No. 21-1177

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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 House for the N.H. House of Representatives,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

This Court invited the United States to participate as amicus in this appeal, which concerns the applicability of Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794, to state legislative bodies and their officers.

The United States has considerable responsibility over the enforcement of Title II and Section 504. The Attorney General has authority to bring civil actions to enforce both statutes. See 42 U.S.C. 12133; 29 U.S.C. 794a. Congress also directed the Department of Justice to issue regulations implementing Title II, 42 U.S.C. 12134, and federal agencies to issue regulations implementing Section 504 with respect to programs or activities that receive federal financial assistance, 29 U.S.C. 794(a). Further, the Department is charged with coordinating executive agencies' implementation and enforcement of Section 504. See 28 C.F.R. Pt. 41 & App. A (Exec. Order 12,250 (Nov. 2, 1980)). Thus, the United States has a strong interest in ensuring the statutes are applied properly.

STATEMENT OF THE ISSUE

New Hampshire state legislators with disabilities that make them vulnerable to COVID-19 sued the Speaker of the New Hampshire House of Representatives in his official capacity under Title II and Section 504. They challenged the refusal to allow them to participate remotely in legislative sessions as a reasonable accommodation. The question presented is whether the common-law doctrine of legislative immunity bars this lawsuit.

STATEMENT OF THE CASE

1. Statutory Background

Title II of the ADA prohibits disability discrimination by public entities. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132.

As relevant here, the statute defines "public entity" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A)-(B). The Department of Justice, which Congress charged with issuing regulations implementing Title II, see 42 U.S.C. 12134, has explained in rulemaking and in guidance documents that Title II's coverage "includes activities of the legislative * * * branches of State and local governments." 28 C.F.R. Pt. 35, App. B, (Section 35.102 Application) (2011). See also U.S. Dep't of Justice, *ADA Title II Technical Assistance Manual* II-1.2000, https://www.ada.gov/taman2.html (referencing Title II's application to state legislatures). Congress also provided that states "shall not be immune under the eleventh amendment" for violations of the ADA, and that parties suing under the ADA may obtain the same remedies against the state as against any other public or private entity. 42 U.S.C. 12202; see

Tennessee v. *Lane*, 541 U.S. 509 (2004) (holding that Title II was a valid exercise of Congress' power under the Fourteenth Amendment with respect to access to the courts).

Title II was modeled closely on Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability "under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). Section 504 defines "program or activity" to include "all of the operations" of "a department, agency," or "other instrumentality of a State." 29 U.S.C. 794(b) and (b)(1)(A). The elements of claims under Title II and Section 504 are nearly identical, and courts generally apply precedent under one statute to cases involving the other. See, *e.g.*, *Theriault* v. *Flynn*, 162 F.3d 46, 48 n.3 (1st Cir. 1998); see also 42 U.S.C. 12201 (stating that unless otherwise provided, the same standards apply to the ADA as to the Rehabilitation Act and its implementing regulations). Acceptance of federal funds effectuates a waiver of sovereign immunity under Section 504. See 29 U.S.C. 794(a)-(b); 42 U.S.C. 2000d-7(a)(1).

Because Congress intended that Title II extend the reach of Section 504 to all state and local government programs, Title II sets forth only a general principle of nondiscrimination and instructs the Attorney General to flesh out the prohibition through regulations. See 42 U.S.C. 12132, 12134. The Title II regulations prohibit public entities from affording a qualified individual with a disability "an

opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others," or provide such persons "an aid, benefit, or service that is not as effective in affording equal opportunity" to gain the same result or benefit as that provided to others. 28 C.F.R. 35.130(b)(1)(ii)-(iii).

In order to provide that equal opportunity, a public entity "shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7)(i). Section 504 also requires recipients to make "reasonable accommodations" to individuals with disabilities so that they may access the benefits of a state's federally funded programs or activities. See *Alexander* v. *Choate*, 469 U.S. 287, 301 (1985). This case concerns that "reasonable accommodation" requirement.[1]

[1] We use the phrase "reasonable accommodation" to refer to both the "reasonable accommodation" and "reasonable modification" requirements of Section 504 and Title II, respectively, as the two terms are functionally the same. See, *e.g.*, *Nunes* v. *Massachusetts Dep't of Corr.*, 766 F.3d 136, 145 n.6 (1st Cir. 2014) (citations omitted); *Kiman* v. *New Hampshire Dep't of Corr.*, 451 F.3d 274, 283 n.9 (1st Cir. 2006) (citation omitted).

2. Factual Background

Plaintiffs-appellants are seven legislators elected to serve in the 400-member New Hampshire House of Representatives (House).[2] *Cushing* v. *Packard*, 994 F.3d 51, 52 (1st Cir. 2021) (withdrawn). Plaintiffs have conditions that make them vulnerable to serious illness or death from COVID-19, *ibid.*, and assert they are "qualified individuals" with disabilities under Title II and Section 504 (App. 32).[3] COVID-19 is highly transmissible in crowded, indoor venues. *Cushing*, 994 F.3d at 53.

Typically, the House meets in person approximately 20 times per year. *Cushing*, 994 F.3d at 52. During the course of the COVID-19 pandemic, some committee and caucus meetings were held via videoconferencing technology. *Ibid.* All full sessions of the House have been held in person. *Ibid.*

The House follows Mason's Manual of Legislative Procedure absent a controlling provision of the New Hampshire constitution or a House rule, custom, usage, or precedent. *Cushing*, 994 F.3d at 53. Mason's Manual Rule 786 prohibits remote participation in floor sessions unless authorized by the State constitution or

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[2] Plaintiffs-appellants all are members of the New Hampshire Democratic Party, which also is a plaintiff in the suit. Neither party affiliation nor the involvement of the New Hampshire Democratic Party is relevant to the resolution of the current appeal. References to "plaintiffs" in this brief pertain only to the individually-named plaintiffs.

[3] "App. __" refers to pages of the Joint Appendix.

the legislature's rules. *Ibid.* At the House's request, the New Hampshire Supreme Court issued an opinion holding that the State's constitution does not prohibit "holding a House session remotely, either wholly or in part, whereby a quorum could be determined electronically." *Opinion of the Justs.*, 173 N.H. 689, 691, 247 A.3d 831, 834 (2020). House members twice sought to amend the House rules to permit either remote participation in legislative sessions or holding the sessions as virtual meetings, but both amendments narrowly failed. *Cushing*, 994 F.3d at 53.

Plaintiffs requested as reasonable accommodations the Speaker's permission to participate remotely in a legislative session held in person, outdoors in January 2021. *Cushing*, 994 F.3d at 53; App. 31, 34-35, 46-50. The Speaker denied their requests. *Ibid.* Plaintiffs again sought to participate remotely in a legislative session held in person, indoors in February 2021. *Ibid.* The Speaker denied these requests as well. *Ibid.* The legislature will hold additional sessions in 2021. *Ibid.*

3. Procedural History

a. District Court Proceedings. Plaintiffs filed a complaint against the Speaker of the New Hampshire House in his official capacity in the U.S. District Court for the District of New Hampshire alleging that the Speaker's refusals to grant their reasonable accommodation requests violated Title II and Section 504. App. 15-44. Plaintiffs sought a declaratory judgment and an injunction allowing them to participate remotely in House sessions going forward. App. 42-43.

Plaintiffs simultaneously moved for a temporary restraining order or preliminary injunction compelling the Speaker to permit them and 23 other House members with serious medical conditions to participate remotely in upcoming House sessions. *Cushing* v. *Packard*, No. 21-cv-147, 2021 WL 681638 (D.N.H. Feb. 22, 2021). Plaintiffs argued that they were likely to succeed on the merits because they are qualified individuals with disabilities entitled to Title II's and Section 504's protections against discrimination, which includes the failure to provide reasonable accommodations. App. 123-124. They argued that remote participation was a reasonable accommodation because of their susceptibility to COVID-19, their important role in the democratic process, and the minimal burden imposed by remote participation. App. 126-129. They also challenged the Speaker's claim that a rule was needed to permit remote participation, as the Speaker claimed, arguing that the State constitution does not prohibit remote participation and the Supremacy Clause compels the Speaker to comply with the ADA. App. 129-130. Further, they argued that the Speaker's ad hoc decisions to conduct proceedings in alternative fashions during the pandemic created a custom of discretionary decisionmaking. App. 130-131.

In response, the Speaker asserted that legislative immunity bars plaintiffs' claims. App. 162-170. The Speaker principally relied on this Court's decision in *National Association of Social Workers* v. *Harwood*, 69 F.3d 622 (1st Cir. 1995),

which held that legislative immunity protected the Speaker and the doorkeeper of the Rhode Island House of Representatives from a suit challenging their enforcement of a rule banning lobbyists from the legislature's floor. App. 163-168. The Speaker argued that this case falls within *Harwood*'s principle that a legislature's regulation of its own activities is "part and parcel of the legislative process" and not subject to judicial review. App. 163-164 (quoting *Harwood*, 69 F.3d at 635). Thus, according to the Speaker, the court could not review his decision to follow the rule prohibiting remote participation in full legislative sessions. App. 165-167.

In reply, plaintiffs argued that legislative immunity is available only to individuals, and they had sued the Speaker in his official capacity—so the action lies against the State. App. 394-396. Plaintiffs also asserted that *Harwood* does not control because it was an action under 42 U.S.C. 1983 in which the defendants were effectively sued in their individual capacities, and distinguished a case on which *Harwood* relied, *Supreme Court of Virginia* v. *Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980). App. 396-397. Even if legislative immunity applied, plaintiffs argued, Congress' abrogation of state sovereign immunity in the ADA also abrogated state legislative immunity. App. 398-402. They also argued that the State had relinquished its immunities under Section 504 by accepting federal

funds through the Coronavirus Aid, Relief, and Economic Security (CARES) Act. App. 402.

Following a hearing, the parties submitted supplemental memoranda on legislative immunity. App. 408-423, 435-449. The Speaker reiterated the view that *Harwood* bars plaintiffs' claims, and also argued that legislative immunity applies to individuals sued in their official capacity. App. 409-418. The Speaker further argued that neither the ADA nor Section 504 abrogates legislative immunity. App. 419-421. Plaintiffs argued that their action is against the State, not the Speaker under *Ex parte Young*, whereby an official's actions are treated as distinct from the state and thus subject to federal judicial review notwithstanding the Eleventh Amendment. App. 435-446. Alternatively, plaintiffs reiterated their arguments regarding abrogation and waiver of state immunities under the ADA and Section 504, respectively. App. 446-449.

The district court denied plaintiffs' motion for preliminary relief, holding that "the Speaker is immune from plaintiffs' suit challenging his enforcement of a House rule that is closely related to core legislative functions." *Cushing*, 2021 WL 681638, at *7. The district court stated that it was bound by *Harwood*, which the court construed to hold that legislative immunity bars suit against an official who enforces a facially non-discriminatory rule that "bears upon its conduct of frankly

legislative business"—including "the very atmosphere in which lawmaking deliberations occur." *Id.* at *4 (quoting *Harwood*, 69 F.3d at 631, 633).

The district court also rejected plaintiffs' argument that legislative immunity does not apply because the suit is in fact against the State, stating that the doctrine "applies to acts, not actors," and that its goals—to spare legislators the distraction and cost of litigation—are served through its application here. *Cushing*, 2021 WL 681638, at *6. Further, the court rejected plaintiffs' argument that the ADA and Section 504 abrogate legislative immunity. *Ibid.*

b. The Panel Decision. Plaintiffs appealed, and a panel of this Court reversed. First, the panel stated that *Harwood* does not control. The panel explained that *Harwood* "would be more analogous" to the question here if the legislature "had barred lobbyists in wheelchairs from having access to the House" because that hypothetical would raise the issue whether Title II and Section 504 abrogate legislative immunity. *Cushing* v. *Packard*, 994 F.3d 51, 54 (1st Cir. 2021). That issue, the panel stated, was "not addressed at all" in *Harwood. Ibid.*

The panel then determined that Title II and Section 504 abrogate legislative immunity, expressly declining also to address plaintiffs' argument that the immunity does not apply because the suit lies against the State, not against a legislator. *Cushing*, 994 F.3d at 54-55 & n.2. The panel concluded that although the ADA does not mention legislative immunity, the statute's express application

to state governments evinced Congress' clear intent to abrogate the immunity and reach an entity such as the New Hampshire legislature. *Id.* at 55. The panel also concluded that by accepting federal funds—including CARES Act funding to support the legislative operations during the COVID-19 pandemic—New Hampshire had waived immunity under Section 504 as to its legislature. *Ibid.* Thus, the panel vacated the district court order and remanded for further proceedings. *Id.* at 56.

The Speaker petitioned for rehearing en banc, which this Court granted, withdrawing the panel opinion and vacating the judgment. *Cushing* v. *Packard*, No. 21-1177, 2021 WL 2216970 (1st Cir. June 1, 2021). The Court invited the United States to participate as amicus. *Ibid.*

SUMMARY OF ARGUMENT

There can be little question that Title II and Section 504 may provide avenues for plaintiffs to obtain declaratory and injunctive relief from the Speaker, in his official capacity, that would enable them to participate remotely in legislative sessions. The New Hampshire House of Representatives is subject to Title II because it is a public entity and to Section 504 because it has accepted federal financial assistance, including through the CARES Act. And both statutes contain antidiscrimination mandates that require covered entities to provide reasonable accommodations to qualified individuals with disabilities so that they

may access the entity's programs, services or activities as effectively as individuals without disabilities. Remote participation may be a reasonable accommodation given their susceptibility to COVID-19.

The Speaker is incorrect that legislative immunity protects his decision to require plaintiffs' in-person attendance—that is, to deny their requests for reasonable accommodation. Legislative immunity is a form of personal immunity for individual legislators, not a form of state sovereign immunity. Because plaintiffs' action here is against the House Speaker in his official (not individual) capacity, it lies against the State. A State entity, unlike an individual legislator, may not claim legislative immunity.

ARGUMENT

THE SPEAKER CANNOT INVOKE LEGISLATIVE IMMUNITY BECAUSE THIS ACTION LIES AGAINST THE STATE

A. Legislative Immunity

The doctrine of legislative immunity derives from the Speech or Debate Clause of the Constitution, see U.S. Const., Art. 1, § 6, Cl. 1 ("[F]or any Speech or Debate in either House, [members] shall not be questioned in any other [p]lace."). It confers absolute immunity on Members of Congress from suits challenging their performance of legislative functions. See *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501-502 (1975); *Gravel* v. *United States*, 408 U.S. 606 (1972). This immunity is not "simply for the personal or private benefit of

Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *Eastland*, 421 U.S. at 502 (quoting *United States* v. *Brewster*, 408 U.S. 501, 507 (1972)). It serves to reinforce separation of powers—shielding against "intimidation of legislators by the Executive and accountability before a possibly hostile judiciary"—while also protecting legislators against the disruption of defending against litigation. *Id.* at 502-503 (citation omitted); see also *Doe* v. *McMillan*, 412 U.S. 306, 311 (1973). The Supreme Court has held that legislative immunity also applies to state, regional, and local legislators sued under 42 U.S.C. 1983. *Bogan* v. *Scott-Harris*, 523 U.S. 44, 49 (1998) (citing, *inter alia*, *Tenney* v. *Brandhove*, 341 U.S. 367, 372-375 (1951) (applying the doctrine to state legislators)).

Legislative immunity applies to only a limited class of parties. The immunity shields *individuals* from personal liability when they are performing legislative functions. See *Forrester* v. *White*, 484 U.S. 219, 223 (1988); *Doe*, 412 U.S. at 318-319. The doctrine's purpose is to ensure that "the exercise of legislative discretion * * * not be inhibited by judicial interference or distorted by the fear of personal liability." *Bogan*, 523 U.S. at 52. It does not protect *the legislative body itself* as a government entity, as the weight of Supreme Court precedent discussing the immunity doctrine confirms. See *Board of Cnty. Comm'rs. Wabaunsee Cnty.* v. *Umbehr*, 518 U.S. 668, 677 n.* (1996); *Spallone* v.

United States, 493 U.S. 265, 278-280 (1990); *Kentucky* v. *Graham*, 473 U.S. 159, 167 (1985); *Owen* v. *City of Independence*, 445 U.S. 622, 638-650 (1980); but cf. *Supreme Court of Va.* v. *Consumers Union of the U.S.*, 446 U.S. 719, 734 (1980) (concluding that "the Virginia [Supreme] Court and its members are immune from suit when acting in their legislative capacity").[4]

Additionally, legislative immunity attaches only to acts that constitute legislative functions.[5] See *Consumers Union*, 446 U.S. at 731-737; see also *Forrester*, 484 U.S. at 224. The immunity reaches conduct that falls within the "sphere of legitimate legislative activity." *Eastland*, 421 U.S. at 501. It applies to activities that are "part and parcel of the legislative process." *National Ass'n of Social Workers* v. *Harwood*, 69 F.3d 622, 631 (1st Cir. 1995) (quoting *Gravel*, 408 U.S. at 626).[6] Lawmakers' "administrative or executive actions," however, do not

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[4] As discussed in greater detail below, we do not understand *Consumers Union* to alter the nature of the doctrine of legislative immunity by extending its protections to legislatures themselves. See pp. 18-21, *infra*.

[5] The United States takes no position on whether the challenged activity is a legislative function, as the Court need not reach that issue in order to resolve this appeal.

[6] The *Harwood* majority recognized that there might be some limit to the doctrine's sweep: conduct that is "so flagrantly violative of fundamental constitutional protections that traditional notions of legislative immunity would not deter judicial intervention." 69 F.3d at 634. The Court stated that conduct that is "invidiously discriminatory" would meet this standard, but did not provide further insight into the scope of this exception. *Id.* at 634-635.

receive the doctrine's protections. *Acevedo-Garcia* v. *Vera-Monroig*, 204 F.3d 1, 8 (1st Cir. 2000) (citing *Bogan*, 523 U.S. at 52-53); see also *Romero-Barcelo* v. *Hernandez-Agosto*, 75 F.3d 23, 29 (1st Cir. 1996).

Thus, legislative immunity shields only activities that are "an integral part of the deliberative and communicative processes by which" legislators participate in proceedings "with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters" in the legislature's jurisdiction. *Eastland*, 421 U.S. at 504 (quoting *Gravel*, 408 U.S. at 625). The Supreme Court "has been careful not to extend the scope of the protection further than its purposes require." *Forrester*, 484 U.S. at 224.

B. Legislative Immunity Does Not Apply Here Because This Is An Action Against The Speaker In His Official—Not Individual—Capacity, And Thus The Action Lies Against The State

1. In this case, legislative immunity presents no bar to relief because the action was brought against the State (via the Speaker in his official capacity), not against the Speaker in his individual capacity as a legislator. Plaintiffs filed this action against "Rep Sherman Packard[,] Speaker of the NH House of Representatives (in his official capacity only)." App. 15. A "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," and, thus, "it is no different from a suit against the State itself." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989)

(citing *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985); *Kentucky* v. *Graham*, 473 U.S. 159, 165-166 (1985); *Monell* v. *Department of Social Servs. of N.Y.*, 436 U.S. 658, 690 n.55 (1978)). For present purposes, then, this action is one against the State. So the question before this Court comes down to whether states are amenable to suit under Title II of the ADA and Section 504 of the Rehabilitation Act. They are.

This action falls within Title II's plain ambit because the State is a "public entity" subject to the statute's antidiscrimination mandate, 42 U.S.C. 12132. As the Second Circuit explained, with respect to ADA suits, "[t]he real party in interest in an official-capacity suit is the government entity. As a result, it is irrelevant whether the ADA would impose individual liability on the officer sued; since the suit is in effect against the 'public entity,' it falls within the express authorization of the ADA." *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 288 (2d Cir. 2003) (citation omitted), cert. denied, 541 U.S. 936 (2004). And because New Hampshire accepted federal funds that went, among other things, to supporting legislative operations during the COVID-19 pandemic, the State waived immunity under Section 504 as to those operations.

The district court incorrectly concluded, in effect, that legislative immunity applies to the legislature itself.[7] *Cushing*, 2021 WL 681638, at *6. As explained above, however, legislative immunity applies only to individual legislators, not to government entities. The doctrine derives from the Speech or Debate Clause, which pertains to the conduct of legislators. See U.S. Const., Art. 1, § 6, Cl. 1 ("[F]or any Speech or Debate in either House, [members] shall not be questioned in any other [p]lace."). At its core is the concern of "insuring the independence of *individual legislators*" from executive and judicial pressures and shielding them from distractions. *Eastland*, 421 U.S. at 502 (quoting *United States* v. *Brewster*, 408 U.S. 501, 507 (1972)) (emphasis added); see also *Doe*, 412 U.S. at 311; *Gravel*, 408 U.S. at 615-616. These aims do not support extension of the doctrine to bar a suit that lies against the State.

2. Correctly understood, the Supreme Court's decision in *Consumers Union* does not preclude this suit. The question in that case was "whether the Supreme Court of Virginia (Virginia Court) and its chief justice are officially immune from suit in an action brought under 42 U.S.C. § 1983 challenging the Virginia Court's

[7] The district court cited an out-of-circuit district court decision in a Section 1983 case for this proposition. *Cushing*, 2021 WL 681638, at *6 (citing *Hall* v. *Louisiana*, 974 F. Supp. 2d 944, 957 (M.D. La. 2013)). The decision has little persuasive value and appears to toggle inconsistently between discussing immunity available to "legislators" and "the Legislature." *Hall*, 974 F. Supp. 2d at 954-957.

disciplinary rules governing the conduct of attorneys."[8] 446 U.S. at 721. Virtually the entire discussion of legislative immunity in *Consumers Union* focused on the immunity of *individual* legislators. *Id.* at 731-733. Nevertheless, the Court had "little doubt that if the Virginia Legislature had enacted the State Bar Code," then "the legislature, its committees, or members * * * could successfully have sought dismissal on the grounds of absolute legislative immunity." *Id.* at 733-734. Thus, because the Virginia Court "and its members are the State's legislators for the purpose of issuing the Bar Code," they were entitled to legislative immunity. *Id.* at 734.

An important thing to note about *Consumers Union*, however, is that the party asserting legislative immunity was not the Commonwealth of Virginia; it was the Virginia Supreme Court. To return to the Supreme Court's hypothetical, there can be little doubt that if the Virginia Legislature had enacted the State Bar Code, and an aggrieved individual sued *the Commonwealth* to challenge the Code, that defendant could not invoke *legislative* immunity. To be sure, after *Will*, that individual could not use Section 1983 to sue the Commonwealth at all because "a State is not a person within the meaning of § 1983." 491 U.S. at 64. And before

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[8] The Court acknowledged that whether the Virginia Court was a proper defendant (as a "person" suable under Section 1983) had been questioned in lower-court proceedings, but was not raised before the Supreme Court. *Consumers Union*, 446 U.S. at 737 n.16.

Will, a nonconsenting state might have invoked its sovereign immunity under the Eleventh Amendment. But with respect to statutes that do properly authorize suits against a State, *Consumers Union* poses no bar to suing the State, even if it is read to bar naming the State legislature as a defendant. States are sued all the time for legislative enactments. Here, because Speaker Packard in his official capacity is the equivalent of the State of New Hampshire, not simply its State legislature, *Consumers Union* is inapposite.

Other Supreme Court decisions make clear that *Consumers Union* did not alter the core personal nature of the immunity by extending its application to governmental entities. In *Owen*, decided in the same term as *Consumers Union*, the Court discussed the historical unavailability of common-law immunities, including legislative immunity, to municipal corporations in holding that such entities are not entitled to qualified immunity based on officers' good faith in a Section 1983 action. 445 U.S. at 638-650. And in *Umbehr*, the Court stated that legislative immunity does not apply to defendants sued in their official capacities, as such immunity "extends to public servants only in their individual capacities" when sued under Section 1983. 518 U.S. at 677 n.* (citing *Leatherman* v. *Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 166 (1993) (emphasis omitted)); see also *Spallone*, 493 U.S. at 278-280 (in holding that local legislators were immune to sanctions for failure to vote for a bill, distinguishing between the

protection that legislative immunity affords to individual legislators but not to legislative bodies).

In short, as the Supreme Court explained in *Kentucky* v. *Graham*, "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." 473 U.S. at 167. Indeed, the *Bogan* Court later construed *Consumers Union* to stand for the proposition that "*officials* outside the legislative branch are entitled to legislative immunity when they perform legislative functions." 523 U.S. at 55 (emphasis added). This comports with the Court's expressed wariness to "extend the scope of the protection further than its purposes require." *Forrester*, 484 U.S. at 224.

3. Decisions the district court cited for the proposition that legislative immunity may attach in official-capacity suits seeking prospective injunctive relief do not compel a different result. *Cushing*, 2021 WL 681638, at *5 (citing *Consumers Union*, 446 U.S. at 731; *Church* v. *Missouri*, 913 F.3d 736, 754 n.3 (8th Cir. 2019); *State Emps. Bargaining Agent Coal.* v. *Rowland*, 494 F.3d 71, 88 (2d Cir. 2007); *Scott* v. *Taylor*, 405 F.3d 1251, 1255 (11th Cir. 2005); *Larsen* v. *Senate of Pa.*, 152 F.3d 240, 244, 254 (3d Cir. 1998), cert. denied, 525 U.S. 1145 (1999); *Risser* v. *Thompson*, 930 F.2d 549, 551 (7th Cir.), cert. denied, 502 U.S. 860 (1991); *Abick* v. *Michigan*, 803 F.2d 874, 876-878 (6th Cir. 1986)).

As plaintiffs argued, most of these cases—like *Consumers Union* and *Harwood*—are distinguishable in that they were brought under Section 1983 (which does not apply to states under *Will*) and rely on *Ex parte Young* to enable prospective injunctive relief against the individual officeholder where the state would be immune because of the Eleventh Amendment. See App. 442-446; Appellants' Opening Br. 36-39. The instant case, in contrast, involves claims under Title II and Section 504 that lie properly against the State (due to abrogation or waiver of sovereign immunity) via the Speaker as the State's agent. In any event, other than *Consumers Union* itself, these cases are not binding here.

Accordingly, the doctrine of legislative immunity has no application in this action because the State, which is the real party in interest, cannot claim it.[9]

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[9] Understanding that this is an action against the State and that the State cannot claim legislative immunity, the question may arise whether state sovereign immunity under the Eleventh Amendment nevertheless bars this action. But Congress in passing the ADA expressly abrogated that immunity, 42 U.S.C. 12202, and the Supreme Court has upheld this abrogation as a valid exercise of Congress' power to enforce the Fourteenth Amendment, as least in the context of physical access to judicial proceedings. *Tennessee* v. *Lane*, 541 U.S. 509 (2004). And states that accept federal funding waive immunity from suit under Section 504 of the Rehabilitation Act. 29 U.S.C. 794(a); 42 U.S.C. 2000d-7. Thus, neither legislative nor sovereign immunity hinders the federal courts from considering plaintiffs' claims. See *National Ass'n of the Deaf* v. *Florida*, 980 F.3d 763, 770-776 (11th Cir. 2020) (without mention of legislative immunity concerns, allowing Title II claims to proceed against the state of Florida, its legislative bodies, and their leaders in their official capacities because Title II validly abrogated sovereign immunity, and also permitting discovery on whether legislative defendants were subject to Section 504 based on acceptance of federal funds).

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation provided in this Court's Order of June 1, 2021, because it is 23 pages long.

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

s/ Katherine E. Lamm
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Date: July 30, 2021

CERTIFICATE OF SERVICE

I certify that on July 30, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that defendant in this case is a registered CM/ECF user and that service will be accomplished by the appellate CM/ECF system.

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