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 NH House of Representatives; DAVID COTE; KATHERINE D. ROGERS; KENDALL SNOW; PAUL BERCH; DIANE LANGLEY; CHARLOTTE DILORENZO; NH DEMOCRATIC PARTY,

Plaintiffs - Appellants,

v.

SHERMAN PACKARD, in his official capacity as Speaker of the House for the N.H. House of Representatives,

Defendant - Appellee.

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

***EN BANC* BRIEF OF PLAINTIFFS-APPELLANTS**

For Appellants Robert R. Cushing, David Cote, Katherine D. Rogers, Kendall Snow, Paul Berch, Diane Langley, Charlotte DiLorenzo:

Paul Twomey, Esq.
Twomey Law Office
P.O. Box 623
Epsom, NH 03234
603-568-3254

Israel Piedra, Esq.
Welts, White & Fontaine, PC
29 Factory Street
Nashua, NH 03060
(603) 883-0797

For NH Democratic Party:

William E. Christie, Esq.
S. Amy Spencer, Esq.
107 Storrs Street/P.O. Box 2703
Concord, NH 03302
(603) 225-7262

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

SUPPLEMENTAL ARGUMENT

The scope of this interlocutory appeal is limited: does the doctrine of legislative immunity bar the relief requested in this case?

Plaintiffs submit it does not — for several reasons.

First, as the First Circuit panel concluded, immunity is abrogated by the ADA and Rehabilitation Act. Second, the "extraordinary character" exception applies to the State's conduct in this case. Third, the nature of injunctive relief and true nature of comity weigh against application of the immunity doctrine in this case. Finally, legislative immunity is a personal immunity and cannot be held by the "public entity" which is the defendant in this action.

I. Legislative immunity is abrogated by the ADA and Rehabilitation Act.

The panel in this case held the Americans with Disabilities Act ("ADA") and Rehabilitation Act abrogate legislative immunity. *Cushing v. Packard*, 994 F.3d 51, 55 (1st Cir. 2021), *withdrawn, reh'g granted*. The panel's reasoning was straightforward. Since a "statute may express a congressional intent sufficient to overbear a common-law doctrine without expressly mentioning the doctrine," the fact that the statutes do not explicitly mention "legislative immunity" is not dispositive. *Id.* Both statutes apply to "any State . . . government." *Id.* The Defendant is "part of New Hampshire's state government." *Id.* Furthermore, by expressly abrogating Eleventh Amendment protections of the states, Congress demonstrated a

clear intent that the statutes should prevail over immunity barriers. *See id.* The fact that "the ADA expressly abrogates Eleventh Amendment immunity by name, yet fails to include a similar mention of legislative immunity," is not persuasive evidence *against* abrogation: Eleventh Amendment immunity "is a more obvious impediment that is expressly enshrined in the Constitution," and "one can easily see why Congress" would rely "on the broad statement applying the statute to state governments to abrogate any other asserted bar, including legislative immunity." *Id.*

The panel's analysis was correct. "Unlike federal legislative immunity, which is grounded in constitutional law, state legislative immunity in federal court is governed by federal common law." *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015). Because it is a common law doctrine, state legislative immunity can be abrogated by Congress. *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981); *Pierson v. Ray*, 386 U.S. 547, 555 (1967). As the panel acknowledged, however, the courts "generally presume that Congress legislates against the backdrop of the common law." *Comcast Corp. v. Nat'l Ass'n of Af. Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020).

However, this presumption does not apply "when a statutory purpose to the contrary is evident." *Id.* This is because the presumption "is just a tool to assist in discerning congressional intent, which remains the lodestar of the judicial inquiry into statutory meaning." *Ryan v. United States Immigration & Customs Enf't*, 974

F.3d 9, 20 (1st Cir. 2020); *see Milwaukee*, 451 U.S. at 317 ("[I]t is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."). Although Congress must "speak directly to the question addressed by the common law" to effectively abrogate a common law principle, it "need not affirmatively proscribe the common-law doctrine at issue." *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotation marks omitted). "Rather, congressional intent can be inferred from the statutory text, the structure of the statute and the relationship between its provisions, and [the legislation's] overall statutory purpose." *AmeriPride Servs. v. Tex. Eastern Overseas, Inc.*, 782 F.3d 474, 486 (9th Cir. 2015); *see Neder v. United States*, 527 U.S. 1, 24-25 (1999) (common law does not apply where it would "be inconsistent with the statutes Congress enacted.").

Therefore, the panel was correct in concluding the "statute as a whole makes it 'evident' that Congress understood [the ADA's] mandate to control" over contrary assertions of common law immunity. *Cushing*, 994 F.3d at 55. As the panel discussed, the "state government" — and all its components — is the express target of Title II of the ADA. 42 U.S.C. § 12131(1)(A). A state legislature is clearly within that definition. *Pulliam v. Allen*, 466 U.S. 522, 541 (1984) ("[A] State acts only by its legislative, executive, or judicial authorities[.]"); 28 C.F.R. § Pt. 35, App. B § 135.102 ("Title II coverage . . . includes activities of the legislative and judicial branches of State and local governments."). That understanding comports with the

statute's declared purpose: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" by "invok[ing] the sweep of congressional authority." 42 U.S.C. § 12101(b). The Act's objectives were informed by Congress' findings that disabled persons have a "right to fully participate in all aspects of society" and that "individuals who have experienced discrimination on the basis of disability often had no legal recourse." *Id.* at (a). "All aspects of society" includes voting, *id.*, and "participat[ing] fully in our political processes . . . ." 135 CONG. REC. S10765-01 (daily ed. Sept. 7, 1989) (statement of Sen. Lieberman).

Moreover, one of the explicit purposes of the ADA is to create "strong, consistent, *enforceable* standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(3) (emphasis added). To that end, Congress explicitly abrogated the Eleventh Amendment immunity of the states. 42 U.S.C. § 12202. If that weren't enough evidence of Congress' intent, the statute goes on to remove any doubt: "In *any* action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State." *Id.* (emphasis added); *see also* OPENING BR. at 42-46; REPLY BR. at 14-16.

As the panel stated in its opinion, the Supreme Court has required more explicit language for abrogation of Eleventh Amendment immunity than for preemption of common law doctrines. *Cushing*, 994 F.3d at 55-56 (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *Texas*, 507 U.S. at 534). Plaintiffs believe (as they discussed in the opening brief) that the *Kimel* case is instructive: in construing the ADEA, the Supreme Court found that Congress made "its intention" to "abrogate the States' constitutionally secured immunity from suit . . . unmistakably clear" simply by providing that "a State, or a political subdivision of a State" was a "public agency" and a valid defendant under the statute. *Kimel*, 528 U.S. at 74. There was no explicit statement abrogating sovereign immunity in the statute. *Id.* If Congress' language in *Kimel* sufficiently expressed an intent to abrogate the constitutionally-enshrined Eleventh Amendment immunity, the language, structure, and purpose of the ADA is easily sufficient to meet the less-rigorous test applied to waivers of common law immunities. *See id.*; *AmeriPride Servs.*, 782 F.3d at 486; *see also In re Perry*, 882 F.2d 534, 543-44 (1st Cir. 1989) ("[C]ommon-law immunities may be vitiated by fair implication.").

The intent of Congress is clear: state governments are subject to the provisions of the ADA and Rehabilitation Act — period. Plaintiffs are entitled to the same remedies they would have against any "private entity other than the State." A judge-made common law doctrine cannot stymie a powerful and comprehensive national

mandate from Congress specifically binding state entities without regard to Eleventh Amendment immunity. To do so would frustrate the express purpose of Congress and — as discussed in detail below — contravene the purpose of the common law doctrine itself. Therefore, to the extent legislative immunity could apply here, it has been abrogated.

a. Waiver under the Rehabilitation Act

To large extent, the abrogation analysis pertaining to the Rehabilitation Act is the same as that for the ADA. However, Plaintiffs believe abrogation under the Rehabilitation Act is even stronger given it involves a *voluntary* waiver by the State. If the Court finds the Defendant has waived any legislative immunity defense by accepting federal funds under the Rehabilitation Act, it need not address the arguably more nettlesome issues regarding the ADA. Both statutes provide the same relevant relief here: reasonable accommodations. Therefore, the Court need only decide the Rehabilitation Act claim to remand this case for further proceedings.

It is clear that legislative immunity can be waived. *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 627-28 (1st Cir. 1995). The waiver in the Rehabilitation Act, moreover, is not limited to Eleventh Amendment immunity. It reaches more broadly. The statute provides that "[n]o otherwise qualified individual with a disability . . . shall . . . be excluded from participation in . . . any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a). The "term

'program or activity' means *all* of the operations" of any "State or local government." *Id.* at (b) (emphasis added). Like the ADA, the Rehabilitation Act states that "[i]n a suit against a State for a violation of [the] statute" remedies are available "to the same extent" such remedies are available in a suit against all other defendants. 42 U.S.C. § 2000d-7(a)(2). Similarly to the ADA, the Rehabilitation Act also includes an explicit waiver of Eleventh Amendment immunity. *Id.* at (a)(1). As with the ADA, the Defendant has pointed to Congress's explicit reference to the Eleventh Amendment as evidence of its intent to preserve other categories of immunities.

A review of the statute's legislative history adds support to the panel's conclusion that Congress did not intend to preserve legislative immunity as a defense to the statute. *Cushing*, 994 F.3d at 55. When the Rehabilitation Act was enacted, it did not make specific reference to states and state entities. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245 (1985). Rather, it simply covered "any program or activity receiving Federal financial assistance." *Id.* In *Atascadero*, the Supreme Court held that this general language — lacking any specific reference to states — was insufficient to abrogate Eleventh Amendment immunity. *Id.* at 246. In response, Congress immediately amended the Act through a law entitled the "Rehabilitation Act Amendments of 1986." PUB. L. NO. 99-506 (1986). The law added explicit reference to the Eleventh Amendment and the provision that remedies are available

in suits against the State "to the same extent" as against private defendants. *Id.* at § 1003.

The legislative record explains these amendments "clarify congressional intent that . . . Congress created a right of action in Federal or State court to remedy violations of section 504 — with *no exception in the law* either from the States or any particular type of remedy . . . ." 132 CONG. REC. S15100-01, 1986 WL 786454 (Oct. 3, 1986). The amendments were intended to "eliminate the court-made barrier to effectuating congressional intent that the holding in the *Atascadero* case so unwisely [] raised. Under this legislation, a statute that is, on its face, equally as applicable to and enforceable against a State agency as it is against other entities, will be enforceable by the same means against State and non-State entities alike." *Id.* ("The provisions in this legislation will . . . make clear that the States may be held accountable in Federal court for injuries they inflict on disabled persons[.]").

This legislative history serves to reinforce what the statutory language of the Rehabilitation Act and the ADA[1] plainly says. The statutes apply to *all* the operations of State governments, without exceptions. It would totally defeat the

[1] "Congress' intent was that Title II extend the protections of the Rehabilitation Act 'to cover all programs of state or local governments, regardless of the receipt of federal financial assistance' and that it 'work in the same manner as Section 504.'" *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) (quoting H.R. Rep. No. 101-485, pt. III at 49-50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 472-73). Thus, the above legislative history should also inform the Court's analysis of the ADA.

purpose of the Rehabilitation Act to allow the Defendant to *voluntarily* accept federal funds—explicitly premised on compliance with the Act—and then attempt to avoid the anti-discrimination obligations imposed by the Act.[2] The legislative immunity defense should therefore be rejected.

II. Even if not abrogated by the ADA and the Rehabilitation Act, the Defendant's conduct in this case falls squarely within the recognized exceptions to legislative immunity.

a. The notion that legislative immunity is "absolute" is a misconception, and here, the Actions of the Speaker of the House are of such an extraordinary character that they fall within the accepted exceptions to the doctrine and application of legislative immunity would be harmful to democracy in New Hampshire.

From its inception the American experiment in democracy demonstrated an abiding commitment to a structure of diffuse and limited power rooted in the founders' profoundly unsettling treatment at the hands of what the Declaration of Independence termed the "absolute Despotism" of the British King. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1438 (1987). Ultimately, they settled on a form of government in which sovereign power was split first between the states and the federal government. *Id.* at 1452. The power of each sovereign was further diluted among the executive, the legislative, and the judicial

[2] Especially because, as the panel noted, the funds were used to facilitate legislative activities, *including paying for remote voting devices* used during "off-site" House sessions. *Cushing*, 994 F.3d at 55; APP. at 102, 141, 150, 405, 501.

branches, *see* U.S. Const., art. I, II, & III, with various legal constructs of both constitutional and prudential import constructed to ensure each branch of government was given a degree of freedom from unwise interference. These include separation of powers clauses, speech and immunity clauses, the non-justiciability of political questions, and legislative immunity. Each of these in turn came with limits so the overriding principle of diffuse limited government was preserved.[3]

These various mechanisms and escape valves were thus devised to ensure that a limited degree of oversight from another branch or sovereign was in place to restrict the possibility of an abuse of power. Perhaps the most striking example of this lays in the Fourteenth Amendment, enacted after the Civil War to establish the authority of the federal government to prevent states from infringing on the fundamental rights of classes of citizens and persons within the jurisdiction of the United States. U.S. Const., amend. XIV.

This case pits this Court's authority to enforce Congress' power under the Fourteenth Amendment against the State's claim that it has unreviewable power to deny citizens with qualifying disabilities under the ADA the right to legislate, as they have been duly elected by thousands of New Hampshire citizens to do, by

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[3] *See* for example, *In re Judicial Conduct Committee*, 151 N.H.123,127(2004), where the New Hampshire Supreme Court discussed the myriad ways in which the branches needed to interact because of a belief that "…(S)eparation of powers in a workable government cannot be absolute."

forcing them into a cruel dilemma where they must navigate a perilous path past the Scylla of disease and the Charybdis of disenfranchisement.

To do so, the Speaker of the House, representing the majority party in the New Hampshire House of Representatives, the Republican Party, seeks to wield the sword of so-called absolute legislative immunity while ignoring the shield of the "extraordinary character" limitation on the doctrine. Even more problematically, the Speaker purports to do so under the guise of "comity" for the policy choices of the State, while ignoring the fact that the unrestricted and unlimited power he claims to possess has been rejected repeatedly by New Hampshire's own courts. He further ignores the incongruity of using a doctrine designed to shield legislators so that they might legislate into a weapon to deprive multiple legislators of any real ability to do so. These failures individually and in concert are fatal to his position.

Numerous courts including the Supreme Court and this Court have recognized that "absolute legislative immunity" is a misnomer—while broad, the doctrine is prudential and is not without limits. In the seminal case on legislative immunity, the Supreme Court made sure to note that not all state legislative acts were insulated from federal judicial review:

> It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible.

Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).

Further, courts have made clear that the legislative immunity afforded to state legislators—the sort at issue in this case—is more permeable than that afforded to federal legislators due to the Supremacy Clause. "State legislative immunity differs . . . from federal legislative immunity in its source of authority, purposes, and degree of protection." *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015). State immunity is based on federal common law, while the privilege of federal legislators is granted by the explicit text of the Constitution: the Speech or Debate Clause. *See Gross v. Winter*, 692 F. Supp. 1420, 1425 (D.D.C. 1988). As a result, the two immunities are not coterminous: for example, the Speech or Debate Clause immunizes criminal acts within the legislative sphere, but common law immunity does not. *Compare United States v. Gillock*, 445 U.S. 360, 373 (1980), *with United States v. Johnson*, 383 U.S. 169, 184-85 (1966). This is because "the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power," especially when "impair[ing] the legitimate interests of the Federal Government" would result in "only speculative benefit to the state legislative process." *Gillock*, 445 U.S. at 373 ("the judicially fashioned doctrine of official immunity does not reach so far as to immunize criminal conduct," and potentially other "important federal interests," that have been "proscribed by an Act of Congress.").

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court reaffirmed the *Kilbourn* Court's "extraordinary character'" limitation on legislative immunity with Justice Black noting in concurrence, "(T)here is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit…". *Id.* at 378-379.

Federal Circuit Courts have likewise recognized the "extraordinary character" limitation on legislative immunity. In a case involving an "irregular and inappropriate" denial of a rezoning ordinance, the Fifth Circuit noted that,

> It may be that at some point, when a legislature acts in a wholly irresponsible and undemocratic manner, its immunity for "legislative" acts dissipates because it is not acting as a legislature, as we understand the term.

Bryan v City of Madison, Miss., 213 F.3d 267, 274 (5th Cir. 2000).

Indeed, this Court has held "absolute" legislative immunity is not absolute:

> The (Supreme) Court has explicitly recognized that there may be some conduct, even within the legislative sphere, that is so flagrantly violative of fundamental constitutional protections that traditional notions of legislative immunity would not deter judicial intervention.

Nat'l Assoc. of Social Workers v. Harwood, 69 F.3d 622, 634. (1st Cir. 1995) (citing *Kilbourn*, 103 U.S. at 204; *Tenney*, 341 U.S. at 378-379).

This case presents this Court with a unique opportunity to apply the "extraordinary character" limitation to the State's unprecedented attempt to use state legislative immunity to prevent a protected class of legislators in the minority

Democratic Party from legislating. To date, following a thorough review of the case law, it appears that all cases involving an invocation of state legislative immunity, the plaintiffs have been non-legislators suing a member of the legislature who then invoked legislative immunity. For example, the *Harwood* plaintiffs were paid private lobbyists demanding physical access to legislators while they were in the process of legislating on the Rhode Island House floor. *Harwood*, 69 F.3d at 624-627.

The situation here is starkly different. Here it is multiple legislators themselves suing so that they can fulfill the obligations of the office. Legislative immunity makes some sense when employed to protect the ability of legislators to deliberate and enact laws free of distraction as long as they do not commit acts of "extraordinary character" while doing so. It makes absolutely no sense to use this judicially created prudential doctrine to *prevent* legislators from doing their jobs.

Compounding the "extraordinary character" of the State's position, here those legislators effectively barred from representing their constituents are not a random group of legislators. Rather they are members of a class of persons protected by the ADA under the authority of the Fourteenth Amendment of the U.S. Constitution[4]. In enacting the ADA, Congress invoked "the sweep of congressional authority" to

[4] Notably, they are also predominantly members of the political minority in a closely divided body. Their exclusion is likely to have affected the outcomes of close votes.

provide a clear, strong, comprehensive, and enforceable national mandate against disability discrimination. 42 U.S.C. § 12101(b).

Unlike other statutes—notably 42 U.S.C. § 1983—Title II of the ADA *requires* the Department of Justice to enforce its provisions. *Frame v. City of Arlington*, 657 F.3d 215, 241 n.5 (5th Cir. 2011); *see also United States v. Hoyts Cinemas Corp.*, 380 F.3d 557 (1st Cir. 2004). Indeed, the statute specifically declares "[i]t is the purpose of this Act . . . to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities." 42 U.S.C. §12101(b)(3). Furthermore, under Part One, Article 11 of the New Hampshire Constitution, disabled citizens are a class expressly guaranteed equal access to the political process, including the right to be elected to office. N.H. Const., Part 1, Art. 11.

Further, Legislative immunity does not exist to protect the individual asserting the defense but rather to protect the ability to legislate. In *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 29 (1st Cir. 1996), this Court reaffirmed its previous holding that "(a)bsolute legislative immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." Here, this is a suit against an individual legislator in name only. In reality, it is a suit against the State itself. *See infra*; *Hafer v. Melo*, 502 U.S. 21, 26 (1991) ("[A]n official-capacity suit against a state officer . . . is no different from a suit against the State itself."). As

such, there is no personal liability at issue. The Supreme Court has recognized that "the heart of [the] justification" for "immunity for the individual official is the concern that the threat of *personal monetary* liability will introduce an unwarranted and unconscionable consideration in the decision making process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy." *Owen v. Independence*, 445 U.S. 622, 655-56 (1980) (second emphasis added); *see also Forrester v. White*, 484 U.S. 219, 223 (1988). Here, there is no personal monetary liability at issue. This is highlighted by the fact that the Defendant is represented by at least four taxpayer-funded attorneys, including three members of the state Attorney General's office.

Relatedly, any "distraction" interest invoked by the Defendant lacks any basis in reality. *See Supreme Court v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980). Plaintiffs do not seek to penalize or restrict any individual legislator's conduct. Rather, it is an action to compel a state entity to comply with their affirmative obligation under federal law to provide reasonable accommodations to the Plaintiffs. *Toledo v. Sanchez*, 454 F.3d 24, 32 (1st Cir. 2006) ("Title II imposes an affirmative obligation on public entities to make their programs accessible to qualified individuals with disabilities . . . ."); 28 C.F.R. § 35.150(a). Therefore—unlike the typical case involving legislative immunity—no particular legislator (including Speaker Packard) is "on trial" in this action.

If this matter is allowed to proceed, the question before the factfinder will simply be whether the proposed accommodation is "reasonable." *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). There is no "inquir[y] into the motives of legislators" required. *See Tenney*, 341 U.S. at 377. In fact, there is no judicial review needed of any legislator's conduct, period. Therefore, there is no threat of legislators being "distracted from or hindered in the performance of their legislative tasks by being called into court to defend their *actions*"—which is the entire "purpose of the protection afforded [to] legislators." *Powell v. McCormack*, 395 U.S. 486, 505 (1969) (emphasis added); *see also Consumers Union*, 446 U.S. at 732.

This is not mere conjecture. The district court *already conducted* a four-hour evidentiary hearing on the merits of the Plaintiffs' request for a preliminary injunction. *See* APP. at 452-576. The district court heard legal argument, but the parties also presented substantial evidence on the merits through multiple live witnesses, offers of proof, and stipulation. *Id.* Speaker Packard was not a witness and is not personally involved in the hearing. *See id.* The Defendant's sole witness was Paul Smith, Clerk of the House. The relief requested is effectively administrative or ministerial: that the House, through Clerk Smith whose staff is responsible for the recording and tabulating of votes, tasks which are purely ministerial and not legislative in nature, provide remote access to Plaintiffs, allowing

them to fulfill their legislative duties. *See* OPENING BR. APP. at 522, 528; *cf. Pierce v. Langdon*, 110 N.H. 170, 171 (1970) ("Although a moderator has broad powers . . . to decide questions of order and prescribe rules of proceeding, **in counting votes he acts only in a ministerial capacity.**") (emphasis added); *Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982) ("Immunity generally is available only to officials performing discretionary functions," not "ministerial tasks").

In the face of a lethal threat from a global pandemic, where scores of other legislators refuse to either don masks or reveal vaccination status, plaintiffs ask that they be allowed to perform the legislative roles for which they were elected through the simple expedient of remote attendance. Should the Speaker not prevail, he will suffer no loss—he can continue his job—but some number of the plaintiffs will be unable to legislate without incurring risk of death.[5] Here, by denying the Speaker the

[5] It is of course impossible to know in advance how many plaintiffs will be in this situation when the legislature next meets. However, we know that as of July 15, 2021, 443 fully vaccinated persons in New Hampshire have contracted Covid-19, nine of whom have died. *See* http://indepthnh.org/2021/07/16/covid-19-cases-among-fully-vaccinated-people-on-the-rise-in-nh-9-deaths/. CDC guidelines continue to recommend that vulnerable persons, even if vaccinated, avoid indoor contact with unmasked, unvaccinated persons. *See* https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/underlying-conditions.html. Furthermore, recent research indicates that persons with certain medical conditions remain highly vulnerable to Covid-19 even when fully vaccinated. *See*, https://www.clinicalmicrobiologyandinfection.com/article/S1198-743X(21)00367-0/fulltext. All plaintiffs have at least one condition of vulnerability even when vaccinated, most have at least two, and one plaintiff

defense of legislative immunity, this Court will further the purpose of the doctrine by allowing Plaintiffs to legislate. *See Forrester*, 484 U.S. at 224 (Supreme Court has been "careful not to extend the scope of the [legislative immunity] protection further than its purposes require.").

In *Harwood*, this Court rejected the efforts of the lobbyist appellants when they sought to "raise the *specter* of a hypothetical legislature that votes to allow access to its chambers to members of only one race or to adherents of only one religion". 69 F.3d at 634 (emphasis added). Appellant legislators here raise no mere specter—they complain of a real barrier to actual meaningful access to fulfill their constitutional duties. A thorough review of relevant case law demonstrates that no other case exists where the doctrine of legislative immunity was used to shield the denial of access to members of the legislature itself based on an immutable characteristic such as race, gender, religion, or physical disability. While attempting to define the precise limits of what constitutes "extraordinary character" might be both exceedingly difficult and exceedingly unwise, it is clear that the denial by the Speaker of functional access to the legislative process to disabled legislators is unique and shocking.

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has four separate conditions that indicate continued vulnerability after vaccination.

As such, the Speaker's conduct in this case easily satisfies what the Supreme Court, this Court, and courts in other circuits contemplated when reserving the right to review legislative acts of "extraordinary character". To hold otherwise would be to grant unlimited power to a legislative majority to deny democracy to a minority of legislators through perversion of a discretionary judicial doctrine. Rather than a prudential means to promote functioning democracy, legislative immunity as employed by the Speaker would be transformed into a weapon of destruction aimed at the core of democracy.

b. Comity counsels this Court to reject absolute immunity for legislators and respect the guarantee of the right of the disabled to participate in the political process under the New Hampshire Constitution as New Hampshire courts have done.

There is nothing absolute about the level of immunity New Hampshire has chosen to afford legislators. While the State has recognized the need to provide some protections from the demands and distractions of litigation, it has always recognized that there are competing imperatives based in fundamental constitutional guarantees that must considered in analyzing where the ultimate public interest lies. While the cases have been considered under various doctrines, the New Hampshire Supreme Court has consistently held that where a fundamental right of a citizen is alleged to have been violated by a legislative act, the Courts must first determine whether values represented by the individual right outweigh those served promoted by immunity. *See discussion of Burt v. Speaker of the House*, 173 N.H. 522 (2020);

Hughes v. Speaker of the House, 152 N.H. 276 (2005); *Baines v. N.H. Senate President*, 152 N.H. 124 (2005) in OPENING BR. at 46-49 and REPLY BR. at 21-23.

In each of these cases, the New Hampshire Supreme Court has examined either legislative immunity (as embodied in the Speech and Debate Clause of Part One, Article 30 of the New Hampshire Constitution) or the closely related Separation of Powers doctrine (as embodied in Part One, Article 37). In each such case, those seeking to subject the Senate President or House Speaker to judicial review claimed that the President or Speaker had violated an individual constitutional right. And in each such case, the Court resolved the issue of individual constitutional rights before addressing whether the legislative actions were shielded from judicial review, making it clear its rejection of the notion that legislative acts are afforded absolute freedom from judicial review. The *Burt* opinion restated the Courts consistent position on judicial review of suits against legislators:

> However, "[o]ur conclusion that the constitution commits to the legislature [such] exclusive authority . . . does not end the inquiry into justiciability." *Horton v. McLaughlin*, 149 N.H. 141, 145 (2003). "The court system [remains] available for adjudication of issues of constitutional or other fundamental rights." *Id*. (quotation omitted). "While it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation." *Baines v. N.H. Senate President*, 152 N.H. 124, 129 (2005) (quotation omitted).

Burt, 173 N.H. at 525-526.

These cases demonstrate that New Hampshire has chosen not to allow insurmountable absolute defenses to insulate the legislature from judicial review. Rather, the people of New Hampshire have chosen to create protections for the legislature, but only to the degree that legislative actions do not infringe upon the fundamental rights of the people. While comity in a general sense might support judicial restraint in reviewing state legislative actions, true comity—respect for and deference to the considered judgments of the states—lies in honoring the wishes of those states which choose to allow limited judicial review. Even if every other state were to choose differently, true respect for comity and federalism would only be found in affirming, not abrogating, the decisions of the people of New Hampshire. New Hampshire has chosen both to limit the immunity granted to legislators and to explicitly guarantee the disabled access to the political process. Comity requires this Court to honor, not extinguish, these value judgments made by the people of New Hampshire.

Further, if this Court were to adopt the New Hampshire rule requiring a balancing of interests when a lawsuit against a legislator implicates other critical and fundamental rights, it would create a functional framework for the concrete application of the heretofore undefined "extraordinary character" limit on legislative immunity that has been contemplated and applied by other federal courts in resolving immunity issues. *See Harlow*, 457 U.S. at 813 ("The resolution of immunity

questions inherently requires a balance between the evils inevitable in any available alternative."); Gillock, 445 U.S. at 373 (resolving a personal immunity issue by balancing "important federal interests" against the immunity's "benefit to the state legislative process").

Alternatively, if this Court were to adopt the New Hampshire framework in this case only out of comity and respect for the approach the New Hampshire Supreme Court takes to considering the breadth of legislative immunity, comity itself could serve as a limiting principle where this Court would defer to the approach the state in which the question of legislative immunity arises. While other courts in other circumstances might set the bar higher than New Hampshire has, no court has ever allowed the doctrine of legislative immunity to be used to create a mortal threat to those who seek to serve the people. This Court should not be the first.

c. Neither the origin nor the function of the doctrine of legislative immunity would be served by its application in this case.

In *Romero-Barcelo v. Hernandez-Agosto*, this Court noted:

> Although not based on the doctrine of separation of powers, as is the constitutional immunity accorded Members of Congress, the state legislative immunity defense nonetheless implicates principles of comity and federalism . . . . Absolute legislative immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches.

75 F.3d 23, 28 (quoting *Agromayor v. Colbert*, 738 F.2d 55, 58-59 (1st Cir. 1984) (citing *United States v. Gillock*, 445 U.S. 360, 370-73 (1980)). *See also Harwood*, 69 F.3d at 628.

Use of absolute legislative immunity to shield the functional exclusion of legislators with disabilities that render them particularly vulnerable in a global pandemic not only fails to advance considerations of comity and function, but in truth operates to defeat each.

Legislative immunity is a discretionary judicial construct that should only be used when it advances the purposes for which it exists and promotes fundamental democratic rights. *Burns v. Reed*, 500 U.S. 478, 487 (1991) (Supreme Court has "refused to extend [absolute immunity] any further than its justification would warrant.") In this case, this Court should exercise its discretion to review the Speaker's extraordinarily discriminatory actions, thereby denying him the limitless power to exclude legislators who are members of protected classes and simultaneously upholding the underlying purpose of legislative immunity—to allow legislators to fulfill their constitutional duties of representing their constituents without fear of civil liability, criminal prosecution, or, in this case, death.

III. The nature of injunctive relief weighs against application of the immunity doctrine.

The rationales for immunity are especially dissociated from this case because this is an action for equitable relief, specifically a prospective injunction and

declaratory judgment. APP. at 42. An injunction is the mode of relief which infringes least on the purposes of legislative immunity.

Courts have long recognized that equitable relief may still be granted when other forms of relief are barred. *See Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975) ("[I]mmunity from damages does not ordinarily bar equitable relief as well."). Courts have reasoned that "injunctive relief against [a state official] raises concerns different from those addressed by the protection of [officials] from damages awards." *Pulliam v. Allen*, 466 U.S. 522, 537 (1984). As noted above, monetary liability is the primary worry of courts granting immunities. *Forrester*, 484 U.S. at 223; *Owen*, 445 U.S. at 655-56. Therefore, injunctive relief is less objectionable to courts considering immunity defenses than requests for money damages. *See Pulliam*, 466 U.S. at 537.

The willingness of courts to grant injunctive relief even when monetary damages are unavailable derives from the fundamental principle that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Prospective injunctions thus help ensure that Acts of Congress "remain the supreme law of the land," predominating over competing exercises of state power, even when damages remedies are unavailable. *Alden v. Maine*, 527 U.S. 706, 747 (1999); *Pulliam*, 466 U.S. at 537; *see also* U.S. CONST. Art. VI, cl. 2. In short: "[r]emedies designed to

end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Moreover, built-in limitations on the availability of equitable relief already "severely curtail the risk that [state officials] will be harassed and their independence compromised by the threat of having to defend themselves against suits by disgruntled litigants." *Pulliam*, 466 U.S. at 537-38. Specifically, equitable relief requires a showing of an inadequate remedy at law, a serious risk of irreparable harm that "outweighs any harm that would stem from granting injunctive relief," and "the public interest weighs in . . . favor" of the injunction. Id. at 537; *Largess v. Supreme Judicial Court*, 373 F.3d 219, 223 n.2 (1st Cir. 2004).

These requirements mitigate the risks of unreasonable judicial interference with government entities/officials. *See Pulliam*, 446 U.S. at 537-38. Therefore, the type of relief requested in this case greatly dilutes the policy justifications for applying legislative immunity. *Burns* at 487. Even if the Court were to find that other categories of relief under the ADA would be barred by the doctrine, injunctive relief under the ADA should not be.

IV. The Defendant cannot hold legislative immunity.

Finally, Plaintiffs continue to urge in the strongest terms possible: legislative immunity is wholly inapplicable in this matter, because it is an action against the

State, and legislative immunity is a personal immunity.[6] *See* OPENING BR. at 22-42; REPLY BR. at 3-14; *see also Wilson v. Houston Cmty. College Sys.*, 955 F.3d 490, 500 (5th Cir. 2020) ("[A]bsolute legislative immunity is a doctrine that protects individuals acting within the bounds of their official duties, not the governing bodies on which they serve. Thus, even if the actions of the state agency's members are legislative, rather than administrative, the state agency itself as a separate entity is not entitled to immunity for violation of the plaintiff's constitutional rights." (cleaned up)); *Sable v. Myers*, 563 F.3d 1120, 1123 (10th Cir. 2009). Thus, this Court can resolve this appeal without reaching the question of abrogation.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that this Court reaffirm the panel decision on its original grounds or other bases discussed herein, reverse the decision of the District Court, and remand for further proceedings.

[6] As the Plaintiffs discussed in their Reply Brief, there may be other barriers to the relief requested by the Plaintiffs, such as sovereign immunity and the reasonableness requirement of the ADA. *But see* William Goren, UNDERSTANDING THE ADA, *Legislative Immunity Trumps Everything* (Mar. 1, 2021) (criticizing District Court decision and stating: "There can be little doubt that sovereign immunity would be waived under the ADA and/or the Rehabilitation Act in this case. There also is little doubt that the plaintiffs would have a strong chance of prevailing on the merits . . . ."). Those questions, however, are not before this Court.

Respectfully Submitted,

NEW HAMPSHIRE DEMOCRATIC PARTY

By its attorneys

Dated: July 19, 2021

/s/ Amy Spencer

William E. Christie, Esq., Bar No. 84929
S. Amy Spencer, Bar No. 1180937
Shaheen & Gordon, PA
107 Storrs Street
PO Box 2703
Concord, NH 03302
(603) 225-7262
wchristie@shaheengordon.com
saspencer@shaheengordon.com

and

REP. ROBERT "RENNY" CUSHING (INDIVIDUALLY AND IN HIS CAPACITY AS MINORITY LEADER OF THE NH HOUSE OF REPRESENTATIVES), REP. DAVID COTE, REP. KENDALL SNOW, REP. KATHERINE ROGERS, REP. PAUL BERCH, REP. DIANE LANGLEY, REP. CHARLOTTE DILORENZO

By and through their attorneys

Dated: July 19, 2021

/s/ Paul Twomey

Paul Twomey, Bar No.: 16166
Twomey Law Office
P.O. Box 263
Epsom, NH 03234
(603) 568-3254
ptwomeylaw@gmail.com

Date: July 19, 2021

/s/ Israel Piedra

Israel F. Piedra, Esq., Bar No. 1198002
Welts, White & Fontaine, PC
29 Factory Street
Nashua, NH 03060
(603) 883-0797
ipiedra@lawyersnh.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this *En Banc* Brief complies with the type limitations in Rule 32(A)(5) and the word limitation set forth in Rule 32(A)(7)(B)(i). This Brief contains 6,626 words.

Date: July 19, 2021

/s/ S. Amy Spencer

S. Amy Spencer, Bar No. 1180937

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 by using the CM/ECF System. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by CM/ECF system: Anthony J. Galdieri, Samuel R.V. Garland, Jennifer Ramsey and Daniel E. Will, Thomas E. Chandler and Katherine E. Lamm.

DATED: July 19, 2021

/s/ S. Amy Spencer
S. Amy Spencer, Bar No. 1180937