UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CENTER FOR INDEPENDENCE OF THE DISABLED, NEW YORK, a nonprofit organization, BROOKLYN CENTER FOR INDEPENDENCE OF THE DISABLED, a nonprofit organization, BRONX INDEPENDENT LIVING SERVICES, a nonprofit organization, HARLEM INDEPENDENT LIVING CENTER, a nonprofit organization, DISABLED IN ACTION OF METROPOLITAN NEW YORK, a nonprofit organization, NEW YORK STATEWIDE SENIOR ACTION COUNCIL, a nonprofit organization, SASHA BLAIR-GOLDENSOHN, an individual, and DUSTIN JONES, an individual, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY, a public benefit corporation, VERONIQUE HAKIM, in her official capacity as interim executive director of the Metropolitan Transportation Authority, NEW YORK CITY TRANSIT AUTHORITY, a public benefit corporation, and DARRYL C. IRICK, in his official capacity as acting president of the New York City Transit Authority,

Defendants.

Case No. 1:17-cv-2990-GBD

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

I. PRELIMINARY STATEMENT

Defendants' renewed summary judgment motion rests almost exclusively on conclusory statements by its representatives—statements that are contradicted by admissible evidence and that fail to demonstrate the existence of reasonable accommodations for people with disabilities who encounter elevator outages in the New York City subway system. Tellingly, Defendants do not even claim their purported accommodations are effective, nor can they. In lieu of meeting their burden to demonstrate that Plaintiffs' requested accommodations would cause an undue hardship, Defendants repeat information which the Second Circuit already found insufficient for summary judgment, along with vague assertions about a theoretical rider's ability to get where she is going when her travel is disrupted by an outage, without considering how arduous or time-consuming that suggested alternative travel might be. Even though evaluating the reasonableness of an accommodation is a fact-specific question, Defendants ignore all evidence of delays and barriers to rerouting, and ignore the consistent class member testimony the Second Circuit relied upon in concluding there are material issues of fact as to whether the subway system presents barriers to meaningful access under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*; Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 *et seq.*; and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq*. Meanwhile, people who rely on elevators to use the subway system continue to be harmed by lengthy delays, thwarted travel, and unreliable notice about outages.

"The hallmark of a reasonable accommodation is effectiveness," *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis*., 804 F.3d 178, 189 (2d Cir. 2015), which in this context means overcoming non-trivial delays and other inadequacies that deter people with disabilities from using the subway because of the infuriating frequency of elevator outages. Instead, Defendants' insufficient "accommodations" amount to gesturing at the complexity of the City's overall

transportation network, and essentially telling class members that they can probably figure it out on their own—without regard for the additional time, distance, number of transfers, or other impediments such rerouting requires. Yet as class members consistently attest, and as demonstrated by Plaintiffs' expert's findings, publicly available reports, and Defendants' own admissions, expecting riders with disabilities to simply reroute themselves results in significant delays and hardships. Unlike other large mass transit systems, Defendants do not mitigate the effects of their out-of-service elevators by taking effective, common-sense steps like offering station-to-station shuttles during outages to specifically accommodate riders who need stair-free access (even though the MTA routinely offers such shuttles for other station disruptions); making on-board train announcements about all elevator outages (even though the MTA announces other service disruptions in real-time); establishing policies to promote installation of redundant elevators; or training MTA personnel to provide better assistance. Defendants thus fail to reasonably accommodate subway riders who need stair-free access when elevators are broken.

II. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs respectfully assume the Court's familiarity with this case but set forth relevant background here for the Court's convenience. After the Court's March 30, 2020, decision denying Plaintiffs' motion for partial summary judgment and granting Defendants' motion for summary judgment, ECF 202, Plaintiffs appealed to the U.S. Court of Appeals for the Second Circuit. ECF 204. On August 23, 2021, the Circuit vacated this Court's order and remanded the case for further proceedings. ECF 205 (the "2d Cir. Op."); *Brooklyn Ctr. for Indep. of the Disabled v. Metro. Transp. Auth.*, 11 F.4th 55 (2d Cir. 2021).

A. The Second Circuit's Holdings

The Circuit held: "The district court did not consider the plaintiffs' evidence that individuals with disabilities who rely on certain subway stations experience appreciable hardship

during elevator outages. However, summary judgment would nonetheless be proper if reasonable accommodations are provided . . . . The district court did not reach the issue of reasonable accommodations. Nor did it independently and liberally construe the NYCHRL, as is required." 2d Cir. Op. at 5.

The Circuit took particular note of Plaintiffs' evidence that "commuters who take high-traffic routes during peak hours may encounter elevator outages . . . much more frequently than the [MTA's] general availability range suggests," and found that:

> "[t]he inconvenience of encountering an inoperable elevator is compounded because (1) at most stations, each level is accessible by a single elevator; (2) access to a particular platform often requires use of two to four elevators . . . (3) about three quarters of stations system-wide lack elevators to begin with, and accessible stations are sparse in some areas; and (4) most elevator outages are unplanned . . . making it difficult to arrange alternative transportation in advance."

Id. at 6–7. The Circuit noted Plaintiffs' evidence that elevator outages "are disproportionately frequent at especially inconvenient stations (usually, the busiest), at especially inconvenient times (usually, rush hour)," *id.* at 15, as well as expert testimony regarding the prevalence of failed trips for such commuters, *id.* at 17. Rather than discounting class member testimony as anecdotal, the Circuit emphasized the way that individual class members' experiences aligned with those findings. *Id.* at 18–19.

Regarding Defendants' methods for notifying the public about outages through the MTA's website, smartphone application, e-mail and text alerts, Trip Planner tool, and permanent signage, the Circuit found that "the usefulness of these tools is disputed." *Id.* at 8. The Circuit stated that "questions remain" as to how long it takes for an initial outage report to be received and to post outages not detected by the MTA's LiftNet system, cited Plaintiffs' "evidence showing that the MTA's website fails to report 20% of outages," and noted that Plaintiffs "dispute the extent and clarity of the physical signs posted at elevators." *Id.* at 8.

While the Circuit posited that "timely directing passengers to nearby bus stops" during an outage might constitute an accommodation, it cautioned that it could not "determine as a matter of law that the bus system is a *reasonable* accommodation." *Id.* at 22. As the Circuit pointed out, again referencing class member testimony, "[t]here is evidence that delays encountered by class members are non-trivial . . . . Further, absent adequate notice of an elevator outage, a traveler who requires two or more elevators per trip may use one elevator only to find that a second is broken. It can be seriously burdensome to then ride the first elevator back to street level and proceed to a bus stop." *Id.* at 23. Similarly, the Circuit characterized as "sometimes impractical" the requirement that rides using the MTA's paratransit service be reserved one to two days in advance. *Id.* at 26.

B. Additional Facts

1. Defendants Do Not Effectively Communicate Outage Information, Preventing Riders with Disabilities From Avoiding Outages.

Defendants acknowledge that there is a delay from the time the New York City Transit Control Desk receives notice of an elevator outage and the time the public is notified through the MTA's existing notification methods; prior record evidence states "most outages are verified and posted to the MTA website within 45 minutes of receipt of notification of an outage." Pls.' Resp. to Defs.' Local Rule 56.1 Statement & Additional Material Facts ("Pls.' 56.1 Resp."), filed herewith, ¶ 10. Once an outage is verified, the estimated return to service time that the MTA publicly posts is not accurate or meaningful. *Id.* ¶ 22 (explaining that it is a default of eight hours, adjusted with further default times if no update about the status has been received). A recent City Council report found that even planned outages are not reliably posted. *Id.* ¶ 19.

Class members also continue to report that the MTA's website and mobile applications are frequently inaccurate and confusing, rendering them inadequate. *Id.* ¶ 22. One class member

estimates that about one-quarter of the outages he encounters are not listed on the website or mobile application and, for roughly half that are, "the notification for the elevator gets listed while I'm in transit, and I therefore cannot plan my trip around the outage." *Id.* Similarly, others who regularly check the MTA's website describe finding inaccurate status information "[m]uch of the time" or "just as often" as accurate information. *Id.*

The usefulness of the MTA's Trip Planner tool and Alternate Accessible Travel Information ("AATI") signage likewise remains in dispute given that they provide alternative itineraries without regard for the alternative route's length; the MTA does not consider the length of time an alternative route might take when identifying alternatives; and there is no cutoff limiting the distance of these alternative routes. *Id.* ¶¶ 22, 27. Defendants have never surveyed riders with disabilities to assess the accuracy of the travel time estimates (including waiting and walking or wheeling time) that the Trip Planner tool provides for alternative itineraries in cases where the customer must reroute, and Trip Planner does not account for real-world factors such as traffic, the time needed for a wheelchair user to be secured and released on the bus, or even the time spent waiting between the entry of a Trip Planner query and the start time of the itinerary. *Id.* ¶ 25. Class members report that the alternate route information on AATI signs is often confusing and unhelpful, and can direct customers to walk longer distances than they are able to due to their disabilities; Jennifer Bartlett, a class member who uses a walker, explained, "[i]t is hard for me to walk long distances and the signage does not say how long the distance is to travel the alternate route." *Id.* ¶¶ 22, 27. Class members also detail the unavailability and indifference of station agents and other MTA personnel when approached for help. *Id.* ¶ 36. Additionally, Defendants' Deputy Chief Accessibility Officer, Rachel Cohen, was unable to say how many accessible stations have Customer Information Center ("CIC") screens (electronic

screens that Defendants state display service information, including elevator outages), and admitted that stations with CIC screens may not all have one outside fare control. *Id.* ¶ 33.

Nevertheless, with the exception of some outages caused by long-term capital replacement projects, Defendants still do not make on-board train announcements about outages, even though they announce other service disruptions—both planned and unplanned—on board. *Id.* ¶ 106. Other mass transit systems, such as the Washington D.C. Metro and the Boston T, make public address announcements of outages. *Id.* ¶¶ 110–111, 115.

2. Defendants Do Not Provide Timely, Reliable Means for Class Members to Reach Their Destinations During Elevator Outages.

Record evidence contradicts Defendants' conclusory assertions about rerouting methods. For example, Defendants offer only a single, hypothetical example for the contention that "often," a back-riding[1] route "will add a relatively short amount of travel time to the customer's journey": in that example, they state a rider encountering a platform elevator outage at the Eastern Parkway – Brooklyn Museum station can continue riding to the Atlantic Avenue station, use the elevators at that station to transfer to a Brooklyn-bound train, "then ride back (approximately 5 minutes in each direction)." ECF 257 at 8. Yet, Ms. Cohen testified that this hypothetical does not include time for the passenger to exit their train, encounter the elevator outage, consider a means of rerouting, wait for the next train to arrive, complete their transfer at the Atlantic Avenue station, including waiting for and using the two elevators necessary to reach the platform in the other direction, or wait for the next Brooklyn-bound train to arrive—factors that, in total, could add at least another 13 to 15 minutes of delay. Pls.' 56.1 Resp. ¶ 43.

[1] "Back-riding" is a term Defendants use to describe a situation when a person who encounters an elevator outage rides beyond the station where they intended to exit, or rides in the opposite direction of their destination, in order to transfer trains at the next accessible station and ride back to the station they were initially trying to reach. Defs.' Mot. for Summary Judgment, ECF 257, 1 2.

Defendants generally admit that back-riding can take over 45 minutes, and that the MTA does not have a specific threshold of extra travel time that they use to determine whether to recommend back-riding as an alternative route to customers. *Id.* ¶ 41. Defendants have not conducted any studies to ascertain how long back-riding can take when passengers must reroute themselves after encountering an elevator outage. *Id.* ¶ 91.

Defendants' theory that, in some cases of elevator outages, a person "may be able to walk, wheel, or take an accessible bus to another nearby accessible station instead," ECF 257 at 8, ignores the significant delays and barriers that class members face when riding the bus. As Plaintiffs' expert Sylvia Morse concluded, and class members and public reports confirm, buses are unreliable and subject to delays, infrequent run times, and slower speeds than subways. Pls.' 56.1 Resp. ¶ 48. Consistent with the experience of class members, Ms. Morse found that the deployment of bus lifts and ramps adds unscheduled delays, with some passengers and drivers reporting 10 to 20 minutes or more of added travel time for that step alone. *Id.* ¶¶ 48–49, 51–52.

Likewise, Defendants' claim that buses are "fully accessible" has little meaning in light of record evidence demonstrating that class members encounter numerous barriers, including buses bypassing them, and bus drivers refusing or being unable to deploy ramps or lifts necessary for class members to board, *id.* ¶¶ 4, 51, 65, 74; obstacles like illegal parking or construction that prevent drivers from properly curbing their vehicles, *id.* ¶¶ 4, 51, 74; sidewalk conditions like missing curb ramps and snow or ice that can impede navigation from the sidewalk onto the bus, and adverse weather that can make waiting outdoors difficult and dangerous, *id.* ¶¶ 4, 47, 51; and crowding on buses, which can prevent class members from boarding or accessing the limited wheelchair securement areas, *id.* ¶¶ 4, 52. In addition, since bus drivers must secure wheelchair-using passengers, class members experience less

independence of movement on the bus than on the subway and risk injury from bus drivers' carelessness. *Id.* ¶¶ 4, 48, 52, 96–97. Defendants' broad assertion that "all of the subway system's accessible stations offer connecting bus service" is also unsupported, as buses do not offer the same routes or service, particularly for interborough travel. *Id.* ¶¶ 4, 53.

Class members and Defendants' own witness also dispute the interchangeability of Access-a-Ride ("AAR") and the subway system. *Id.* ¶¶ 59–60. AAR enrollment often requires repeated in-person assessments that can be difficult and time-consuming. *Id.* ¶ 56. Once enrolled, program restrictions severely limit customers' ability to rely on AAR for their various transit needs. *Id.* ¶¶ 5, 54–55, 57 (customers cannot make reservations more than two days or less than one day in advance of the trip, or by telephone after 5pm). AAR customers may be given pickup times up to an hour earlier or later than requested, and drivers can arrive up to 30 minutes after the pick-up time and still be considered "on time." *Id.* ¶ 5. AAR does not limit the number of stops that one customer can expect their driver to make on the way to their destination, including in multiple boroughs. *Id.* ¶ 58. Consistent with class member testimony, the U.S. Attorney's Office for the Southern District of New York concluded that AAR fails to provide "a level of service comparable" to the subway and bus systems; that limitations in service include "substantial numbers" of untimely pickups and drop offs, trip denials, missing trips, and "excessively long trips"; and that AAR's policies allow for and fail to recognize the extent of excessive travel times. *Id.* ¶¶ 5, 58–59.

Defendants do not provide station-to-station shuttle service as an accommodation for individuals with mobility disabilities during outages, even though Defendants routinely provide shuttles for other service disruptions, and though other mass transit systems provide this

accommodation. *Id.* ¶¶ 104–105, 109, 116–119. Nor do Defendants have policies promoting the installation of redundant elevators, unlike other mass transit systems. *Id.* ¶¶ 44–45, 108, 120.

III. LEGAL ARGUMENT

A. Legal Standards

1. Summary Judgment Standard

Summary judgment is unavailable to Defendants because the material facts they rely upon in their motion are firmly in dispute. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A court should "grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party," and "if there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party, summary judgment must be denied." *Scalercio-Isenberg v. Port Auth. of N.Y. & N.J.*, 487 F. Supp. 3d 190, 199–200 (S.D.N.Y. 2020) (cleaned up).[2] As discussed, the Second Circuit has already found that "there are genuine disputes of material fact as to whether the subway system presents barriers to meaningful access," but left for this Court to consider on remand whether the MTA provides reasonable accommodation during elevator outages. 2d Cir. Op. at 15–16, 19–20.

2. Reasonable Accommodation Standard and Burden-Shifting

A plaintiff's burden to establish the availability of reasonable accommodations that can provide meaningful access is "not a heavy one." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995). "[I]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits, and that once the

[2] Correspondingly, since the NYCHRL must be "construed liberally for the accomplishment of [its] uniquely broad and remedial purposes," N.Y.C. Admin. Code § 8-130(a), courts must read the local law's provisions "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013) (cleaned up).

plaintiff has done this, she has made out a *prima facie* showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003) (cleaned up). Further, all accommodations are presumed reasonable under the NYCHRL unless the covered entity shows that they pose an undue hardship. N.Y.C. Admin. Code § 8-102 (reasonable accommodation definition); *see Phillips v. City of New York*, 66 A.D.3d 170, 185 (N.Y. App. Div. 2009), overruled on other grounds by *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 11 N.E.3d 159 (N.Y. 2014).

Thus Defendants misapprehend the burdens here. On their motion for summary judgment, not only must they show that there is no dispute of material facts regarding Plaintiffs' allegations under the ADA, Section 504, and NYCHRL, but Defendants also bear the burden of proof regarding the reasonableness of their purported accommodations, bearing in mind that "[t]he reasonableness of an accommodation is a fact-specific question that often must be resolved by a factfinder." 2d Cir. Op. at 12 (cleaned up). A "defendant is entitled to summary judgment only if the undisputed record reveals that the plaintiff was accorded a plainly reasonable accommodation." *Id.* at 12–13 (cleaned up). An "accommodation must overcome . . . non-trivial temporal delays that limit access to programs, services, and activities." *Id.* at 22–23 (alteration in original) (citing *Wright v. N.Y.S. Dep't of Corr.*, 831 F.3d 64, 73 (2d Cir. 2016)).

B. Plaintiffs Have Suggested Reasonable Accommodations, Which Defendants Have Failed to Show Would Be an Undue Burden.

Plaintiffs have requested facially-plausible reasonable accommodations, including making on-board train announcements about all outages; offering station-to-station shuttles during outages; establishing policies to promote installation of redundant elevators; and training employees to provide better assistance during outages. *See* Complaint, ECF 1 at ¶¶ 3, 5, 82–84. These accommodations are available—they have been adopted by other mass transit systems and

Defendants have implemented similar practices in other contexts. Plaintiffs have thus met their burden under the ADA, Section 504, and NYCHRL; yet Defendants have refused to provide these accommodations, or justify their refusal.

On-board train announcements would mitigate the impact of outages by notifying riders of elevator breakdowns that occur while they are already in transit and by providing notice to riders who lack smartphones or access to cellular service while underground. *See* Pls.' 56.1 Resp. ¶¶ 22–23. For these reasons, agencies like Washington D.C.'s Washington Metropolitan Area Transit Authority ("WMATA") and Boston's Massachusetts Bay Transportation Authority ("MBTA") make public address announcements of outages. *Id.* ¶¶ 110–111, 115. But despite routinely making real-time train announcements for other types of planned and unplanned service disruptions (such as delays or weekend service changes), MTA crews do not announce elevator outages, except for some caused by long-term capital replacement projects. *Id.* ¶ 106.

Other transit systems also provide station-to-station shuttles during elevator outages to accommodate people who need stair-free access. *Id.* ¶¶ 109, 116. For example, the MBTA provides shuttle service until the affected elevator is returned to service, and positions station agents to assist passengers with shuttles. *Id.* ¶¶ 117–19. WMATA provides shuttle service which passengers can request via phone. *Id.* ¶¶ 109, 112. Unlike those agencies, the MTA does not have a policy or practice of providing shuttles as a specific accommodation to passengers during elevator outages, *id.* ¶ 104, even though the MTA routinely offers station-to-station shuttles for other service disruptions, *id.* ¶ 105.

Other transit systems have adopted policies promoting the installation of redundant elevators. *Id.* ¶ 120 (MBTA officer explaining that the "MBTA practice is to provide at least two accessible routes to . . . platforms in all newly constructed stations" and to invest "heavily in the

installation of redundant elevators at existing stations"); *id.* ¶ 108 (WMATA standard is to include two elevators at each station built after 2000). In contrast, despite acknowledging that stations with redundant elevators cause "the least impact" to riders during outages, the MTA does not have any policies regarding redundancy, and only "approximately ten" of the MTA's ADA-accessible stations have redundant elevators. *Id.* ¶¶ 44–46.

As another example, the MTA could train its employees to provide better assistance during outages. *See id.* ¶ 36 (Defendants' Deputy Chief Accessibility Officer admitting that the MTA has received complaints that station agents are unhelpful during outages); *id.* (describing class members' repeated negative experiences with station agents).

Plaintiffs have met the low *prima facie* burden to show that reasonable accommodations are available, and Defendants have provided no evidence of undue hardship. *See Henrietta D.*, 331 F.3d at 280; N.Y.C. Admin. Code § 8-102. Thus, summary judgment must be denied.

C. Defendants' Contention That They Reasonably Accommodate Class Members Who Encounter Subway Elevator Outages Remains Heavily Disputed.

1. Defendants Rely on Conclusory Statements About Riders' Ability to Reroute Without Consideration for the Length or Difficulty of Alternative Routes.

Defendants' "accommodations" boil down to little more than blithe pronouncements about the theoretical possibility that riders can reroute themselves when they encounter broken elevators. The notional existence of an alternate way to go from point A to point B, unbounded by any consideration for delay or difficulty, does not constitute a "plainly reasonable" accommodation. *See* 2d Cir. Op. at 26. Defendants are not entitled to summary judgment, both because of ample disputed material facts and because they fail to demonstrate that their accommodations overcome non-trivial temporal delays and other kinds of "appreciable hardship" for passengers, like the "seriously burdensome" alternate routes described by the Circuit. *See id.* at 5, 12, 22–23. Far from doing so, Defendants admit they have not studied the additional

distance or delay required by their alternate routes, and they place no limits on the amount of extra time or distance that riders with disabilities may endure by following their alternate routes. *Supra* Section II(B)(1); Pls.' 56.1 Resp. ¶¶ 22, 25, 27.

Defendants evade the issue of rerouting delays almost entirely, and offer only a single, hypothetical back-riding trip to support their sweeping pronouncement that "[t]hese re-routings generally do not add much time to a given trip." ECF 257 at 18. However, their representation that this hypothetical trip would only take 10 minutes of extra travel time is contradicted by their own witness, who admitted that it could actually add more than double that time (for a total added delay of at least 23 to 25 minutes) when accounting for real world conditions. *Supra* Section II(B)(2); Pls.' 56.1 Resp. ¶ 43 (describing unaccounted-for, real-world conditions like discovering the outage, figuring out how to reroute, waiting for trains, and transferring). In Defendants' hand-picked example, the next accessible station is only 3 stops away, but the inevitable delays occasioned by back-riding are easily magnified in a subway system where some lines have 5 to 18 inaccessible stations in a row. *Id.* ¶¶ 3, 43; 2d Cir. Op. at 19 ("Since fewer than a quarter of subway stations have elevators to begin with, there are limited alternative subway options when an elevator at any particular station is inoperable. Options are of course nonexistent in neighborhoods with no accessible stations—which is the case in 51% of neighborhoods across the Bronx, Brooklyn, Manhattan, and Queens.").

Relying again on this one hypothetical trip, Defendants declare that "[a]n additional 10 minutes of riding the subway does not violate the ADA," ECF 275 at 18, even though the actual delay for their example would be closer to 23+-minutes, and class members routinely report that back-riding can cause delays of more than an hour. *See* Pls.' 56.1 Resp. ¶¶ 41, 43. Even if Defendants' hypothetical *were* exemplar of class member experiences—and Plaintiffs dispute

that it is—such a delay has been found to violate the ADA. *See Celeste v. E. Meadow Union Free School Dist.*, 373 F. App'x 85 (2d Cir. 2010) (affirming that school denied student with mobility disability meaningful access where he was forced to take 20-minute round-trip detour to athletic field). Properly considering the total temporal delay—even of this hypothetical—thus distinguishes this case from *Ellison v. United States Postal Service*, cited by Defendants, ECF 257 at 18–19, in which the court found that an added 4–8 minutes travel time by car to nearby post offices (in addition to website retail options) did not deprive the plaintiff of meaningful access. 603 F. Supp. 3d 658, 664–65 (S.D. Ind. 2022). By contrast, subway back-riding requires more of class members than hopping in the car and driving to one of many nearby post offices: instead, they must discover the outage, figure out a new route, wait for the next train, travel in the wrong direction, wait for elevators when transferring, and wait for the train back. Defendants also cite *Williams v. Chicago Transit Authority* for the inapposite proposition that "riding to the next station and looping back is 'a reasonable response to an isolated elevator outage.'" ECF 257 at 18 (quoting *Williams v. Chicago Transit Auth.*, No. 16 C 9072, 2017 WL 4467456, at *3 (N.D. Ill. Sept. 30, 2017)). Unlike in *Williams*, the paucity of accessible NYC subway stations makes it far less likely that class members could reroute by back-riding to the very next station. In most cases, they would have to bypass several stations, possibly up to 18. Pls.' 56.1 Resp. ¶ 3. Regardless, the Circuit already found that, for some class members, "elevator outages go beyond the 'isolated or temporary.'" 2d Cir. Op. at 19 (quoting 49 C.F.R. § 37.161(c)).

2. Defendants Rely on Conclusory Statements About the Efficacy of Bus and Paratransit Systems, Without Consideration for Delay or Hardship.

Defendants' claims that class members can rely on the bus and AAR when they encounter subway elevator outages are similarly conclusory and directly contradicted by

evidence including expert testimony, public reports, party admissions, and the experiences of class members, who vigorously dispute the effectiveness and accessibility of these systems.

a) Practical Barriers Limit Class Members' Access to Buses and the Bus System Subjects Them to Non-Trivial Temporal Delays.

As an initial matter, bus service burdens class members because it is often slow, unreliable, and limited in scope, making travel much more arduous and delayed than travel by subway, and making it an ineffective and unreasonable accommodation. Pls.' 56.1 Resp. ¶¶ 4, 48 (noting that NYC's buses are "the slowest in the United States" and citing testimony from class members about long wait times, delays, and unpredictable schedules). Contrary to Defendants' unsupported claim that all passengers are affected equally, ECF No. 257 at 23, passengers with mobility disabilities often *do* face more delays than others while attempting to use the bus system, since the process of deploying the bus ramp or lift and securing (and then releasing) the passenger's wheelchair can take up to 10 or 20 minutes, or more depending on equipment malfunction. Pls.' 56.1 Resp. ¶¶ 4, 48, 52, 74, 97. For example, class member Jean Ryan has had to wait up to an hour to exit express buses after the wheelchair lift stopped working. *Id*. ¶ 4.[3] And contrary to the Circuit's remark that "[i]n any event, buses cross the bridges," 2d Cir. Op. at 22, local buses generally don't, making interborough travel by bus time-consuming and expensive, Pls.' 56.1 Resp. ¶ 4 ("[I]nterborough routes are, by and large, served by express buses, which cost more and are not eligible for reduced fare rates during weekday rush hours.").

Given the Circuit's focus on commuters traveling during peak hours, *see* 2d Cir. Op. at 19, these delays are significant and non-trivial—especially since class members often lack

[3] While some class members do occasionally take the bus instead of the subway, this is often due to the lack of accessible subway stations. *See* Pls.' 56.1 Resp. ¶ 75 (admitting that Ms. Bartlett travels to Williamsburg by bus but explaining that she does so "because there are no ADA-accessible elevators in the station in which she would have to transfer").

advance notice that they may have to reroute due to unplanned elevator outages. *See id.* at 23 ("the adequacy of buses as a reasonable accommodation depends, at least in part, on whether a passenger gets prompt notice to go to a bus stop . . . or to find a bus"); Pls.' 56.1 Resp. ¶¶ 86–87. According to Robert Thompson, New York City Transit's manager of Control Desk operations, there are many delays baked into the elevator outage reporting system. Pls.' 56.1 Resp. ¶¶ 10, 14, 16, 19, 21, 106; *see infra* Section III(C)(3). In addition, Defendants' Elevator and Escalator Status webpage is often incorrect, so that even when class members check it in advance, they still often encounter outages. Pls.' 56.1 Resp. ¶¶ 19, 22, 63, 72–73; *see infra* Section III(C)(3).

It can become "seriously burdensome" to go to street level, navigate to a bus, and then take that bus to either one's destination or to another subway station. *See* 2d Cir. Op. at 23. For example, despite checking Defendants' mobile application for elevator status in advance, class member Bryanna Copeland encountered an unexpected elevator outage at 96th Street on her way to pick up her graduation cap and gown. Pls.' 56.1 Resp. ¶ 64. Though she tried riding further uptown on the subway and circling back, she encountered another unexpected outage and missed the deadline by which she had to arrive to pick up the cap and gown. *Id*. Class member Monica Bartley has been forced to transfer from the subway to a bus after unsuccessfully back-riding, adding hours to each journey. *See* Pls.' 56.1 Resp. ¶ 22. After encountering an unexpected elevator outage, class member Karin Willison had to back-ride to her origin station, which took about 20 minutes, and then transfer to a bus, which took an hour. *See* Pls.' 56.1 Resp. ¶ 70.

As these examples illustrate, and as the Circuit recognized, *see* 2d Cir. Op. at 23, forcing class members to reroute a subway trip via bus unexpectedly can cause non-trivial temporal delays lasting for "extended period[s] of time"—sometimes up to hours, causing class members to miss appointments—creating yet another question of fact as to whether the bus system is a

reasonable accommodation when subway elevators go out of service. *See Wandke v. Nat'l R.R. Passenger Corp.*, Case No. C22-396-MLP, 2022 WL 9378042, at *4 (W.D. Wash. Oct. 14, 2022); Pls.' 56.1 Resp. ¶ 64. The delays imposed on class members can equal if not exceed those found to be discriminatory in other cases and contexts. *See Wright*, 831 F.3d at 73–74 ("non-trivial temporal delay" because of requirement to book mobility aide "well in advance" of use made the proffered accommodation ineffective); *Celeste*, 373 F. App'x at 88 (20-minute detour, which cut "almost in half" student's time to participate in class, deprived student of meaningful access); *Wandke*, 2022 WL 9378042, at *4 (plaintiff adequately pled exclusion from participation in Amtrak's services where he had to wait an hour and 20 minutes for alternative transportation); *Scalercio-Isenberg*, 487 F. Supp. 3d at 203–04 (genuine dispute of material fact on whether having to call an hour before and arrive 20 to 30 minutes before preferred bus's departure was reasonable accommodation).

The bus system imposes additional burdens on customers with disabilities that Defendants similarly fail to acknowledge. To support their claim that the bus system is accessible and can be used to reroute during subway elevator outages, Defendants rely almost exclusively on the say-so of the MTA's Deputy Chief Accessibility Officer. *See* ECF No. 257 at 8, 19. But merely calling the bus system "accessible" is not enough. Ample evidence, including from Plaintiffs' expert Sylvia Morse, reveals that numerous barriers can impede, significantly delay, and even prevent passengers with disabilities from using the bus as an accommodation. Class members' experiences demonstrate that the bus does not provide an effective accommodation and Defendants' own data supports these observations: between 2014 and 2019, the MTA received 24,589 complaints about its bus system regarding issues that directly or indirectly relate to accessibility barriers for people with mobility disabilities. Pls.' 56.1 Resp. ¶ 4.

These obstacles are non-trivial and create a question of fact as to whether the bus system is a *reasonable* accommodation during elevator outages. *See* 2d Cir. Op. at 22–23. Accommodations that are ineffective, unsafe, or deprive persons with disabilities of dignity and independence are not reasonable. *See Wright*, 831 F.3d at 73–74 (concluding that the prison's mobility assistance program was "in practice . . . ineffective" because it required plaintiff to "seek out and rely upon the cooperation of other inmates" and was subject to "non-trivial temporal delays"); *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1136 (9th Cir. 2012) (defendant's denial of plaintiff's preferred accommodation, which would have allowed her to feel "more comfortable and dignified," and insistence on accommodation which did not, was not reasonable); *Wandke*, 2022 WL 9378042, at *3–4 (plaintiff adequately pled he was denied the benefit of Amtrak's services where he alleged that proffered accommodation was neither prompt nor safe). As the evidence establishes that bus trips can be inaccessible and deprive class members of safety and independence, there is at minimum a dispute of fact as to the reasonableness of the bus as an accommodation for class members.

b) Practical Barriers Limit Class Members' Access to Paratransit, and AAR Subjects Them to Non-Trivial Temporal Delays.

Defendants similarly fail to support their conclusory statement that "[f]or certain riders, NYCT's Access-A-Ride . . . paratransit service also serves as an [sic] reasonable accommodation." ECF No. 257 at 2. Overwhelming evidence, including Defendants' own witness and class member testimony, contradict the effectiveness of this mode of transportation.

First, AAR is simply unavailable as an option for passengers with mobility disabilities who encounter unplanned elevator outages. As Defendants admit, AAR generally requires customers to reserve trips no more than two days and no less than one day in advance. Pls.' 56.1 Resp. ¶¶ 55, 57; ECF No. 257 at 8–9; *see* 2d Cir. Op. at 26 (recognizing the same). Given that

80% of elevator outages in the system are unplanned, AAR's advanced reservation requirement generally removes this service as a "backstop." Pls.' 56.1 Resp. ¶ 87; *Wright*, 831 F.3d at 74.

Second, AAR is notoriously unreliable and time-consuming, even with subscription service. As discussed above, customers may be given pickup times up to an hour earlier or later than requested, and AAR drivers frequently make customers wait, sometimes for hours, miss scheduled trips entirely, or force riders to endure excessively long trips while they pick up and drop off other customers across the five boroughs. *Id.* ¶¶ 5, 58–59, 99–100. For example, class member Jean Ryan has experienced AAR trips that lasted between 4 and 6 hours one way. *Id.* ¶¶ 5, 59. AAR is so unreliable that class members who have tried to use it to commute have given up. For example, "excruciating" and "tortuous" AAR rides forced Ms. Ryan to give up her job. *Id.* ¶ 58; *see id.* ¶ 5 (detailing obstacles for AAR travelers, including deficiencies identified by the U.S. Attorney's Office for the Southern District of New York); *see also Am. Council of the Blind of N.Y., Inc. v. City of New York*, 579 F. Supp. 3d 539, 554 (S.D.N.Y. 2021) (noting that AAR "may take twice as long as a comparable bus trip, and may not be practical for short trips"). Experiences like this have caused class members to forego using AAR at all. Pls.' 56.1 Resp. ¶ 123. These non-trivial temporal delays render AAR an unreasonable and ineffective accommodation. *See Wright*, 831 F.3d at 74; *Celeste*, 373 F. App'x at 88; *Wandke*, 2022 WL 9378042, at *4; *Scalercio-Isenberg*, 487 F. Supp. 3d at 203–04.

3. Defendants' Notifications Do Not Work, Details of the Lag Time Remain in Dispute, and Class Members Consistently Discover Outages En Route.

Despite bearing the burden on their motion for summary judgment, Defendants appear to rest on essentially the same evidence regarding notifications that previously caused the Circuit to conclude "there are factual issues." 2d Cir. Op. at 24. As the Circuit explained, "we cannot decide in the first instance whether advance notice that lags by 45 minutes—and perhaps even by

14 minutes (plus however long it takes the MTA to become aware of the outage)—is adequate to enable meaningful access, especially in the absence of evidence as to how long the whole process takes from outage to notification." *Id.* at 24. Despite a second bite at the apple, material facts regarding notifications remain in dispute.

While Defendants heap blame on class members for not taking sufficient advantage of the MTA's notifications, their own witnesses continue to showcase the ineffectiveness of their system. Notifications to the public are not timely: per testimony of Defendants' Control Desk Operations Manager, Robert Thompson, there is a delay between the moment the Control Desk receives notice of an outage and the moment the public is notified of that outage. Pls.' 56.1 Resp. ¶ 10. This delay occurs regardless of the source of the initial outage report. *Id*. ¶¶ 13–14. These delays, moreover, can be far from minor given that the MTA notifies the public about outages only after it has conducted an investigation to verify the outage—a process which may typically take one or two minutes, but has been known to take ten minutes or more. Pls.' 56.1 Resp. ¶¶ 14, 21. Defendants minimize and even deny these delays, but they provide no undisputed evidence to establish that the delays are negligible. Pls.' 56.1 Resp. ¶ 10 (disputing Defendants' claim that changes in elevator availability are "simultaneously reported to the public").

Moreover, these notifications generally require passengers to have smartphones, be able to connect to the internet at any given moment, and stay vigilant by checking for notifications not just before leaving home or work but throughout their subway trip. Pls.' 56.1 Resp. ¶¶ 22–24. By the MTA's own admission, however, cellular and internet connectivity is available in only some parts of the subway system. Pls.' 56.1 Resp. ¶ 23. In addition, class members who use wheelchairs cannot operate their phones while wheeling, making it even more unrealistic for them to continuously re-check the MTA's webpage and application. Pls.' 56.1 Resp. ¶ 72

(Plaintiff Dustin Jones testifying that he cannot check the website on his cell phone on the way to the subway while wheeling). But even if they were ceaselessly vigilant, class members might still not benefit since, as detailed *infra*, the outage information shared is frequently inaccurate.

While Defendants try to paper over these deficiencies by pointing to the installation of electronic CIC screens, these screens are not necessarily a reliable source of timely outage information. According to Defendants' Deputy Chief Accessibility Officer, CIC screens rotate through various categories of information, including advertisements. Pls.' 56.1 Resp. ¶ 32. It is unclear how often advertisements are displayed in lieu of outage information and unclear how many screens are in accessible stations or outside fare control. *Id.* ¶¶ 32–34. Evidence suggests that these screens do not display pertinent real-time information enough to be of meaningful assistance. *Id.* ¶ 34 (citing the City Council's finding that there appears to be "little on-site signage relating to elevator or escalator outages outside of longer-term capital improvements").

Class members' testimony reflects the degree to which lag time and other challenges limit the effectiveness of the MTA's notifications, revealing that these notifications are effectively useless, either because they are delayed or because they are inaccurate. *Id.* ¶¶ 22, 71–73. For example, class member Jennifer Bartlett has found notifications so "unreliable" as to be "practically useless" and frequently encounters outages that "are not listed on [the MTA's] status page"; Plaintiff Sasha Blair-Goldensohn estimates that about one-quarter of the outages he encounters are not listed on MTA's website or application and that for roughly half of those that are, the notification does not go out until he is already traveling; class member Brianna Copeland, who always checks the MTA's mobile application before traveling, similarly finds that "[m]uch of the time" it is inaccurate; and class member Arielle Rausin "just as often" encounters a malfunctioning elevator whose status is not accurately updated. *Id.* ¶¶ 22, 63; *see*

also id. ¶ 72 (Plaintiff Dustin Jones testifying that he stopped relying on the notifications because of their frequent inaccuracy). Even when notices of outages are timely and correct, it can be confusing to figure out which specific elevator they refer to. *Id.* ¶ 22 (class member Copeland testifying that she "sometimes struggle[s] to determine which elevator is being referred to . . . and if it's one I need for my journey"); *cf.* 2d Cir. Op. at 8 ("plaintiffs dispute the extent and clarity of the physical signs posted at elevators").

That some class members do not (based on past experience) rely on the MTA's notifications is no proof of the sufficiency of Defendants' accommodations. Rather, class members' experience of the notifications as unreliable, tardy, and confusing shows that these notifications are inadequate. *Wright*, 831 F.3d at 73 (citing *Disabled In Action v. Bd. of Elections of N.Y.*, 752 F.3d 189, 200 (2d Cir. 2014)) ("An accommodation is not plainly reasonable if it is so inadequate that it deters the plaintiff from attempting to access the services otherwise available to him.").

D. The Non-Trivial Temporal Delays and Hardships That Class Members Experience Raise Genuine Disputes Regarding Meaningful Access.

The extra time and other burdens that Plaintiffs bear due to elevator outages in the subway system demonstrate that Defendants' accommodations are ineffective. Defendants turn the reasonable accommodation inquiry on its head by highlighting isolated instances when class members have managed to get themselves to their destinations despite elevator outages, but "conditioning access upon arduous or costly 'coping mechanisms' and on the assistance of strangers is anathema to the stated purpose of the Rehabilitation Act and the ADA." *Am. Council of Blind of N.Y., Inc. v. City of New York*, 495 F. Supp. 3d 211, 235 (S.D.N.Y. 2020) (cleaned up). Just as the plaintiff in *Wright*'s "sporadic use" of a prison's formal request process for mobility assistance did "not diminish his argument that the mobility assistance program [wa]s

not plainly reasonable," *Wright*, 831 F.3d at 74, Defendants' recitation of a handful of instances of class members back-riding or using the bus or AAR does not diminish the extensive evidence showing that class members regularly endure delays of an hour and a half or more; resort to dangerous actions like 'bumping' down stairs in their wheelchairs, or begging other passengers to carry them and their mobility aids out of the station; do not trust MTA's inaccurate notifications; wait in the elements and struggle to board buses; and miss events or even give up their careers. Pls.' 56.1 Resp. ¶¶ 4–5, 22, 41, 47–48, 58-59, 62–66, 70, 74, 76, 88–90, 122–125; *see also Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1259 (D.C. Cir. 2008) (forced dependence on the "kindness of others" constitutes denial of meaningful access "that is not remedied by the use of existing coping mechanisms").

Defendants' argument that summary judgment is appropriate because Plaintiffs offer only class member testimony fails as a matter of fact and law. To start, Plaintiffs raise numerous disputes of material facts by relying not just on class member testimony but on, *inter alia*, data from the MTA's performance metrics dashboard, customer feedback records, government investigations and reports, expert analysis, and testimony from Defendants' own witnesses. *See generally* Pls.' 56.1 Resp. Regardless, class member testimony is entirely appropriate and meaningful for the Court to consider. *Am. Council of Blind of N.Y., Inc.,* 495 F. Supp. 3d at 237 ("the inquiry into the accessibility of a service of a public entity as a whole necessarily considers individual instances in which that service is inaccessible"); *see* 2d Cir. Op. at 17–19 (citing class member testimony as support for reasonable inference regarding lack of meaningful access).[4]

[4] Defendants cite disparate-treatment case law to assert that only statistics can create disputes of material facts in this case. But this argument misunderstands Plaintiffs' claims and the applicable laws, which distinguish the reasonable accommodation inquiry from disparate treatment or disparate impact. *See Henrietta D. v. Bloomberg*, 331 F.3d at 276–77 ("[W]e hold that a claim of

Moreover, class members' testimony about delay, danger, and deterrence from commuting due to broken elevators is more than sufficient to rebut any claim by Defendants that they offer plainly reasonable accommodations. *See Am. Council of the Blind of New York, Inc.*, 579 F. Supp. 3d at 554 (finding lack of meaningful access where absence of accommodation forced plaintiffs to "take longer, less convenient routes than they otherwise would," "wait up to 20 minutes at intersections," "get off the bus or subway at a stop other than the one closest to their destination" and "forego activities"); *Scalercio-Isenberg,* 487 F. Supp. 3d at 203–04 (S.D.N.Y. 2020) (finding dispute of fact about whether defendant's accommodation was reasonable where plaintiff was asked to call ahead an hour before her bus's departure, and arrive 20 to 30 minutes early, which the Court characterized as a "significant amount of time"); *Disabled In Action v. City of New York*, 437 F. Supp. 3d 298, 311 (S.D.N.Y. 2020) (holding defendants liable where proposed accommodation "would require mobility-impaired individuals, on average, to travel significantly farther than [non-disabled] individuals . . . to reach a precinct station at which they can access police services").

Defendants' argument that rerouting struggles are "not a problem specific to class members," ECF 257 at 23, is at odds with the fact that riders with mobility disabilities have more limited options for subway rerouting than non-disabled riders given the low number of accessible stations. 2d Cir. Op. at 18 ("certain travelers are more likely to encounter elevator outages because of the number of elevators they use per week; and the inconvenience of any single

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discrimination based on a failure reasonably to accommodate is distinct from a claim of discrimination based on disparate impact. Quite simply, the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available . . . is sufficient to sustain a claim for a reasonable accommodation.") To prevail, much less defeat summary judgment, Plaintiffs need not present statistical evidence—though they do offer systemic data and evidence. *See* Pls.' 56.1 Resp. ¶¶ 4–5, 44, 48, 100–101.

elevator outage can be heightened if there is no other way to access a particular platform."); Pls.' 56.1 Resp. ¶ 103; *see also Henrietta D.*, 331 F.3d at 282 ("That others cannot avail themselves of the services does not make the minimal access provided to the plaintiff 'meaningful.'").

Unfortunately, that reality, and Defendants' failure to accommodate, mean that class members find dealing with elevator outages "frustrating, and often humiliating," and that Defendants' failures to take common-sense measures—like making on-board train announcements, offering shuttle service, creating policies to promote elevator redundancy, and training MTA personnel to better assist stranded customers— "impedes their independence and their ability to safely, timely, and freely access" the subway. *See Am. Council of the Blind of New York, Inc.*, 579 F. Supp. 3d at 555 (finding a lack of meaningful access based on similar factors for blind plaintiffs navigating the NYC pedestrian grid). Defendants' proffered alternatives are so insufficient as to deter class members from even attempting to use the subway, *see, e.g.*, Pls.' 56.1 Resp. ¶¶ 58, 65, 70, 74, 122, and they cause class members to be dramatically delayed to, or entirely miss, appointments, gatherings with loved ones, and work, *id.* ¶¶ 22, 41, 56, 62, 64, 66, 70, 88. Plaintiffs' extensive evidence shows that the accommodation the MTA presently offers class members causes "non-trivial temporal delays," 2d Cir. Op. at 22–23, and is "so inadequate that it deters the plaintiff[s] from attempting to access the services otherwise available," *Wright*, 831 F.3d at 73. Defendants' motion must therefore fail.

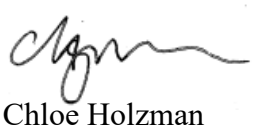
IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion for summary judgment in its entirety.

Dated: April 14, 2023
New York, New York

Respectfully submitted,

DISABILITY RIGHTS ADVOCATES



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