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

MOTION TO STAY THE MANDATE AND JUDGMENT PENDING PETITION FOR CERTIORARI

Pursuant to Federal Rule of Appellate Procedure 41(d), the appellee, Sherman Packard, in his Official Capacity as Speaker of the New Hampshire House of Representatives, moves to stay the mandate and any corresponding entry of final judgment in relation to this appeal pending the filing of a petition for certiorari in the Supreme Court. Alternatively, the Speaker requests that the Court stay the issuance of the mandate (or the effect of any order directing such issuance) and any final judgment for a period of 21 days so that the Speaker can seek re-

lief from the Supreme Court. In support of this motion, the Speaker states as follows:

INTRODUCTION

1. The New Hampshire House of Representatives has adopted rules to govern House proceedings, including floor sessions of the full body. *See* 2021-2022 House Rules, As of April 15, 2021, *available at* https://www.gencourt.state.nh.us/house/abouthouse/houserules.htm (individual rules cited as "House Rule __"). House Rule 65 sets an order of precedence by which House procedures are derived. *See* House Rule 65. It states in full:

> Sources of Authority. The 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.

House Rule 65.

2. The plaintiffs, several members of the House, wish to participate remotely in House floor sessions. App. 139, 140, 144, 145, 148, 153, 155, 157. No constitutional provision addresses remote participa-

tion in House floor sessions by members of the House. App. 182. Similarly, no rule of the New Hampshire House permits remote participation in House floor sessions by House members. App. 182. Nor is there any custom, usage, or precedent of House members participating in House floor sessions remotely. App. 182. Indeed, even during the pandemic full sessions of the House have continued to occur in person. App. 261–263.

3. Accordingly, the 2020 edition of *Mason's Manual of Legislative Procedure* governs whether members of the House may participate in floor session remotely. *See* House Rule 65. On January 6, 2021, the New Hampshire House of Representatives voted 316 to 4 to adopt the 2020 edition of *Mason's Manual* as a parliamentary guide. App. 183. 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. Because no constitutional provision specifically authorizes remote participation in House floor sessions, App. 182, the House would need to pass a rule permitting such participation in order for it to be authorized under Section 786, *see* App. 189.

4. On two occasions, members of the House proposed rule amendments that would permit remote participation in floor sessions. App. 183, 184. On both occasions, the proposed amendments failed by majority vote. App. 183, 184. The plaintiffs nevertheless requested that the Speaker exempt them from Section 786 and allow them participate in floor sessions remotely as purported accommodations under the Americans with Disabilities Act and Rehabilitation Act. App. 139, 140, 144, 145, 148, 153, 155, 157. The Speaker indicated that he could not provide the plaintiffs with the exemptions they sought absent a rule authorizing him to do so. *See* Def.'s Br. at 5–6 (citing Calendar and Journal of 2021 Session, House Calendar, at 1, *available at* https://www.gencourt.state.nh.us/house/caljourns/calendars/2021/HC_10.pdf).

5. The plaintiffs filed suit, asserting official-capacity claims against the Speaker under, *inter alia*, Title II of the ADA and Section 504 of the Rehabilitation Act. App. 15. The plaintiffs simultaneously sought "emergency" injunctive relief. App. 109–137. After expedited briefing, the district court held an evidentiary hearing just four days after the plaintiffs filed their complaint. App. 5; Tr. 1. The district court denied the requested injunction, concluding that the Speaker enjoyed

absolute legislative immunity from the plaintiffs' claims. *See Cushing v. Packard*, No. 21-cv-147-LM, 2021 WL 681638 (D.N.H. Feb. 22, 2021).

6. The plaintiffs appealed, and this Court vacated the district court's order. *See Cushing v. Packard*, __ F.3d. __, 2021 WL 1310839, at *1 (1st Cir. Apr. 8, 2021). Relying on broad statutory language applying the ADA and Rehabilitation Act to "any State . . . government," the panel inferred that Congress intended both statutes to abrogate absolute legislative immunity. *Id.* at *4. The panel remanded the matter to the district court "with instructions to consider plaintiffs' substantive claims." *Id.* at *5. The panel also directed the district court to consider whether any of the plaintiffs' claims are moot. *See id.*

7. Because the panel's analysis conflicts with Supreme Court precedent and this case presents a question of exceptional importance, the Speaker has filed a petition for rehearing en banc. *See* Def.'s Pet. Reh'g En Banc (filed Apr. 19, 2021). The plaintiffs have filed an "emergency" motion asking this Court to "immediately" issue the mandate or, alternatively, to direct the district court to allow this matter to proceed before the en banc petition is resolved. *See* Pls.' Emergency Mot. Clarification (filed Apr. 16, 2021). The Speaker has objected to that motion.

See Def.'s Obj. Emergency Mot. (filed April 19, 2021). Both the Speaker's petition for rehearing en banc and the plaintiffs' "emergency" motion remain pending.

8. In the normal course, the mandate would not issue in this case, and the panel's judgment would accordingly not become final, until seven days after an order denying the Speaker's petition for rehearing en banc. *See* Fed. R. App. P. 41(b). In light of the plaintiffs' "emergency" motion, however, it is unclear whether the Court will wait for that normal period to expire. And if the Court denies the Speaker's petition for rehearing en banc, then the Speaker intends to file a petition for writ of certiorari in the Supreme Court.

9. Accordingly, the Speaker respectfully requests that this Court, to the extent it declines to rehear this case en banc, stay the mandate and any corresponding entry of final judgment pending the Speaker's filing of a petition for writ of certiorari. Alternatively, the Speaker requests that the Court stay the issuance of the mandate (or the effect of any order directing such issuance) and any final judgment for a period of 21 days from the date of any order denying the petition for rehearing en banc, so that the Speaker can seek relief from the Su-

preme Court. As discussed below, there is at least a reasonable probability that the Supreme Court will grant certiorari in this case and reverse the panel's judgment. The Speaker will also suffer irreparable harm absent a stay. The requirements for a stay pending a petition for certiorari are accordingly satisfied.

STANDARD OF REVIEW

10. To obtain a "stay of the mandate pending the filing of a petition for writ of certiorari in the Supreme Court," a movant "must show that the petition would present a substantial question and that there is good cause for the stay." Fed. R. App. P. 41(d)(1). "The inquiry contemplated by this rule 'focuses on whether the applicant has a reasonable probability of succeeding on the merits and whether the applicant will suffer irreparable injury.'" *United States v. Pleau*, 680 F.3d 1, 23 (1st Cir. 2012) (Torruella, J., dissenting) (quoting *McBride v. CSX Transp., Inc.*, 611 F.3d 316, 317 (7th Cir. 2010)). "To demonstrate a reasonable probability of success on the merits, the applicant must show a reasonable probability that four Justices will vote to grant certiorari and a reasonable possibility that five Justices will vote to reverse the judgment of the Court of Appeals.'" *Id.* (Torruella, J., dissenting) (bracketing

omitted) (quoting *McBride*, 611 F.3d at 317). "A showing of irreparable injury will generally be automatic from invocation of the immunity doctrine if the trial has begun or will commence during the pendency of the petitioner's appeal." *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982).

ARGUMENT

A. There is a reasonable probability that the Supreme Court will grant certiorari and reverse the panel's decision.

11. There is at least a reasonable probability that four Justices will vote to grant certiorari in this case. When reviewing a petition for writ of certiorari, the Supreme Court considers, *inter alia*, whether

> a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by [the Supreme] Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court.

Sup. Ct. R. 10(c). The panel's decision in this case satisfies both of these considerations.

12. The Supreme Court has emphasized that federal courts cannot infer the abrogation of common-law immunity doctrines from broad statutory language. *See, e.g.*, *Pulliam v. Allen*, 466 U.S. 522, 529 (1984); *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); *Supreme Court of Va. v.*

Consumers Union of U. S., Inc., 446 U.S. 719, 738–39 (1980) ("*Consumers Union*"); *Pierson v. Ray*, 387 U.S. 547, 555 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Rather, Congress must "specifically so provide[]" if it wishes to abrogate a common-law immunity. *Pierson*, 387 U.S. at 555. Put differently, "common-law principles of legislative and judicial immunity were incorporated into our judicial system" and "should not be abrogated absent clear legislative intent to do so." *Pulliam*, 466 U.S. at 529. As the Ninth Circuit has observed, these decisions establish 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).

13. The panel's decision in this case conflicts with the "clear statement rule" embodied in the Supreme Court's precedents. The panel did not identify anything in the statutory language or legislative history of the ADA or Rehabilitation Act clearly indicating that Congress affirmatively intended to permit suits challenging conduct within the sphere of legitimate legislative activity that absolute legislative immunity protects. *Cf. Consumers Union*, 446 U.S. at 738–39 (illustrating the type of legislative record required to find such an intent). The panel in-

stead concluded that Congress could rely on a "broad statement applying [the ADA and Rehabilitation Act] to state governments to abrogate . . . legislative immunity." *Cushing*, 2021 WL 1310839, at *4. The Supreme Court rejected this precise sort of analysis in favor of the clear statement rule. *See, e.g.*, *Tenney*, 341 U.S. at 376. Accordingly, the panel resolved this appeal "in a way that conflicts with relevant decisions of [the Supreme] Court." Sup. Ct. R. 10(c).

14. Additionally, the panel's decision reflects the first time *any* federal court has held that a congressional act abrogates legislative immunity. The panel itself acknowledged that it was reaching "a matter of first impression." *Cushing*, 2021 WL 1310839, at *3. And as a result of the panel's decision, no state, regional, or local actor in New Hampshire, Maine, Massachusetts, Rhode Island, or Puerto Rico enjoys legislative immunity on the broad swath of potential claims arising under the ADA or Rehabilitation Act. Nor can state entities such as state legislatures and their committees, state courts, and state agencies invoke legislative immunity in the face of such claims. *See Consumers Union*, 446 U.S. at 733–34. This case therefore does not present merely a limited dispute only affecting the interests of private parties. Rather, the

novelty of the panel's holding and its sweeping effect demonstrate that this case involves "an important question of federal law" that the Supreme Court should resolve. Sup. Ct. R. 10(c).

15. This is all the more true when considering that the panel's decision is in tension with those of several other federal courts. A number of courts, including the Ninth Circuit, have rejected similar arguments that other federal statutes abrogate legislative immunity.[1] Multiple federal courts, including at least two circuits (albeit one in an unpublished opinion), have likewise rejected arguments that the ADA and Rehabilitation Act abrogate other immunity doctrines, including the judicial and prosecutorial immunities derived from common law.[2] That the panel's analysis is at odds with the reasoning in these decision further illustrates that there is a reasonable probability that at least four Justices will vote to review this case. Sup. Ct. R. 10(c).

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[1] *See, e.g.*, *Chappell*, 73 F.3d at 919–25 (RICO); *Hispanos Unidos v. Gov't of U.S. Virgin Islands*, 314 F. Supp. 2d 501, 505 (D.V.I. 2004) (the Voting Rights Act); *Latino Pol. Action Comm., Inc. v. City of Bos.*, 581 F. Supp. 478, 483 (D. Mass. 1984) (same).

[2] *See, e.g.*, *Duffy v. Freed*, 452 F. App'x 200, 202 (3d Cir. 2011) (unpublished) (prosecutorial immunity); *Bartell v. Lohiser*, 215 F.3d 550, 555 n.1 (6th Cir. 2000) (qualified immunity); *Nemcik v. Fannin*, No. 18-cv-05120-JST, 2019 WL 720993, at *3 (N.D. Cal. Feb. 20, 2019), *aff'd*, 797 F. App'x 319 (9th Cir. 2020) (judicial immunity); *Stebbins v. Hannah*, No. 4:15-cv-00436-JLH-JJV, 2015 WL 5996295, at *3 (E.D. Ark. Sept. 1, 2015), *report and recommendation adopted*, No. 4:15-cv-00436-JLH-JJV, 2015 WL 5999787 (E.D. Ark. Oct. 14, 2015) (same).

16. For similar reasons, there is at least a reasonable probability that five Justices will vote to reverse the panel's judgment. That the panel's analysis directly conflicts with Supreme Court precedent alone demonstrates as much. Indeed, the Supreme Court reiterated as recently as 2012 that "[i]mmunities 'well grounded in history and reason' . . . were not somehow eliminated 'by covert inclusion in the general language' of § 1983." *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quoting *Tenney*, 341 U.S. at 376)). That unanimous decision, in which six current Justices joined, also favorably cited *Pierson*, *Briscoe*, and *Pulliam* for the proposition that the general language of § 1983 did not support an inference that Congress intended to abrogate long-established common-law principles. *See id.* at 361–62. As discussed, the panel's reliance on broad statutory language in this case conflicts with the clear statement rule set forth in *Pierson*, *Briscoe*, and *Pulliam*. There is accordingly reason to believe that a majority of the Court will reverse that decision.

17. Additionally, the Supreme Court has not hesitated to reverse lower-court judgments that fail to respect the robust protection legislative immunity provides against federal-court challenges to legitimate

legislative activities. In *Tenney*, the Court reversed the Ninth Circuit's conclusion that the plaintiff could bring claims against several state legislators under § 1983. *See* 341 U.S. at 371, 379. In *Consumers Union*, the Court vacated a fee award entered by a three-judge panel against the Supreme Court of Virginia to the extent it "center[ed] on the exercise or nonexercise of the state court's legislative powers." 446 U.S. at 739. In *Bogan v. Scott-Harris*, the Supreme Court reversed a decision of this Court that "erroneously relied on petitioners' subjective intent in resolving the logically prior question of whether their acts were legislative." 523 U.S. 44, 55 (1998). Given the anomalous nature of the panel's decision here, there is a reasonable probability that it will suffer the same fate.

18. It bears noting, too, that the Supreme Court's legislative immunity decisions routinely garner a broad majority of Justices from across the ideological spectrum. *Tenney* was decided by a vote of 8 to 1. *See* 341 U.S. at 369; *id.* at 379 (Black, J., concurring); *id.* at 381 (Douglas, J., dissenting). *Consumers Union* and *Bogan* were both unanimous decisions. *See Bogan*, 523 U.S. at 46; *Consumers Union*, 446 U.S. at

739.[3] Indeed, the closest split defense counsel have been able to find in a legislative immunity case is the 6 to 3 vote in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, in which the majority held that individual members of a local agency enjoyed absolute legislative immunity from damages claims for acts performed in a legislative capacity. *See* 440 U.S. 391, 402 –06 (1979); *id.* at 406 (Brennan, J., dissenting in part); *id.* at 406–08 (Marshall, J., dissenting in part); *id.* at 408–09 (Blackmun, J., dissenting in part). But even the dissenting Justices in that case appeared to take a broad view of the scope of immunity enjoyed by *state* legislators, with Justice Marshall specifically distinguishing *Tenney* on the basis that it did not involve local officials, *id.* at 406–07, and Justices Blackmun and Brennan indicating that they still would have applied a qualified legislative immunity to local actors, *id.* at 408–09. Each of these decisions therefore suggests that a broad coalition of Justices may be willing to reverse the panel's judgment.

19. For all of these reasons, the Speaker has a "reasonable probability of succeeding on the merits" in the event he files a petition for certiorari in this case. *Pleau*, 680 F.3d at 13 (Torruella, J., dissenting)

[3] Justice Powell did not take part in the *Consumers Union* decision. 446 U.S. at 739.

(quoting *McBride*, 611 F.3d at 317). The first requirement for a stay of the mandate is accordingly satisfied. *See id.*

B. The Speaker will suffer irreparable injury if the mandate and judgment are not stayed.

20. The Speaker will also "suffer irreparable injury" if the mandate and judgment are not stayed pending the filing of petition for writ of certiorari. *See Pleau*, 680 F.3d at 23 (Torruella, J., dissenting) (quoting *McBride*, 611 F.3d at 317). As noted, "[a] showing of irreparable injury will generally be automatic from invocation of the immunity doctrine if the trial has begun or will commence during the pendency of the petitioner's appeal." *McSurely*, 697 F.2d at 317. "[C]ompelling a public official to trial before the merits of an immunity defense are determined will generally constitute irreparable injury . . . because of the irretrievable loss of immunity from suit." *Id.* at 317 n.13. This is certainly true in the context of this case.

21. Legislative immunity "is intended not only to relieve defendants from liability, but also from the burden of having to defend themselves." *Agromayor v. Colberg*, 738 F.2d 55, 57 (1st Cir. 1984) (citations and quotation marks omitted). "[A] private civil action, whether for an injunction or damages, creates a distraction and forces legislators to di-

vert their time, energy, and attention from their legislative tasks to defend the litigation." *Consumers Union*, 446 U.S. at 733 (cleaned up). These burdens are only heightened in States like New Hampshire, "where the part-time citizen-legislator remains commonplace." *Bogan*, 523 U.S. at 52. Legislative immunity guards against such burdens by "afford[ing] protection not only from liability but from suit." *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 28 (1st Cir. 1996).

22. As with other immunity doctrines, the benefit legislative immunity confers "is for the most part lost as litigation proceeds past motion practice." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*, 506 U.S. 139, 145 (1993) (discussing Eleventh Amendment immunity and qualified immunity). As this Court has noted, the "intent [of legislative immunity] would be unprotected if a defendant must wait until after trial to appeal." *Agromayor*, 738 F.3d at 58. In the words of the Supreme Court, "[t]he privilege [is] of little value" when legislators are "subjected to the cost and inconvenience and distractions of a trial." *Tenney*, 341 U.S. at 377. This Court has accordingly long held that "the denial of a plausible claim of absolute legislative immunity is an immediately appealable 'final decision' under the collateral order doctrine in-

asmuch as one of the elements of the immunity is freedom from having to stand trial." *Krohn v. United States*, 742 F.2d 24, 27 (1st Cir. 1984) (internal citation omitted) (citing *Agromayor*, 738 F.2d 55).

23. Because the district court concluded that legislative immunity applies in this case, the panel's decision is the first time the Speaker has been denied the benefit of that immunity. If this Court declines to rehear this case en banc, then the only way the Speaker can seek review of that denial is through a petition for writ of certiorari in the Supreme Court. The panel remanded this matter to the district court "with instructions to consider the plaintiffs' substantive claims." *Cushing*, 2021 WL 1310839, at *5. If this remand goes into effect before the Supreme Court determines whether to review this case, then the Speaker will be forced to defend against the plaintiffs' claims on the merits. This will subject the Speaker to the "distraction" of "a private civil action" and force him to divert "time, energy, and attention from [his] legislative tasks to defend the litigation." *Consumers Union*, 446 U.S. at 733 (cleaned up). He will thus lose the very benefit that legislative immunity is designed to confer. *See Tenney*, 341 U.S. at 377; *Agromayor*, 738 F.3d at 58.

24. The plaintiffs' litigation strategy in this case only confirms as much. Despite not filing this lawsuit until nearly eleven months into the pandemic, the plaintiffs have filed "emergency" motion after "emergency" motion, seeking significant relief on an extraordinarily expedited basis. For instance, the plaintiffs accompanied their complaint with an "emergency motion for temporary restraining order and/or preliminary injunction" in which they requested "expedited consideration." *See* ECF Doc. No. 2 & 2-1. The district court held an evidentiary hearing just four days later. *See* App. 5; Tr. 1. On the day this appeal was docketed, the plaintiffs filed an "emergency motion to expedite appeal," even though expedited treatment was automatic under 28 U.S.C. § 1657(a). *See* Pls.' Emergency Mot. Expedite Appeal (filed April 5, 2021). The day after the panel issued its opinion, the plaintiffs filed an "emergency motion for expedited status conference" in the district court seeking a status conference the following Monday and requesting "immediate relief under the ADA and Rehabilitation Act," even though the mandate had not issued. ECF Doc. No. 33 ¶ 11. And when the Speaker indicated that he intended to invoke his procedural right to seek a rehearing en banc, the plaintiffs filed another "emergency motion" seeking "immediate re-

lief" from this Court, in which they expressed their intent to proceed "as quickly as possible" an "adjudication on the merits of this case." Pls.' Emergency Mot. Clarification ¶ 29.

25. These serial "emergency" motions make clear that, absent a stay, the plaintiffs intend to subject the Speaker to the burdens of defending against this litigation and, if possible, to obtain a decision on the merits before any petition for writ of certiorari is resolved. They also help ensure that "changing circumstances" will not "moot the plaintiffs' claims." *Cushing*, 2021 WL 1310839, at *5. To that end, plaintiffs' counsel have indicated to defense counsel that a small number of representatives will not be able to attend in-person sessions of the House regardless of their vaccination status. It is thus apparent that absent a stay, the Speaker will be required to defend this case on the merits, functionally losing any entitlement to legislative immunity that he might otherwise possess. *See Tenney*, 341 U.S. at 377; *Agromayor*, 738 F.3d at 58.

26. This case therefore presents a paradigmatic example of how a public official suffers "irreparable injury" due to "the irretrievable loss of immunity from suit." *McSurely*, 697 F.2d at 317 n.13. The second requirement for a stay of the mandate is accordingly satisfied. *See Pleau*,

680 F.3d at 13 (Torruella, J., dissenting) (citing *McBride*, 611 F.3d at 317).

CONCLUSION

27. To the extent the Court denies the Speaker's petition for rehearing en banc, it should stay the mandate and any corresponding entry of final judgment pending the filing of a petition for writ of certiorari in the Supreme Court. *See* Fed. R. App. P. 41(d)(1). Alternatively, the Court should stay the issuance of the mandate (or the effect of any order directing such issuance) for a period of 21 days from the date of any order denying the petition for rehearing en banc, so that the Speaker can seek relief from the Supreme Court.

WHEREFORE, the Speaker respectfully requests that this Honorable Court:

A. Stay the issuance of the mandate and any final judgment in this case pending the Speaker's petition for writ of certiorari;

B. Alternatively, stay the issuance of the mandate (or the effect of any order directing such issuance) and any final judgment by a period of 21 days from the date of any order denying the petition for rehearing en banc so that the Speaker can seek relief from the Supreme Court; and

C. Grant such other and further relief as the Court deems just and equitable.

Respectfully submitted,

JOHN M. FORMELLA, ATTORNEY GENERAL

Date: April 26, 2021

/s/Samuel Garland

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Date: April 26, 2021

/s/Samuel Garland
Samuel R.V. Garland