UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1177

ROBERT R. CUSHING, individually and in his capacity as the Minority Leader of the N.H. House of Representatives; DAVID COTE; KATHERINE D. ROGERS; KENDALL SNOW; PAUL BERCH; DIANE LANGLEY; CHARLOTTE DILORENZO; N.H. DEMOCRATIC PARTY,

Plaintiffs-Appellants

v.

SHERMAN PACKARD, in his official capacity as Speaker of the New Hampshire House of Representatives

Defendant-Appellee

On Appeal from the United States District Court for the District of New Hampshire

---

APPELLEE'S SUPPLEMENTAL BRIEF

OFFICE OF THE NEW HAMPSHIRE
ATTORNEY GENERAL

By: Anthony J. Galdieri, No. 117548
Senior Assistant Attorney General
Samuel R.V. Garland, No. 1189913
Jennifer S. Ramsey, No. 1190982
Assistant Attorneys General
Civil Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3650

July 19, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Legislative Record

Other Authorities

INTRODUCTION

In its order granting the Speaker of the New Hampshire House of Representative's petition for rehearing en banc, the Court directed the parties to brief "the contours of the common law doctrine of legislative immunity, and any exceptions to the doctrine." June 1, 2021 Order at 2. The Court further directed the parties to brief "whether, to the extent legislative immunity may attach in the circumstances of this matter, the immunity applies to an action for injunctive relief such as the plaintiffs have requested in this case." *Id.* Reflection on these questions confirms that absolute legislative immunity bars the plaintiffs' claims in this case.

The federal common-law doctrine of legislative immunity grew out of the historical parliamentary privilege in England. By the Founding Era, this privilege had developed to provide Parliament robust protection from judicial intervention. The Supreme Court has adhered to the broad conception of legislative immunity reflected in the historical record. To that end, Supreme Court precedent makes clear that absolute legislative immunity attaches without exception to all actions taken in the sphere of legitimate legislative activity. This is true regardless of the defendant named or the relief sought. Because the plaintiffs challenge quintessential, legitimate legislative activities in this case, the doctrine of legislative immunity bars their claims.

DISCUSSION

I. Absolute legislative immunity attaches without exception to all actions taken in the sphere of legitimate legislative activity.

A. The historical record reflects that legislative immunity developed to provide robust protection from outside interference.

The federal common-law doctrine of absolute legislative immunity "has tap-roots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). "Very early in the history of Parliament, it became evident that members, to be of any real service, must be free to attend all sessions, unmolested by threats, insults, attacks, or arrests, whether they originated from the Crown, the courts of law controlled by the crown, or from private citizens." Carl Wittke, *The History of English Parliamentary Privilege* 15 (1921) ("Wittke").[1] "This was especially true in Tudor and Stuart England, when Parliament, and more particularly the Commons, were struggling for recognition and supremacy against the prerogative of royally-controlled courts." Wittke 15–16. "Since at least the early years of the reign of Henry VIII, the Speaker of the House of Commons" opened Parliament by "claim[ing] by humble petition to the Crown, the ancient rights and privileges of the Commons," which included "freedom from

[1] This brief references the version of *The History of English Parliamentary Privilege* available at https://babel.hathitrust.org/cgi/pt?id=hvd.32044020057766&view=1up&seq=9 (last visited July 19, 2021).

arrest; freedom from molestation for members and their servants; [and] freedom of speech in debate." Wittke 21.

While Parliament asserted parliamentary privilege from an early date, the history of that privilege "[was] a turbulent one, developed in the course of conflict between Parliament and the Crown as to the proper subjects of discussion on the floor of Parliament." *United States v. Johnson*, 337 F.2d 180, 186 (4th Cir. 1964), *aff'd* 383 U.S. 169 (1966) (citing generally Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (16th ed. 1957); Wittke). "During the reigns of both Queen Elizabeth and James I[,] the Crown resisted Parliament's expansion of its independence," and "[m]ore than once, members of Parliament were committed to the Tower." *Id.* at 187 (citing Thomas P. Taswell-Langmead, *English Constitutional History from the Teutonic Conquest to the Present Time* 249 (11th ed. 1960)). But "[a]s Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger." *Tenney*, 341 U.S. at 372. Whereas, "[i]n 1523, Sir Thomas More could only make a tentative claim" to parliamentary privilege, *id.* (citation omitted), a broad conception of parliamentary privilege was well established by the mid-1600s, in theory if not in practice, *see, e.g.*, *id.*; Wittke 28–30.

This broad conception is reflected in Sir Edward Coke's *Fourth Part of the Institutes of the Laws of England*, published in 1644. There, Coke observed "that

all weighty matters in any Parliament moved concerning the Peers of the Realm, or Commons in Parliament assembled, ought to be determined, adjudged, and discussed by the courte of the Parliament, and not by the Civill law, nor yet by the Common laws of this Realm used in more inferior Courts." Edward Coke, *Fourth Part of the Institutes of the Laws of England* 15 (1644) ("Coke").[2] According to Coke, "Judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws . . . ." Coke 16. In other words, Coke understood the parliamentary privilege to preclude courts of law from interfering in parliamentary procedure. *See id.*

Coke published his *Fourth Institute* during the reign of Charles I, whose "accession . . . brought continued conflict" between Parliament and the Crown. *Johnson*, 337 F.2d at 187 (citing S.B. Chrines, *English Constitutional History* 151–53 (2d ed. 1953)). "In 1629 three members of the House of Commons, Sir John Elliot, Denzill Holles and Benjamin Valentine, when arrested and prosecuted for libelous and seditious speeches . . . maintained that they were punishable, if at all, only in Parliament." *Id.* "The King's Bench rejected their plea and convicted them, Judge Sir William Jones observing: 'We are the judges of their lives and lands; therefore of their liberties.'" *Id.* (citing 3 Howell's State Trials 296, 306). "The de-

[2] This brief references the version of Coke's *Fourth Institute* available at http://lawlibrary.wm.edu/wythepedia/library/CokeFourthPartOfTheInstitutesOfTheLawsOfEngland1644.pdf (last visited July 19, 2021)

cision was very unpopular and contributed to the eventual downfall of Charles." *Id.* (citing generally Wittke).

When the Glorious Revolution of 1688 "expelled the last of the Stuarts and introduced a new dynasty, many [questions of parliamentary privilege] were settled by a bill of rights, formally declared by the Parliament and assented to by the crown." *Kilbourn v. Thompson*, 103 U.S. 168, 202 (1880) (citing 1 W. & M., sess. 2, c. 2). Specifically, the English Bill of Rights of 1689 "declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.'" *Tenney*, 341 U.S. at 372 (quoting 1 W. & M., sess. 2, c. 2). "After the Revolution of 1688 and the consequent Bill of Rights, the privilege of freedom of speech and debate in Parliament was never again seriously questioned or denied." Witkke 30.

By the Founding Era, the broad scope of the parliamentary privilege was firmly entrenched. William Blackstone—"whose works constituted the preeminent authority on English law for the founding generation," *Alden v. Maine*, 527 U.S. 706, 715 (1999)—observed in 1765 that "[t]he dignity and independence of the two houses [of Parliament] are . . . in great measure preserved by keeping their privileges indefinite." 1 William Blackstone, Commentaries *159 ("Blackstone").[3] Blackstone noted that "[p]rivilege of parliament was principally established, in or-

[3] This brief references the version of Blackstone's *Commentaries* available at https://www.gutenberg.org/files/30802/30802-h/30802-h.htm#Chapter_the_second (last visited July 19, 2021).

der to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown." Blackstone 159. The privilege was, in Blackstone's words, "indulged to prevent the member's being diverted from the public business," and included protection from "seisures of process from the courts of law." Blackstone 160.

This history reflects why "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney*, 341 U.S. at 373. "It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution." *Id.* Article V of the Articles of Confederation is "almost identical to the English Bill of Rights of 1689." *Johnson*, 383 U.S. at 177–78. And while the Constitution's Speech or Debate Clause was ultimately "formulated by the [Constitutional] Convention's Committee on Style," it was originally approved in "a slightly different formulation which repeated almost verbatim the language of Article V," before ultimately being adopted in its current form "without discussion and without opposition." *Id.* at 177 (citations omitted).

The Supreme Court has thus recognized that the Speech or Debate Clause "was a reflection of political principles already firmly established in the States." *Tenney*, 341 U.S. at 373. "Many of the colonies, which afterwards became States in our Union, had similar provisions in their charters or in their bills of rights,

which were part of their fundamental laws . . . .” *Kilbourn*, 103 U.S. at 202. “Three State Constitutions adopted before the Federal Constitution”—those of Maryland, Massachusetts, and New Hampshire—“specifically protected [legislative] privilege.” *Tenney*, 341 U.S. at 373–74. “As other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability.” *Id.* at 375.

In 1808, the Supreme Judicial Court of Massachusetts offered an early interpretation of the scope the legislative immunity under the Massachusetts Constitution. *See Coffin v. Coffin*, 4 Mass. 1 (1808). Chief Justice Parsons, writing for a unanimous court, observed:

> [Legislative privilege is] secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.

Id. at 27. This broad conception of legislative immunity mirrored the view of parliamentary privilege set forth in Coke's *Fourth Institute* and, later, in Blackstone's *Commentaries*.

B. The Supreme Court has adhered to the broad conception of legislative immunity reflected in the historical record.

Chief Justice Parsons's broad view of legislative immunity found a foothold in the Supreme Court's subsequent jurisprudence. In *Kilbourn*, the Supreme Court stated that *Coffin* "is, perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight." 103 U.S. at 204. The Court rejected a narrow view of the protection conferred by the Speech or Debate Clause, holding instead that it attaches "to things generally done in a session of the House by one of its members in relation to the business before it." *Id.* at 204. Since *Kilbourn*, the Supreme Court has "[w]ithout exception . . . read the Speech or Debate Clause broadly to effectuate its purposes"—namely, "to insure that the legislative function . . . may be performed independently." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501–02 (1975).

The same purpose, derived from the same historical experience, undergirds the doctrine of legislative immunity at issue in this case. In formally recognizing that doctrine in *Tenney*, the Supreme Court traced "the tradition of legislative free-

dom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here." *See* 341 U.S. at 372–76. The Court quoted extensively from *Coffin*, including the observation that legislative immunity is "'secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.'" *Id.* at 373–74 (quoting 4 Mass. at 27). The Court found it "significant that legislative freedom was so carefully protected by constitutional framers at a time when even [Thomas] Jefferson expressed fear of legislative excess." *Id.* at 375.

The Supreme Court has since indicated that absolute legislative immunity from civil claims under federal common law is "on a parity with the similar federal privilege." *Johnson*, 383 U.S. at 180; *see also Supreme Ct. of Va. v. Consumers Union of U. S., Inc.* (*Consumers Union*), 446 U.S. 719, 733 (1980) ("[W]e generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution."). Numerous federal courts of appeals, including this Court, have likewise noted that common-law legislative immunity is "coterminous" with the broad immunity conferred under the Speech or Debate Clause. *See, e.g.*, *Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009); *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 86

(2d Cir. 2007); *Larsen v. Senate of Com. of Pa.*, 152 F.3d 240, 249 (3d Cir. 1998); *Nat'l Ass'n of Soc. Workers v. Harwood* (*Harwood*), 69 F.3d 622, 629 (1st Cir. 1995). [4]

C. Absolute legislative immunity bars any challenge to acts taken in the sphere of legitimate legislative activity regardless of the defendant named or the relief sought.

Absolute legislative immunity, like immunity under the Speech or Debate Clause, "attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998). The operative question when legislative immunity is invoked is whether the challenged conduct was legislative in nature. *See id.* In resolving this question, a court must determine "whether, stripped of all considerations of intent or motive, [the challenged] actions were legislative." *Id.* "[O]nce it is determined that [a defendant was] acting within the 'legitimate legislative sphere,'" legislative immunity "is an absolute bar to interference." *Eastland*, 421 U.S. at 503.

The actions challenged in this case are quintessentially legislative. The New Hampshire House of Representatives adopted rules that, among other things, set an order of precedents by which House procedures are derived. *See* Rule 65, 2021-2022 House Rules, As of June 12, 2021, *available at* https://www.gencourt.state.

[4] Similarly, the New Hampshire Supreme Court has noted that "New Hampshire's Speech and Debate Clause is the equivalent of the speech or debate clause, article I, section 6 of the United States Constitution." *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 291, 876 A.2d 736, 749 (2005) (cleaned up).

nh.us/house/abouthouse/houserules.htm ("House Rule 65"). Specifically, "[t]he procedures of the New Hampshire House shall be derived from the following sources in the order of precedence listed: (a) Constitutional provisions. (b) Rules of the New Hampshire House. (c) Custom, usage and precedent. (d) Adopted parliamentary manual (*Mason's Manual of Legislative Procedure, 2020 edition)*. (e) Statutory provisions." *Id.* (formatting altered).

The plaintiffs wish to participate remotely in House floor sessions. App. 139, 140, 144, 145, 148, 153, 155, 157. No constitutional provision or House Rule addresses this issue. App. 182. Nor is there any custom, usage, or precedent of House members participating in House floor sessions remotely. App. 182. Accordingly, the 2020 edition of *Mason's Manual of Legislative Procedure* governs. *See* House Rule 65.

On January 6, 2021, the New Hampshire House—a 400-member body—voted 316 to 4 to adopt the 2020 edition of *Mason's Manual* as the parliamentary manual applicable under Rule 65. App. 183. *Mason's Manual* is well-recognized as a leading manual on parliamentary procedure throughout the United States, as reflected by the fact that one or both houses of the legislatures of at least 40 States have adopted it in at least some capacity.[5] The 2020 edition of *Mason's Manual* is

[5] *See* Alabama House Rules, *available at* http://www.legislature.state.al.us/aliswww/ISD/House/ALHouseRules_Clerk.aspx; Alaska State Legislature Uniform Rules, *available at* http://akleg.gov/docs/pdf/uniform_rules.pdf; Arizona Senate Rules, *available at* https://www.azsenate.gov/alispdfs/SenateRules.pdf; Arizona House Rules, *available at* https://www.azhouse.gov/alispdfs/55th_Legislature_Rules_as_amen

ded.pdf; Arkansas House Rules, *available at* https://www.arkansashouse.org/assets/uploads/2021/02/20210225123949-93rd-house-rule-book-for-webpdf.pdf; California Senate Rules, *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SR3; California House Rules, *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220HR1; Colorado Senate Rules, *available at* https://leg.colorado.gov/house-senate-rules; Connecticut General Assembly Rules, *available at* https://www.cga.ct.gov/lco/pdfs/Rules_and_Precedents.pdf; Florida Senate Rules, *available at* https://flsenate.gov/UserContent/Publications/SenateRules/2020-2022_Rules.pdf; Florida House Rules, *available at* https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Reference&CommitteeId=&Session=2021&DocumentType=The%20Rules%20Of%20The%20House%20of%20Representatives&FileName=2020-2022%20House%20Rules%20-%20%20Edition%201.pdf; Georgia Senate Rules, *available at* https://www.legis.ga.gov/api/document/docs/default-source/secretary-of-the-senate-document-library/senaterules2021final.pdf?sfvrsn=bacc53b4_2; Hawaii Senate Rules, *available at* https://www.capitol.hawaii.gov/docs/SenateRules.pdf; Hawaii House Rules, *available at* https://www.capitol.hawaii.gov/docs/HouseRules.pdf; Idaho Senate Rules, *available at* https://legislature.idaho.gov/statutesrules/senaterules/; Idaho House Rules, *available at* https://legislature.idaho.gov/statutesrules/houserules/; Indiana Senate Rules, *available at* https://secure.iot.in.gov/legislative/2444.htm; Iowa Senate Rules, *available at* https://www.legis.iowa.gov/docs/publications/SR/1210198.pdf; Iowa House Rules, *available* at https://www.legis.iowa.gov/docs/publications/HR/1209770.pdf; Kansas House Rules, *available at* http://www.kslegislature.org/li/m/pdf/house_rules.pdf; Kentucky Senate Rules, *available at* https://legislature.ky.gov/Legislators/Documents/HouseRules2020.pdf; Kentucky House Rules, *available at* https://legislature.ky.gov/Legislators/Documents/SenateRules2020.pdf; Louisiana House Rules, *available at* http://legis.la.gov/legis/Laws_Toc.aspx?folder=73; Louisiana Senate Rules, *available at* https://www.legis.la.gov/legis/Laws_Toc.aspx?folder=211; Maine House Rules, *available at* https://legislature.maine.gov/house/house/Documents/HouseRules; Maine Senate Rules, *available at* https://legislature.maine.gov/senate-rules; Michigan House Rules, *available at* https://www.legislature.mi.gov/Documents/Publications/rules/house_rules.pdf; Michigan Senate Rules, *available at* https://www.senate.michigan.gov/Senate Rules.pdf; Minnesota House Rules, *available at* https://www. house.leg.state.mn.us/cco/rules/permrule/hrule.htm; Montana Senate Rules, *available at* https://leg.mt.gov/content/Sessions/65th/2017-Rules/2017-Senate-Rules.pdf; Montana House Rules, *available at* https://leg.mt.gov/content/Sessions/65th/2017-Rules/2017-House-Rules.pdf; Nebraska Unicameral Legislature Rules, *available at* https://www.nebraskalegislature.gov/FloorDocs/Current/PDF/Rules/RuleBook.pdf; Nevada Senate Rules, *available at* https://www.leg.state.nv.us/Session/81st2021/Docs/SR_Senate.pdf; Nevada House Rules, *available at* https://www.leg.state.nv.us/Session/81st2021/Docs/SR_Assembly.pdf; New Jersey Senate Rules, *available at* https://www.njleg.state.nj.us/legislativepub/Rules/SenRules.pdf; New Jersey House Rules, *available at* https://www.njleg.state.nj.us/legislativepub/Rules/AsmRules.pdf; New Mexico House Rules, *available at* https://www.nmlegis.gov/Publications/Legislative_Procedure/house_rules.pdf; New Mexico Senate Rules, *available at* https://www.nmlegis.gov/publications/legislative_procedure/senate_rules_21.pdf; North Carolina House Rules, *available at* https://www.ncleg.gov/Sessions/2021/Bills/House/PDF/H1v2.pdf; North Dakota Legislative Manual, *available at* https://www.legis.nd.gov/files/resource/legislative-rules/rules21a.pdf; Ohio House Rules, *available at* https://www.legislature.ohio.gov/publications/rules-of-the-house; Ohio Senate Rules, *available at* https://www.legislature.ohio.gov/publications/rules-of-the-senate; Joint Rules of the Oklahoma Legislature, *available at* https://www.okhouse.gov/Documents/Rules/58/Joint%20Rules%20-%2058th%20OK%20Leg%20(2021-2022).pdf; Oregon House Rules, *available at* https://www.oregonlegislature.gov/chief-clerk/Documents/HouseRules79thLegislativeAssemblyAdopted.pdf; Oregon Senate Rules, *available at* https://www.oregonlegislature.gov/secretary-of-senate/Documents/79th Legislative Assembly Senate Rules.pdf; Pennsylvania House Rules, *available at* https://www.house.state.pa.us/rules.cfm; Pennsylvania Senate Rules, *available at* https://www.pasen.gov/rules.cfm; Rhode Island House Rules, *available at* http://www.rilin.state.ri.us/SiteAssets/rules/H5002Aaa.pdf; Rhode Island Senate Rules, *available at* http://www.rilin.state.ri.us/Site

804 pages long and contains 807 sections. *See generally* Paul Mason, *Mason's Manual of Legislative Procedure* (2020 ed.).

Section 786 of *Mason's Manual* provides that "[a]bsent specific authorization by the constitution or adopted rules of the body, remote participation in floor sessions by members of the legislative body is prohibited." App. 189. No constitutional provision specifically authorizes remote participation in House floor sessions. App. 182. On at least two occasions, proposed rule amendments that would permit remote participation in House floor sessions failed by a majority vote of the full House. App. 183, 184.

In *Consumers Union*, the Supreme Court observed that "the issuance of" and "failure to amend" state-bar disciplinary rules constituted a legislative act protected by legislative immunity. 446 U.S. at 734. Similarly, this Court and at least two other circuits have held that the enactment and enforcement of legislative rules of procedure are acts within the sphere of legitimate legislative activity. *See Reeder v.*

Assets/rules/S0336Aaa.pdf; South Carolina House Rules, *available at* https://www.scstatehouse.gov/housepage/HouseRules2021.pdf; Rules of the South Dakota Legislature, *available at* https://mylrc.sdlegislature.gov/api/Documents/171528.pdf; Tennessee House Rules, *available at* https://www.capitol.tn.gov/Archives/House/111GA/publications/111th%20Permanent%20Rules.pdf; Tennessee Senate Rules, *available at* https://www.capitol.tn.gov/Archives/Senate/112GA/publications/Permanent%20Rules%20Of%20Order%20112th(011321).pdf; Texas House Rules, *available at* https:// www.house.texas.gov/_media/pdf/hrrules.pdf; Texas Senate Rules, *available at* https://senate.texas.gov/_assets/pdf/SenateRules87-temporary.pdf; Utah House Rules, *available at* https://le.utah.gov/xcode/HR_1800101180000101.pdf; Utah Senate Rules, *available at* https://le.utah.gov/xcode/SR_1800101180000101.pdf; Vermont Senate Rules, *available at* https://legislature.vermont.gov/assets/All-Senate-Documents/Senate-Rules.pdf; Vermont House Rules, *available at* https://legislature.vermont.gov/assets/All-House-Documents/houserules.pdf; Virginia Senate Rules, *available at* https://apps.senate.virginia.gov/Portal/Resources/SenateRules.pdf; Wisconsin Assembly Rules, *available at* https://docs.legis.wisconsin.gov/2019/related/rules/assembly/11/91/2; Wyoming House and Senate Rules, *available at* https://wyoleg.gov/2021/Rules/HouseSenateRulesCombined.pdf (all last visited July 19, 2021).

Madigan, 780 F.3d 799, 800–01 (7th Cir. 2015); *Harwood*, 69 F.3d at 632; *Consumers Union of U.S. Inc. v. Periodical Correspondents Ass'n*, 515 F.2d 1341, 1351 (D.C. Cir. 1975). These precedents—which the plaintiffs have never meaningfully questioned—compel the conclusion that the House's incorporation of Section 786 into the House Rules and the Speaker's enforcement of that provision constitute legislative acts within the sphere of legitimate legislative activity. Legislative immunity accordingly applies. *See Bogan*, 523 U.S. at 54.

This is true even though the plaintiffs seek only declaratory and injunctive relief. The Supreme Court has made clear that legislative immunity extends to "actions seeking declaratory and injunctive relief." *Consumers Union*, 446 U.S. at 732–33; *see also Eastland*, 421 U.S. at 503 (same conclusion under the Speech or Debate Clause). This is because the purpose of legislative immunity "is to insure that the legislative function may be performed independently without fear of outside interference." *Consumers Union*, 446 U.S. at 731 (citation omitted). "'[A] private civil action, whether for an injunction or damages, creates a distraction and forces legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation.'" *Id.* at 733 (original bracketing omitted) (quoting *Eastland*, 421 U.S. at 503). Accordingly, "legislators engaged in the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Id.* at 731–

32 (cleaned up). It follows, then, that legislative immunity, when properly invoked, bars suit irrespective of the relief sought.

For similar reasons, legislative immunity bars both individual- and official-capacity claims. This is clear from *Consumers Union*, where the Supreme Court concluded that legislative immunity barred claims brought against the Supreme Court of Virginia "and its chief justice in his official capacity." *Id.* at 721. Moreover, every circuit to have considered the issue has held or strongly implied that legislative immunity extends to official-capacity claims for prospective relief. *See* Appellee's Br. at 33 & n.4 (collecting cases). This conclusion stands to reason, as an official-capacity suit—like an individual-capacity suit—can "create[] a distraction and force[] legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Consumers Union*, 446 U.S. at 733.

While the plaintiffs' claims in this case are official-capacity claims for the reasons discussed in the Speaker's opening brief and below, *see* Appellee's Br. at 32–49; *infra* Section II, it bears noting that state *entities* can also invoke legislative immunity. Once again, *Consumers Union* compels this conclusion. The Supreme Court held that "the [Supreme Court of Virginia] and its members [were] immune from suit when acting in their legislative capacity." *Id.* at 734. The Court further noted that, when it attaches, legislative immunity applies to claims "brought against *the legislature*, its *committees*, or members," *id.* at 733–34 (emphasis add-

ed). The plaintiffs have never persuasively explained why these statements are not binding on this Court. *See* Appellee's Br. at 49–54. Indeed, even if these statements were technically dicta—and they are not—they remain the type of "considered dict[a]" that this Court may not ignore. *See McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) (noting that "a carefully considered statement, though technically dictum, must carry great weight and may even be regarded as conclusive" (cleaned up)).

The trial court's conclusion that "legislative immunity may be claimed not only by government officials, but by government entities themselves," *Cushing v. Packard*, No. 1:21-cv-147- LM, 2021 WL 681638, at *3 (D.N.H. Feb. 22, 2021), was therefore compelled by precedent. But even if it were not, it naturally flows from the purposes legislative immunity is designed to serve. The Supreme Court broadly construes legislative immunity "to effectuate its purposes," *Eastland*, 421 U.S. at 501–02, of which the central purpose is to "insure that the legislative function may be performed independently without fear of outside influence," *Consumers Union*, 446 U.S. at 731. This purpose is undermined, not effectuated, if a plaintiff is permitted to proceed on a claim that legislative immunity would otherwise bar simply by asserting it against an entity rather than a person. In either instance, the onus of defending the lawsuit is borne by legislators and their aides,

thus creating the precise "distraction" and "diver[sion]" legislative immunity is designed to protect against. *See id.* at 733.

In sum, absolute legislative immunity extends to all challenges to actions taken in the sphere of legitimate legislative activity regardless of the defendant named or the relief sought. Because the plaintiffs challenge legislative action taken in the sphere of legitimate legislative activity, their claims are barred.

D. There are no recognized exceptions to absolute legislative immunity.

In the civil context, the sole limit the Supreme Court has ever placed on absolute legislative immunity is that it only attaches to "actions taken within the sphere of legitimate legislative activity." *Bogan*, 523 U.S. at 54 (citation and quotation marks omitted).[6] That prerequisite is met in this case for the reasons stated above and in the Speaker's opening brief. *See supra* Section I.C.; Appellee's Br. at 3–6, 23–24, 28. "[O]nce it is determined that [a defendant was] acting within the 'legitimate legislative sphere,'" legislative immunity "is an *absolute* bar to interference." *Eastland*, 421 U.S. at 503 (emphasis added). There are, in other words, no exceptions to legislative immunity once it applies. Nor do any of the limits to

[6] The Speech or Debate Clause includes textual exceptions for "Treason, Felony and Breach of the Peace." U.S. Const., art. I, § 6, cl. 1. Similar exceptions to the parliamentary privilege were recognized under English common law. *See* Wittke 16 ("Cases of 'treason, felony, and breach of the peace,' that is, action in criminal law or offences against the public peace, were always regarded as exceptions to the general rule of privilege, but just what was included under those terms was not awlways clear and often varied with time and conditions."). To the extent these exceptions are likewise imported into the common-law legislative immunity doctrine, they plainly are not implicated in this case.

legislative immunity that the Supreme Court has contemplated in dicta apply to the plaintiffs' claims.

1. *Kilbourn v. Thompson*

In *Kilbourn*, the Supreme Court deemed it "not necessary to decide [whether] there might be things done, in one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." 103 U.S. at 204. The Court nonetheless observed in dicta:

> If we could suppose the members of these bodies so far forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate.

Id. at 204–05. Since *Kilbourn*, the Court has declined to reach the question whether legislative immunity has some outer limits and, if so, where those limits reside. *See, e.g.*, *Tenney*, 341 U.S. at 378–79 (declining to reach this question); *see also Harwood*, 69 F.3d at 634–35 (noting that the Supreme Court "reserved" this question in *Kilbourn*).

In light of the examples offered in *Kilbourn*, there is reason to believe that the Supreme Court was contemplating actions to which legislative immunity would never attach in the first place under modern precedent. The Supreme Court has since made clear that legislative immunity "has not been extended beyond the leg-

islative sphere," and that the mere fact legislators "perform certain acts in their official capacity . . . does not necessarily make all such acts legislative in nature." *Gravel v. United States*, 408 U.S. 606, 625–26 (1972). It is hard to conceive how "execut[ing] . . . the Chief Magistrate of the nation" and "assuming the function of a court for capital punishment," *Kilbourn*, 103 U.S. at 204–05, constitute legitimate legislative acts, even if undertaken by legislators in an official capacity, such that they would fall within "the sphere of *legitimate* legislative activity," *Bogan*, 523 U.S. at 54 (emphasis added). The dicta in *Kilbourn* may therefore reflect nothing more than the well-established proposition that there are things legislators could do that fall beyond legislative immunity's reach. *See Gravel*, 408 U.S. at 625–26; Wittke 16 ("Cases of 'treason, felony, and breach of the peace,' that is, action in criminal law or offences against the public peace, were always regarded as exceptions to the general rule of privilege, but just what was included under those terms was not always clear and often varied with time and conditions.").

But regardless of what the *Kilbourn* dicta means, it has no bearing on the outcome of this case. It cannot seriously be argued that the challenged conduct here—adopting a manual of parliamentary procedure and enforcing one of its 807 provisions governing how House floor sessions operate—constitutes an action of "extraordinary character," let alone "an utter perversion of [the legislative] powers to a criminal purpose." *Kilbourn*, 103 U.S. at 204–05. Nor can one realistically

characterize the equal application of such a rule, contained in a well-known and widely used procedural manual adopted by a 316 to 4 majority of the New Hampshire House, as without *any* "rational relationship to legitimate legislative purposes" such that it even implicates "the question reserved by the *Kilbourn* Court" at all. *See Harwood*, 69 F.3d at 634. Accordingly, any *Kilbourn*-based argument is without merit.

2. Abrogation

The Supreme Court has also left open whether Congress may abrogate common-law absolute legislative immunity through its powers under Section 5 of the Fourteenth Amendment. In *Tenney*, the Court expressed skepticism "that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere," characterizing this as "a big assumption." 341 U.S. at 376. The Speaker shares the *Tenney* Court's skepticism that the Fourteenth Amendment "'can justify an attempt to inject the Federal Judiciary into the internal procedures of a House of a state legislature.'" *Harwood*, 69 F.3d at 634 (original bracketing omitted) (quoting *Davids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1977)).[7] Nevertheless, the Speaker acknowledges that, since *Tenney*, the Supreme Court has suggested that Congress can abrogate common-law legislative immunity when it

[7] To the extent this case winds up in the Supreme Court, the Speaker reserves the right to press this issue.

expresses a "clear legislative intent to do so." *Pulliam v. Allen*, 566 U.S. 522, 529 (1984).

None of the statutes implicated in this case reflect such an intent. *Tenney* forecloses any argument that 42 U.S.C. § 1983 abrogates legislative immunity. *See* 341 U.S. at 376. The plaintiffs' Fourteenth Amendment claim is therefore barred. Moreover, the Speaker has set forth in detail in his opening brief, petition for rehearing en banc, and motion to stay the mandate why the ADA and Rehabilitation Act do not abrogate legislative immunity. *See* Appellee's Br. at 54–60; Appellee's Pet. Reh'g En Banc at 4–12; Appellee's Mot. Stay Mandate ¶¶ 5–19. The Speaker incorporates those arguments into this supplemental brief by reference.

As discussed in the Speaker's previous filings, the Supreme Court has emphasized that federal courts cannot infer the abrogation of common-law immunity doctrines from broad statutory language. *See, e.g.*, *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012); *Pulliam*, 466 U.S. at 529; *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); *Consumers Union*, 446 U.S. at 738–39; *Pierson v. Ray*, 387 U.S. 547, 555 (1967); *Tenney*, 341 U.S. at 376. Rather, Congress must "specifically so provide[]" if it wishes to abrogate a common-law immunity. *Pierson*, 387 U.S. at 555. This is because "common-law principles of legislative immunity . . . were incorporated into our judicial system" and "should not be abrogated absent clear legislative intent to do so." *Pulliam*, 446 U.S. at 529. The Ninth Circuit has characterized these deci-

sions as establishing a "clear statement rule" under which there must be a "clear indication that Congress affirmatively intended to abrogate immunity." *Chappell v. Robbins*, 42 F.3d 918, 923–24 (9th Cir. 1996); *cf. PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021) (slip op. at 5, 21) ("Congress cannot abrogate state sovereign immunity in the absence of an *unmistakably clear statement*." (emphasis added)).

In *Consumers Union*, the Supreme Court illustrated the type of legislative record required to find a congressional intent to abrogate legislative immunity. The Court noted that it had previously held in *Hutto v. Finney*, 437 U.S. 678 (1978), that Congress intended to waive Eleventh Amendment immunity from attorney's fees under 42 U.S.C. § 1988 "based on expressed legislative history" reflecting that intent. *Consumers Union*, 446 U.S. at 738. The Court had noted in *Hutto* that the House Report for § 1988 stated that "'the 11th Amendment is not a bar to the awarding of counsel fees against state governments,'" and that the Senate Report contemplated that attorney's fees would "'be collected either directly from the [state] official, in his official capacity, from funds of his agency or under his control, or from the State . . . government (whether or not the agency or government is a named party)." 437 U.S. at 694 (quoting H.R. Rep. No. 94-1558, at 7 n.14 (1976); S. Rep. No. 94-1011, at 5 (1976)). The Court indicated in *Consumers Union* that a "similar" legislative record would be needed to find congressional intent

to abrogate absolute legislative immunity, but concluded that no such record existed. *See* 446 U.S. at 738–39.

There is no "clear indication" in the text of the ADA or Rehabilitation Act that Congress "affirmatively intended" either statute to abrogate common-law legislative immunity. *See Chappell*, 42 F.3d at 923–24. Throughout this case, the plaintiffs have principally relied on language that, by its express terms, relates to Eleventh Amendment immunity. *See* 42 U.S.C. § 2000d-7; 42 U.S.C. § 12202. The panel opinion similarly concluded that Congress could rely on a "broad statement applying [the ADA and Rehabilitation Act] to state governments to abrogate legislative immunity." *Cushing v. Packard*, 994 F.3d 51, 55 (1st Cir. 2021), *reh'g en banc granted, opinion withdrawn*, No. 21-1177, 2021 WL 2216970 (1st Cir. June 1, 2021). But the Supreme Court made clear in *Consumers Union* that congressional intent to abrogate Eleventh Amendment immunity does not *ipso facto* reflect a clear intent to waive absolute legislative immunity. 446 U.S. at 738–39. And the panel opinion's reliance on generalized language reflects the type of analysis that the Supreme Court has consistently rejected in favor of a "clear statement rule," as discussed in the Speaker's petition for rehearing en banc and motion to stay. *See See* Appellee's Pet. Reh'g En Banc at 4–12; Appellee's Mot. Stay Mandate ¶¶ 7, 11–19.

To the extent legislative history remains relevant,[8] there is likewise nothing in the history of the ADA or Rehabilitation Act evincing a "clear legislative intent" to abrogate legislative immunity. *Pulliam*, 466 U.S. at 529. The legislative history of the ADA reflects only that Congress intended to abrogate Eleventh Amendment immunity in light of the Supreme Court's holding in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242–47 (1985), that general language in the Rehabilitation Act did not abrogate that immunity. *See, e.g.*, S. Rep. No. 101-116, at 86 (1990) (noting the immunity provision "is included in order to comply with the standards set forth in *Atascadero*"). The legislative history of 42 U.S.C § 2000d-7, which was passed the year after *Atascadero*, similarly demonstrates that Congress was solely focused on undoing the holding in that case. *See, e.g.*, 132 Cong. Rec. S15100-01 (daily ed. Oct. 3, 1986) (statements of Sens. Weicker, Cranston, Hatch) (reflecting an intent to overcome *Atascadero*). And the House and Senate Reports

[8] In the years since *Consumers Union*, the Supreme Court has observed that "[l]egislative history generally will be irrelevant to the judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). The Supreme Court recently reiterated that "Congress cannot abrogate state sovereign immunity in the absence of an unmistakably clear statement." *PennEast Pipeline Co., LLC*, 141 S. Ct. 2244 (slip op. at 5, 21). Given that the Supreme Court has previously suggested that Congress must express the same level of intent to abrogate legislative immunity as is required to abrogate Eleventh Amendment immunity, *see, e.g.*, *Consumers Union*, 446 U.S. at 738–39; *Quern v. Jordan*, 440 U.S. 332, 342–43 (1979), there is reason to question whether legislative history remains relevant when legislative immunity is implicated, *cf. Dellmuth*, 491 U.S. at 230. The Speaker nonetheless acknowledges that *Consumers Union* contemplates that legislative history can be considered, and that the Supreme Court has admonished lower federal courts to "follow [a] case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation and quotation marks omitted).

with respect to the Rehabilitation Act likewise reveal no discussion of legislative immunity. *See* S. Rep. 93-318 (1973); H.R. Conf. Rep. No. 93-500 (1973).

There is, in other words, no clear indication in either the language or histories of the ADA and Rehabilitation Act that Congress affirmatively intended either statute to abrogate absolute legislative immunity. *See Pulliam*, 466 U.S. at 529; *accord Hutto*, 437 U.S. at 694. Any abrogation-based argument is therefore also misplaced.

3. Other limits or exceptions

The plaintiffs have previously contended that legislative immunity does not apply because they are seeking to vindicate important, federally protected rights. The Supreme Court has consistently declined to recognize such an exception to absolute legislative immunity. Rather, the Court has emphasized that legislators "are immune from liability for their actions within the legislative sphere *even though* their conduct, if performed in other than legislative contexts, would itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Eastland*, 421 U.S. at 510 (cleaned up) (emphasis added). Nor can an exception to legislative immunity be justified by "the familiar argument that the broad protection granted by [the immunity] creates a potential for abuse." *Id.*

The plaintiffs' repeated suggestion that the Speaker's decision to enforce Section 786 of *Mason's Manual* has been motivated by partisan considerations is

likewise unavailing. "[I]n times of political passion, dishonest and vindictive motives are readily attributed to legislative conduct and as readily believed." *Tenney*, 341 U.S. at 378 (footnote omitted). But "the privilege of absolute immunity would be of little value if legislators could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based on jury's speculation as to motives." *Bogan*, 523 U.S. at 54 (citations, quotation marks, and brackets omitted). Moreover, it is not "consonant with our scheme of government for a court to inquire into the motives of legislators." *Id.* at 55 (same omissions). Motive therefore plays no role in the Court's inquiry.

II. Legislative immunity applies to official-capacity claims for injunctive relief like those at issue in this case.

Through this action, the plaintiffs request a mandatory injunction requiring the Speaker to allow them to participate remotely in House floor sessions. App. 15–44. They seek this relief solely against the Speaker in his official capacity. *See* App. 15, 22. *Consumers Union* makes clear that legislative immunity extends to claims for injunctive relief brought against a state official in his or her official capacity. *See* 446 U.S. at 721, 732–34. Similarly, every circuit to have considered the issue has held or strongly implied that legislative immunity extends to official-capacity claims for prospective relief. *See* Appellee's Br. at 33 & n.4 (collecting cases). Moreover, as discussed above, *see supra* Section I.C., applying legislative

immunity to official-capacity claims for injunctive relief "effectuate[s] [the] purposes" of legislative immunity by "insur[ing] that the legislative function . . . may be performed independently." *Eastland*, 421 U.S. at 501–02. Legislative immunity accordingly applies to the plaintiffs' claims for relief.

It makes no difference that the plaintiffs seek injunctive relief under the ADA and Rehabilitation Act in addition to § 1983. In either context, the claim is not authorized by the statute itself and instead arises under the *Ex parte Young* doctrine, as discussed in the Speaker's opening brief. Appellee's Br. at 11–12, 34–39. Indeed, *every* other numbered circuit has held that an official-capacity claim for prospective relief brought under the ADA or Rehabilitation Act *is* a claim brought pursuant to *Ex parte Young*. *See* Appellee's Br. at 35 n.6. The plaintiffs' attempt to distinguish official-capacity claims for prospective relief under the ADA and Rehabilitation Act from those brought under § 1983 is accordingly unavailing.

The plaintiffs' attempt to cast their ADA and Rehabilitation Act claims as asserted against the State is also unavailing. This is true for at least two reasons. *First*, as discussed in the Speaker's opening brief, the plaintiffs' own pleadings and litigation strategy confirm that the plaintiffs fully intended to bring their ADA and Rehabilitation Act claims as official-capacity claims against the Speaker. Appellee's Br. at 12, 45–49. As "master[s] of the complaint," *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002), the plaintiffs must live

with that decision. *Second*, legislative immunity would still bar the plaintiffs' claims even if they were brought against the State or one of its instrumentalities, as discussed in the Speaker's opening brief and above. *See* Appellee's Br. at 12–13, 49–54; *supra* Section I.C. The plaintiffs' contention that their ADA and Rehabilitation Act claims survive legislative immunity because they are asserted against the State, as opposed to a specific state official, is therefore both procedurally and legally unsound.

III. The plaintiffs' position would have profound ramifications on how legislative business is conducted.

The plaintiffs have thus far failed to grapple with the profound ramifications of the view they advocate. For one, the plaintiffs' theory promises to place internal disputes over legislative procedures under the oversight of the federal judiciary. Under their theory, the ADA and Rehabilitation Act provide a federal court with license to control when a state legislative session occurs, how persons participate in those sessions, and the manner in which state legislatures generally conduct the public's business, including debating and voting on bills. This all but ensures that legislators will be routinely subject to the "distraction[s]" and "diver[sions]" that inherently come with defending against civil litigation. *Consumers Union*, 446 U.S. at 733. It likewise promises to embroil state legislators and the federal judiciary in "political wars of attrition in which [political] opponents try to defeat [each other] through litigation rather than at the ballot box." *E.E.O.C. v. Wash. Suburban*

Sanitary Comm'n, 631 F.3d 174, 181 (4th Cir. 2011). These are the very hazards that legislative immunity is designed to guard against. *See Bogan*, 523 U.S. at 52; *Consumers Union*, 446 U.S. at 733; *Tenney*, 341 U.S. at 377–79.

The plaintiffs' theory also threatens to undermine confidence in the legislative process. State legislative bodies conduct their business in the public view, so citizens may observe the proceedings, including debate, amendment, and voting, and the environment in which legislators operate. Video headshots of dozens of state representatives appearing remotely on a monitor diminishes the public's ability to observe these individuals to ensure, for example, that their votes are not being inappropriately influenced by persons off-screen. The public has the right to observe how public officials conduct public business in open floor sessions and to hold legislators accountable for their conduct. N.H. Const., pt. I, art. 8. The public also has the right to appear in the gallery, in observance of the House, to bring influence or pressure to bear on House members. The public is deprived of these constitutionally important opportunities when legislators appear remotely on a flat monitor with little or no view of the assembled public.

CONCLUSION

Under federal common law, absolute legislative immunity bars any challenge to an act taken in the sphere of legitimate legislative activity regardless of the defendant named or the relief sought. In this case, the plaintiffs challenge quintes-

sential legislative acts within the scope of legitimate legislative activities. The Supreme Court has never recognized any formal limit on or exception to common-law legislative immunity once it attaches, and those it has contemplated in dicta plainly do not apply in this case. Rather, the New Hampshire House of Representatives must be left to determine how House floor sessions should proceed without judicial intervention. The trial court therefore correctly concluded that absolute legislative immunity bars the plaintiffs' claims, and this Court should affirm that decision.

Respectfully submitted,

SHERMAN PACKARD, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NEW HAMPSHIRE HOUSE OF REPRESENTATIVES

By his attorney

JOHN M. FORMELLA
NEW HAMPSHIRE ATTORNEY GENERAL

July 19, 2021

/s/*Samuel Garland*

Anthony J. Galdieri, No. 1175480
Senior Assistant Attorney General
Samuel R.V. Garland, No. 1189913
Jennifer S. Ramsey, No. 1190982
Assistant Attorneys General
N.H Department of Justice
Civil Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3650
anthony.galdieri@doj.nh.gov
samuel.garland@doj.nh.gov
jennifer.ramsey@doj.nh.gov

CERTIFICATE OF COMPLIANCE

This document complies with Fed. R. App. P. 35(b)(2)(a) and this Court's order granting rehearing en banc, because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 30 pages. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared with a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

July 19, 2021 /s/*Samuel Garland*

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF filers and will be served via the CM/ECF System: S. Amy Spencer, William E. Christie, Israel F. Piedra, Paul J. Twomey, Thomas E. Chandler, and Katherine Elmlinger Lamm.

July 19, 2021 /s/*Samuel Garland*