing an Application for State Election Electronic Absentee Ballot – Americans with Disabilities Act form.

10. "Website" means all election- and voting-related webpages within the Internet domains of "sos.nh.gov" and "app.sos.nh.gov" and/or available at the URLs of <https://sos.nh.gov/> and <https://app.sos.nh.gov>. On Defendants' present Website, this includes all pages available under the "Elections" menu or tab on the homepage located at <https://sos.nh.gov/>.

## II. TERMS

### A. Accessible Absentee Voting Program

1. The Defendants shall retain as part of their Absentee Voting Program the VotingWorks system or substantially equivalent remote Accessible vote-by-mail system that allows for the delivery and marking of absentee ballots for voters with Print Disabilities, which Defendants implemented as more fully described in the Final Term Sheet dated August 28, 2020 and filed in this case on August 30, 2020. As set forth in the Final Term Sheet, this system will not include the electronic return of a marked absentee ballot.

2. The Defendants will implement the procedure attached hereto as **Exhibit A**, titled, "Responding to Requests from Voters with Print Disabilities for a Reasonable Accommodation Returning a Marked Absentee Ballot" as part of its Absentee Voting Program. The parties acknowledge that, from time to time, this procedure may need to undergo minor revisions, including to the extent alterations in the technology underlying the remote Accessible vote-by-mail system require such revisions to the procedure. The procedure addresses how voters with Print Disabilities may request and receive reasonable accommodations for the process of returning a ballot that was received and marked via the system in Section II.A.1. The reasonable accommodation available under this procedure will not include the electronic return of a marked absentee ballot. The Defendants will make this procedure available on their Website, will send it directly to persons who request and receive access to a State Election Electronic Absentee Ballot, and will provide it to local election officials.

3. Notwithstanding the implementation of the procedure described in Section II.A.2. above, the Defendants shall continue the process described in the August 28, 2020 Final Term Sheet by which voters with Print Disabilities may elect to return by mail the marked ballots received through the system in Section II.A.1.

4. The Defendants will continue as part of their Accessible Voting Program to make all necessary forms for registering to vote in a format that is Accessible to and fillable by those with Print Disabilities in conformance with WCAG 2.0 and 2.1 AA Success criteria. The Defendants shall accept electronic signatures on such documents as need to be signed and so inform voters.

5. The Defendants shall timely update all available information about the Absentee Voting Program whether in electronic or paper form to explain how persons who have Print Disabilities may vote absentee.

6. The Defendants shall continue to offer timely guidance and training to local election officials about the Accessible Voting Program described in this Agreement sufficiently in advance of the September and November 2022 elections to allow voters with Print Disabilities to use it.

7. Defendants agree to evaluate in good faith the feasibility of implementing a commercially available electronic method for delivering to Print Disabled voters the election



ballots and allowing them to be marked and returned to election officials using a secure cloud-based portal by consulting with an expert in voting systems and technology in 2021 and 2023. Defendants agree to complete this evaluation in 2023, notwithstanding the expiration of this Agreement pursuant to Section C.1. The Defendants will provide Plaintiffs' counsel with a summary of their evaluation of such electronically available methods. The summary shall outline all electronically available methods that were considered, and include a summary of the findings of the above-referenced expert. The summary may be given orally or in writing, at the option of the Defendants.

B. Accessible Electronically Available Information

1. The Defendants will ensure that their Website is compliant with the ADA and Rehabilitation Act, including the provisions in those laws that pertain to persons with Print Disabilities. In furtherance of this, Defendants have entered into a contract with SilverTech, Inc., dated June 23, 2021, entitled "Contract for ADA/WCAG Compliant Website." The Defendants will work with SilverTech to ensure that the election- and voting-related portions of the Secretary of State's Website are prioritized in this process and that all work to make those election- and voting-related portions of the Website compliant with the ADA and Rehabilitation Act are completed as soon as possible.

2. The Secretary of State's Office will modify the Election Information Lookup Functions to make them compliant with the ADA and Rehabilitation Act, including the provisions in those laws that pertain to persons with Print Disabilities.

3. Defendants will resolve the issues outlined in Section II.B. on or before February 28, 2022. If Defendants are unable to meet this deadline, Defendants shall notify Plaintiffs' counsel as soon as practicable to meet and confer in good faith regarding any reasonable extension of the deadline, which shall not be unreasonably denied.

4. The Defendants shall ensure that their Website will remain compliant with the ADA and Rehabilitation Act, including the provisions in those laws that pertain to persons with Print Disabilities, on an on-going basis as information, forms, functions, and/or features are updated or changed on the Website.

C. Other Terms

1. This Agreement shall be in effect starting from the date of the last signature affixed to it until one (1) year from the date that Defendants certify to Plaintiffs that the obligations in Section II.B.1 & 2 have been satisfied.

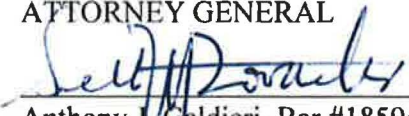
2. Within three days of the execution of this Agreement, the Plaintiffs will take any and all steps necessary to dismiss *Frye v. Gardner*, 20-cv-00751-SM (D.N.H.), without prejudice, provided, however, that the Court shall retain jurisdiction to enforce its terms, including the obligations set forth in Section II.A.7.

3. Provided that Defendants satisfy the terms of this Agreement, Plaintiffs waive and release any past and present claims against Defendants and their agents, successors, and assigns, including claims for declaratory and injunctive relief and attorneys' fees and costs, that are based on the allegations raised, or which could have been raised, in the pleadings filed in this Action. For the avoidance of doubt, this provision shall survive beyond the expiration of this Agreement pursuant to Section C.1. In addition, this waiver and release provision does not preclude Plaintiffs or any other party from pursuing any claims after the expiration of the term of the agreement as set forth in Section II.C.1 against the Defendants seeking the implementation of an electronic method for delivering to Print Disabled voters the election ballots and allowing them to be marked and returned to election officials.

William M. Gardner, Secretary of State, and the  
New Hampshire Department of State

By their attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

  
Anthony J. Galdieri, Bar #18594  
Senior Assistant Attorney General  
Seth M. Zoracki, Bar #267887  
Assistant Attorney General  
Samuel R.V. Garland, Bar #266273  
Assistant Attorney General  
Civil Bureau  
(603) 271-3650  
anthony.galdieri@doj.nh.gov  
seth.zoracki@doj.nh.gov  
samuel.garland@doj.nh.gov

October 1  
Dated: ~~September~~, 2021

Daniel Frye, Mary Jean Shiner, Jeffrey J. Dickinson, Daniel Hebert, National Federation of the Blind, Inc., National Federation of the Blind of New Hampshire, and Granite State Independent Living,

October 1  
Dated: September \_\_, 2021

By their Attorneys,

DISABILITY RIGHTS CENTER-  
NEW HAMPSHIRE, INC.

By: 

Pamela E. Phelan (#10089)  
Pamelap@drcnh.org  
(603) 491-4157 (mobile number)  
James Ziegler (#20689)  
jamesz@drcnh.org  
(603) 661-7314 (mobile number)  
64 North Main Street, Ste. 2  
Concord, NH 03301  
(603) 228-0432 (general office number)  
(603) 225-2077 (general office fax number)

Gregory P. Care (*pro hac vice*)  
gpc@browngold.com  
(443) 534-5641 (mobile number)  
Abigail A. Graber (*pro hac vice*)  
agraber@browngold.com  
(410) 215-0110 (mobile number)  
BROWN, GOLDSTEIN & LEVY, LLP  
120 East Baltimore Street, Suite 1700  
Baltimore, Maryland 21202  
(410) 962-1030 (general office number)  
(410) 385-0869 (general office fax number)

**Responding to Requests from Voters with Print Disabilities  
for a Reasonable Accommodation Returning a Marked Absentee  
Ballot**

The State of New Hampshire provides an opportunity for individuals with print disabilities to electronically receive and mark their state election absentee ballots. This tool helped safely manage the 2020 election under emergency conditions. This option for persons with print disabilities is available for state elections.

A voter with a print disability may mark their absentee ballot using electronic or regular means. The voter can return the absentee ballot to the city or town clerk in a number of ways. Place the marked ballot in the smaller (inner) envelope. The voter may complete either the affidavit on the inner envelope or a separate electronic absentee ballot affidavit. Voters completing the affidavit on the inner envelope containing the marked ballot put that into the larger return mail envelope. Voters who complete the separate electronic absentee ballot affidavit in lieu of the affidavit on the inner envelope put the separate affidavit and the inner envelope containing the marked ballot inside the larger return envelope.

The larger return envelope is then returned by:

1. Placing the mail envelope in the outgoing mail with postage.
2. Personally delivering the mail envelope to the city or town clerk.
3. Utilizing the assistance of a delivery agent. RSA 657:17, II (d) states "A person assisting a blind voter or a voter with a disability who has signed a statement on the affidavit envelope acknowledging the assistance" may be a delivery agent for that voter.



The Secretary of State will make a reasonable accommodation for a voter with a print disability who is unable to use these methods to return a marked state election absentee ballot. This includes voters who are unable to identify a delivery agent that the voter deems suitable. This also includes voters who are unable to place the ballot in the correct envelopes. A voter with a print disability who has received and marked an electronic state election absentee ballot may contact the Secretary of State's Office to request help. Call 603-271-3242 or e-mail [ADA@sos.nh.gov](mailto:ADA@sos.nh.gov).

The Secretary of State's Office will contact the voter. We will communicate with the voter to obtain information about his or her disability and the accommodation they request. The voter will need to provide information to allow us to plan the appropriate accommodation. A reasonable accommodation might include a Secretary of State employee, city or town clerk, or a designee serving as a delivery agent. It might also include assisting the voter to place the ballot in the correct envelopes.

This help is only available for voters with print disabilities who received an electronic state election absentee ballot. Voters are strongly encouraged to request help no later than 4:30 PM on the Wednesday before a Tuesday election. It may not be practical to honor late requests. Election officials become very busy in the lead up to an election. Timely requests for help are important to make sure that election officials can properly perform their election duties and voters are able to timely return marked ballots.

The Secretary of State's office recommends legislation to formalize this procedure.



The Secretary of State includes specific guidance on absentee ballot procedures for voters with print disabilities in election official training. This guidance includes ways to protect the privacy and independence of voters with disabilities.

The Secretary of State employs a vendor to inform individuals with disabilities about the voting options available to them. The training offered in 2020 and future training includes information specific to voters with a print disability.