UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1177

ROBERT CUSHING, et al.

Plaintiffs-Appellants

v.

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

Defendant-Appellee

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

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BRIEF FOR APPELLEE SHERMAN PACKARD

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STATEMENT OF ISSUES

The New Hampshire House of Representatives (the "House") has adopted rules to govern House proceedings. *See* 2021-2022 House Rules, As of March 11, 2021 (individual rules cited as "House Rule __").[1] Those rules set an order of precedence by which House procedures are derived. House Rule 65. When a given procedure is not governed by a constitutional provision, another House Rule, or "[c]ustom, usage, and precedent," it "shall be derived" from the 2020 edition of *Mason's Manual of Legislative Procedure* ("*Mason's Manual*"). House Rule 65. On January 6, 2021, by a vote of 316 to 4, the House adopted 2020 edition of *Mason's Manual* as a parliamentary guide. App. 183.

Mason's Manual prohibits remote participation in House floor sessions "[a]bsent specific authorization by the constitution or adopted rules of the body." App. 189. Neither the New Hampshire Constitution nor the House Rules authorize remote participation in floor sessions. App. 182. Proposed rule amendments allowing for such participation have twice been put

[1] The 2021-2022 House Rules are available at www.gencourt.state.nh.us/house/abouthouse/houserules.htm.

to a vote before the full House and twice failed to pass. App. 182–184. The plaintiffs nonetheless asked the federal district court to intervene and issue a mandatory injunction requiring the Speaker of the House (the "Speaker") to allow them to participate remotely in House floor sessions.

The question presented is:

Does absolute legislative immunity bar the plaintiffs' claims?

STATEMENT OF CASE

I. Statement of the facts

Floor sessions of the House have historically occurred in person. App. 182. This has continued throughout the COVID-19 pandemic. In June 2020, the House twice convened in person at the hockey arena at the University of New Hampshire. App. 261–262. It did so again at that same arena in September 2020. App. 262. In December 2020, the House convened in person on an athletic field outside of the hockey arena. App. 263. And on January 6, 2021, the House convened in person in a parking lot at the University of New Hampshire, with members participating from their vehicles. App. 268, 384.

The New Hampshire Constitution vests the House with the power to determine its own "rules of proceedings." N.H. Const., pt. II, Art. 22. The New Hampshire Supreme Court has made clear that "the legislature, alone, has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure." *Starr v. Governor*, 154 N.H. 174, 178, 910 A.2d 1247, 1251 (2006) (citation omitted). While the

New Hampshire Supreme Court recently opined that "holding a session remotely, either in whole or in part, whereby a quorum could be determined electronically, would not violate Part II, Article 20" of the New Hampshire Constitution, *Opinion of the Justices*, __ N.H. __, __ A.3d __, 2020 WL 6750797, at *7 (Nov. 17, 2020), it noted that "it is within the competency of the [H]ouse to prescribe [the] method which shall be reasonably certain to ascertain the presence of a quorum," *id.* (cleaned up). The New Hampshire Supreme Court contemplated that the House would do so, if at all, through its constitutional rulemaking power. *Id.* (citing N.H. Const. pt. II, Art. 22).

The House Rules set an order of precedence by which House procedures are derived. *See* House Rule 65. When a given procedure is not governed by a constitutional provision, another House Rule, or "[c]ustom, usage, and precedent," it "shall be derived" from the 2020 edition of *Mason's Manual*. House Rule 65. On January 6, 2021, the House 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* prohibits remote participation in floor sessions of the House "[a]bsent specific authorization by the constitution or the adopted rules of the body." App. 189. The New Hampshire Constitution does not specifically authorize remote participation in House floor sessions, nor does any House Rule address this issue. App. 182. There is also no precedent for full sessions of the House being conducted remotely. App. 182. Indeed, as noted, the House has continued to conduct floor sessions in person even during the pandemic. App. 261–263.

On two occasions, proposed amendments allowing for remote participation in House sessions have been put to a vote before the full House. App. 183, 184; *see* App. 190–201 (House Journal No. 1, Journal of the Dec. 2, 2020 session); App. 202–259 (House Journal No. 2, Journal of the January 6, 2021 session). On both occasions, the proposed amendments did not pass. App. 183, 184, 190–259. The plaintiffs, who are each members of the House, have nonetheless requested that the Speaker allow them to attend and participate in future House sessions remotely. App. 139, 140, 144, 145, 148, 153, 155, 157. The Speaker has declined those requests,

noting that "[t]he House has not adopted a rule which allows it to meet remotely, either wholly or in part, and until such time as the members adopt such a rule, [the House is] obligated to meet in-person." Calendar and Journal of the 2021 Session, House Calendar No. 10, at 1.[2]

II. The district court proceedings.

The plaintiffs filed this action on February 15, 2021, asserting that the Speaker's failure to allow them to participate in House sessions remotely violated their rights under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Fourteenth Amendment to the United States Constitution, and Part I, Article 11 of the New Hampshire Constitution. App. 15. They asserted these claims solely against the Speaker in his official capacity. App. 15, 17. That same day, the plaintiffs filed an "emergency motion for temporary restraining order and/or preliminary injunction," accompanied by a 24-page memorandum of law. App. 109–137. In that motion, the plaintiffs asked the district court to issue a mandatory

[2] The February 5, 2021 House Calendar is available at https://www.gencourt.state.nh.us/house/caljourns/calendars/2021/HC_10.pdf.

preliminary injunction requiring the Speaker to allow them to participate remotely in the next House session, which was scheduled to begin just nine days later. App. 111.

The district court expedited the plaintiffs' request and directed that the Speaker file a response by 5:00 p.m. on February 18. App. 5. The district court scheduled a hearing for the morning of February 19. App. 5. The Speaker filed an objection to the plaintiffs' motion on February 18, arguing, among other things, that absolute legislative immunity barred the plaintiffs' claims. App. 158–180. The district court directed the plaintiffs to respond to that argument, if they wished, by 8:00 a.m. the following morning. App. 8. The plaintiffs filed a memorandum as directed. App. 393–404.

The hearing on February 19 proceeded as scheduled. *See* Tr. 1. At the hearing, the district court heard evidence and argument on the immunity issue and the merits of the plaintiffs' claims. *See generally* Tr. 1–125. At the end of the hearing, the district court directed the parties to file supplemental memoranda

on the legislative immunity issue by midnight the next day. Tr. 123–124. Both sides filed memoranda. *See* App. 408–449.

On February 22, 2021, the district court issued an order denying the plaintiffs' motion for a temporary restraining order or preliminary injunction. *See Cushing v. Packard*, No. 21-cv-147-LM, 2021 WL 681638 (D.N.H. Feb. 22, 2021). The district court concluded that the plaintiffs were not likely to succeed on the merits of their claims because those claims were barred by absolute legislative immunity. *Id.* at *3–7. In reaching this conclusion, the district court considered and rejected the plaintiffs' arguments for why legislative immunity did not apply. *See id.* This appeal followed.

SUMMARY OF ARGUMENT

This appeal presents a straightforward question: Does absolute legislative immunity bar an action challenging the enactment and enforcement of a procedural rule governing how state legislators participate in a legislative session? This Court's decision in *National Association of Social Workers v. Harwood*, 69 F.3d 622 (1st Cir. 1995) ("*Harwood*"), leaves no doubt that the answer is equally straightforward. In *Harwood*, this Court held that "[a] rule that colors the very conditions under which legislators engage in formal debate is indubitably part and parcel of the legislative process, and the acts of House officials (whether or not elected members) enforcing it are therefore fully protected against judicial interference by the doctrine of legislative immunity." *Id.* at 632. The district court faithfully applied this holding to the plaintiffs' claims and concluded that they were barred. *See Cushing*, 2021 WL 681638, at *3–6.

The district court also correctly concluded that those claims are barred under established Supreme Court precedent. The Supreme Court has made clear that absolute legislative immunity

"attaches to all actions taken in the sphere of legitimate legislative activity," *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998), and applies to both damages actions and those "seeking declaratory or injunctive relief," *Supreme Court of Va. v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 732 (1980) ("*Consumers Union*"). In *Consumers Union*, the Supreme Court unanimously held that a state supreme court and its chief justice were entitled to legislative immunity on claims challenging "the issuance of, or failure to amend," state-bar disciplinary rules. *Id.* at 734. The Supreme Court observed that if a state legislature had enacted the rules in question, "there is little doubt" that legislative immunity would bar a claim "brought against the legislature, its committees, or members for refusing to amend" those rules. *Id.* at 733–34.

In light of this observation, it is unsurprising that at least two other circuits have joined this Court in holding that legislative immunity bars challenges to the enactment and enforcement of legislative rules of procedure. *See Reeder v. Madigan*, 780 F.3d 799, 800–01 (7th Cir. 2015); *Consumers Union of U.S., Inc. v.*

Periodical Correspondents' Ass'n, 515 F.2d 1341, 1351 (D.C. Cir. 1975). It is likewise unsurprising that the plaintiffs have been unable to identify *any* case in which a federal court declined to apply legislative immunity to such a challenge. Instead, the plaintiffs pin their hopes here, as they did below, on an attempt to complicate the straightforward question this case presents. The district court rejected that attempt, and this Court should do the same.

Contrary to the plaintiffs' assertion, there is no material difference between an official-capacity claim for prospective relief brought under the ADA or Rehabilitation Act and one brought under 42 U.S.C. § 1983. In either scenario, the claim is not authorized by the statute itself and instead arises under the *Ex parte Young* doctrine. *See infra* Section II.B. Similarly, in either scenario the *Ex parte Young* doctrine presents an avenue for a plaintiff to maintain a claim that would be barred by the Eleventh Amendment if brought against an arm of the State. *See infra* Section II.B. The plaintiffs' efforts to distinguish their ADA and Rehabilitation Act claims on this basis accordingly fail.

As do their mid-stream attempts to recast this action as one against the State itself. The plaintiffs own filings belie any suggestion that they really meant to bring their ADA and Rehabilitation Act claims against anyone but the Speaker, and their theories and arguments below confirm that they did not. Moreover, the plaintiffs' decision to name only the Speaker as a defendant avoided Eleventh Amendment issues that would have arisen had they instead sued the State or one of its instrumentalities. There is simply no hint in the record that the plaintiffs intended to assert their ADA and Rehabilitation Act claims against the sovereign.

But it would not have mattered even if they had. As the district court noted, legislative immunity attaches to actions, not actors. *See Cushing*, 2121 WL 681638, at *6. The Supreme Court has thus made clear that legislative immunity extends to claims challenging legislative activities even when brought against a legislative body. *See Consumers Union*, 446 U.S. at 733–34. This Court has likewise emphasized that, "[a]s a rule, a *legislature's* regulation of the atmosphere in which it conducts its core

legislative activities—debating, voting, passing legislation, and the like—is part and parcel of the legislative process, and, hence, not subject to judicial veto." *Harwood*, 69 F.3d at 635 (emphasis added). In this case, the plaintiffs challenge how the House conducts its floor sessions. Legislative immunity bars this type of challenge no matter the defendant

The plaintiffs are also incorrect that the ADA and Rehabilitation Act abrogate legislative immunity. Initially, it is unclear whether Congress possesses the power to abrogate legislative immunity at all. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). But even if it does, legislative immunity is "a component of federal common law," *Harwood*, 59 F.3d at 629, which can only be abrogated when Congress "speak[s] directly to the question addressed," *United States v. Texas*, 507 U.S. 529, 534 (1993) (cleaned up). The district court correctly observed that neither the ADA nor the Rehabilitation Act speaks to legislative immunity. *See Cushing*, 2021 WL 681638, at *6. And any discussion of Eleventh Amendment immunity in those statutes is irrelevant, as the abrogation of legislative immunity involves a

separate inquiry. *See Consumers Union*, 446 U.S. at 738.

The plaintiffs' remaining arguments are nothing more than different shades of the well-worn contention that legislative immunity should not apply to claims involving important federal rights. Courts have consistently rejected this assertion. For instance, the Supreme Court held in *Consumers Union* that legislative immunity barred a constitutional challenge to a disciplinary rule even though that rule almost certainly violated the First Amendment. *See id.* at 733–34. In *Harwood*, this Court held that legislative immunity barred a constitutional challenge to a legislative rule that "may arguably be wrong as a matter of policy and as a matter of constitutional law." 69 F.3d at 634. As this Court observed, even "rigorous" constitutional scrutiny must give way in the face of legislative immunity. *Id.* at 635 n.13. If legislative immunity extends even to otherwise viable constitutional claims, then there is no reason why it should topple at the mere invocation of the ADA or Rehabilitation Act.

There is, accordingly, no principled basis for this Court to reverse the district court's order in this case. The application of

legislative immunity to the plaintiffs' claims is straightforward and controlled by binding precedent. Like the district court, this Court should apply that precedent and conclude that the plaintiffs' claims are barred. The Court should accordingly affirm the district court's well-reasoned order.

STANDARD OF REVIEW

"When evaluating the denial of a preliminary injunction, [this Court's] review is for abuse of discretion. *Akebia Therapeutics, Inc. v. Azar*, 976 F.3d 86, 92 (1st Cir. 2020). The Court "review[s] the district court's answers to legal questions de novo, factual findings for clear error, and judgment calls with some deference to the district court's exercise of discretion." *Id.*

The preliminary-injunction standard has four elements: "the movant's likelihood of success on the merits"; "whether and to what extent the movant will suffer irreparable harm if injunctive relief is withheld"; "the balance of hardships as between the parties"; and "the effect, if any, that the issuance of an injunction (or the withholding of one) will have on the public interest." *Id.* The most important of these elements "is whether the movant has demonstrated a likelihood of success on the merits," which this Court has described "as the 'sine qua non' of the preliminary injunction inquiry." *Id.* (citation omitted). "If the movant fails to demonstrate a likelihood of success on the merits, the remaining elements are of little consequence." *Id.*

In this case, the district court concluded that the plaintiffs were not likely to succeed on the merits of their claims because those claims are barred by legislative immunity. *Cushing*, 2021 WL 681638, at *3, 7. The district court denied the plaintiffs' request for a temporary restraining order or preliminary injunction on this basis and did not consider the other factors. *See id.* This Court's inquiry is therefore a limited one: whether the district court correctly applied legislative immunity to bar the plaintiffs' claims. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is a general rule . . . that a federal appellate court does not consider an issue not passed upon below.").

ARGUMENT

I. Absolute legislative immunity bars the plaintiffs' claims.

A. Legislative immunity generally.

"A defense of absolute legislative immunity for state legislators has been recognized since 1951." *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 28 (1st Cir. 1996) (citing, *inter alia*, *Tenney*, 341 U.S. 367). Legislative immunity is "a component of federal common law" that is, at least in the civil context, "essentially coterminous" with the immunity conferred by the Speech or Debate Clause. *Harwood*, 69 F.3d at 629 (citing *Consumers Union*, 446 U.S. at 732–33). It derives from an understanding that, "[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by fear of personal liability." *Bogan*, 523 U.S. at 52. Put differently, legislative immunity "allows [legislators] to focus on their public duties by removing the costs and distractions attending lawsuits" and "shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *E.E.O.C. v.*

Wash. Suburban Sanitary Comm'n, 632 F.3d 174, 181 (4th Cir. 2011).

Legislative immunity thus "affords protection not only from liability but from suit." *Romero-Barcelo*, 75 F.3d at 28. It extends to "suits for either prospective relief or damages." *Harwood*, 69 F.3d 630 (quoting *Consumers Union*, 446 U.S. at 731). Because the purpose of legislative immunity "is to insure that the legislative function may be performed independently without fear of outside interference," it protects legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Consumers Union*, 446 U.S. at 731–32. It is "not afforded 'simply for the personal or private benefit of [a legislator], but to protect the integrity of the legislative process by insuring the independence of individual legislators.'" *Harwood*, 69 F.3d at 629 (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972)).

Accordingly, legislative immunity does turn on the role of the defendant, but rather "attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan*, 523 U.S. at 54

(citations and quotation marks omitted). The operative question when legislative immunity is raised is whether the challenged conduct was legislative in nature. *See id.* When a plaintiff challenges a legitimate legislative activity, legislative immunity applies regardless of whether the claims in question were "brought against the legislature, its committees, or members." *Consumers Union*, 446 U.S. at 733–34.

"Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54. A court may not inquire into a legislator's "subjective intent in resolving the logically prior question of whether his acts were legislative." *Id.* A court must instead determine "whether, stripped of all considerations of intent or motive, [the challenged] actions were legislative." *Id.* If they were, the inquiry ends and the claims are barred. *See id.*

B. *Harwood* and *Consumers Union* control the outcome of this case.

In light of this overview, it is difficult to conceive how the plaintiffs' claims—which functionally challenge the enactment and enforcement of a rule governing how the House conducts its

floor sessions—could ever fall beyond legislative immunity's reach. This Court's decision in *Harwood* and the Supreme Court's decision in *Consumers Union* confirm that they do not.

Harwood involved a challenge to a Rhode Island House Rule that "purport[ed] to ban both lobbyists and lobbying from the floor of the House while the House [was] in session." 69 F.3d at 625. The plaintiffs brought official-capacity claims against the Speaker of the Rhode Island House and its doorkeeper. App. 427. After the district court ruled largely for the plaintiffs, the Speaker and doorkeeper raised legislative immunity for the first time on appeal. *See Harwood*, 69 F.3d at 625. This Court invoked its discretion to consider the issue, which it noted "implicate[d] matters of great public moment, and touche[d] upon policies as basic as federalism, comity, and respect for the independence of democratic institutions." *Id.* at 628.

This Court emphasized that legislative immunity attaches to actions that are "'an integral part of the deliberative and communicative processes by which [legislators] participate in . . . House proceedings with respect to the consideration and

passage or rejection of proposed legislation or with respect to other matters [committed to their jurisdiction]." *Id.* at 632 (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)) (brackets in *Harwood*). The Court believed it to be "transparently clear" that "a procedural rule adopted by a house of the legislature as a whole for the management of its own business" constitutes a legislative act. *Id.* at 632 n.9. The Court likewise felt it "beyond serious dispute that enforcing a duly enacted legislative rule which prohibits lobbying on the House floor during House sessions is well within the legislative sphere" because it "necessarily affects the manner in which the House conducts its most characteristic legislative functions, *e.g.*, debating and voting." *Id.* at 632.

The Court thus reasoned that "[a] rule that colors the very conditions under which legislators engage in formal debate is indubitably part and parcel of the legislative process, and the acts of House officials (whether or not elected members) enforcing it are therefore fully protected against judicial interference by the doctrine of legislative immunity." *Id.* (citations omitted). The Court emphasized that when "a legislative body adopts a rule, not

invidiously discriminatory on its face, . . . that bears upon its conduct of frankly legislative business, . . . the doctrine of legislative immunity must protect legislators and legislative aides that do no more than carry out the will of the body by enforcing the rule as part of their official duties." *Id.* The Court accordingly held that, "[a]s a rule, a legislature's regulation of the atmosphere in which it conducts its core legislative activities—debating, voting, passing legislation, and the like—is part and parcel of the legislative process, and, hence, not subject to judicial veto." *Id.* at 635. The Court concluded that both the challenged rule, "and the defendants' actions in interpreting it and enforcing it, fit within the sweep" of legislative immunity, thus "requir[ing] that the federal courts refuse to entertain the suit." *Id.*

The same is true in this case. The House, by a vote of 316 to 4, adopted a rule prohibiting remote participation in floor sessions. App. 183. This rule, even more so than the one at issue in *Harwood*, "necessarily affects the manner in which the House conducts its most characteristic legislative functions, *e.g.*, debating and voting." 623 F.3d at 632. The adoption of "a procedural

rule . . . by the house of a legislature as a whole for the management of its own business" plainly "comprises a legislative act." *Id.* at 632 n.9. Accordingly, the rule itself, "and the [Speaker's] actions in interpreting and enforcing it," are protected by legislative immunity and are not subject to challenge in federal court. *Id.* at 635.

Harwood is binding precedent under the law-of-the-circuit doctrine. *See, e.g.*, *United States v. Mendoza*, 963 F.3d 158, 163 (1st Cir. 2020) (noting that a subsequent panel is "bound by prior panel decisions that are closely on point" (cleaned up)). And its holding is manifestly correct. At least two other circuits have similarly held that absolute legislative immunity bars challenges to the enactment and enforcement of a legislative body's rules. In *Reeder v. Madigan*, the Seventh Circuit held that legislative immunity barred a lawsuit against the Illinois Speaker of the House and Senate President challenging the denial of media credentials under Illinois House and Senate Rules. *See* 780 F.3d at 800–01. Similarly, in *Consumers Union of U. S., Inc. v. Periodical Correspondents Association*, the D.C. Circuit held that

enforcement of "internal rules of Congress validly enacted under authority specifically granted to the Congress and within the scope of the authority appropriately delegated to it" is entitled to immunity under the Speech or Debate Clause. 515 F.3d at 1351.

The plaintiffs have not identified any case that calls these holdings into question. Rather, to their credit, the plaintiffs appear to acknowledge that *Harwood* poses a significant obstacle to their claims. *See* Pls.' Br. 38. The district court correctly concluded that this was an obstacle the plaintiffs could not overcome. This Court should reach the same conclusion and affirm the district court's order.

While *Harwood* is dispositive, the Supreme Court's decision in *Consumers Union* also leaves no daylight for reversal in this case. *Consumers Union* involved challenges to the Supreme Court of Virginia's disciplinary rules brought against, among others, the court itself "and its chief justice in his official capacity." *See* 446 U.S. at 721. Equating the legislative immunity afforded under federal common law to that conferred under the Speech or Debate Clause, the Supreme Court emphasized that legislators "should be

protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Id.* at 732 (cleaned up).

The Supreme Court noted that its holding in *Tenney v. Brandhove*—which first extended legislative immunity to claims for damages against state legislators, 341 U.S. at 379—applied equally to actions "seeking declaratory or injunctive relief." *Consumers Union*, 446 U.S. at 732. The Supreme Court emphasized that "a private civil action, whether for an injunction or damages, creates a distraction and forces legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Id.* at 733 (cleaned up). The Court reasoned that

> there is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members for refusing to amend the Code in the wake of [recent] cases indicating that the Code in some respects would be held invalid, the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity.

Id. at 733–34. Based on this reasoning, the Supreme Court held that "the Virginia Court and its members are immune from suit when acting in their legislative capacity." *Id.* at 734.[3]

In other words, the Supreme Court reached its holding in *Consumers Union* by *extending* reasoning that it thought clearly applied to claims against a state legislature or its members to those brought against a state court and one of its officers. *See id.* at 732–34. This is in keeping with the Court's prior suggestion that legislative immunity is at its apex in cases involving the legislature itself. *See Tenney*, 341 U.S. at 378 (noting that legislative immunity deserves "greater respect" in a case "in which the defendants are members of a legislature"). It stands to reason, then, that the holding in *Consumers Union* would apply with arguably greater force to claims brought against a legislature or legislator. This case presents such claims.

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[3] The Supreme Court further held that absolute legislative immunity did not extend to the enforcement of the challenged rules through disciplinary proceedings, as that was a *prosecutorial*, not legislative, function. *See Consumers Union*, 446 U.S. at 735–36. The plaintiffs do not advance any similar argument in this case, and it would fail in any event, as enforcing a legislative rule that regulates the "atmosphere in which [a legislative body] conducts its core legislative activities—debating, voting, passing legislation, and the like—is part and parcel with the legislative process, and, hence, not subject to judicial veto." *Harwood*, 69 F.3d at 635.

Again, the House adopted, by an overwhelming majority of the full body, a rule prohibiting remote participation in floor sessions. App. 183. Proposed rule amendments allowing for remote participation in floor sessions have twice been put to a vote before the full House and have twice failed to pass. App. 182–184. Thus, through this action, the plaintiffs effectively request that the federal judiciary overrule "the issuance of, or failure to amend," the current prohibition. *Consumers Union*, 446 U.S. at 734. There is simply no way to reconcile such a remedy with the reasoning employed in *Consumers Union*, and this Court, like the district court, is bound to follow the Supreme Court's "directly applicable precedent." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 59 (1st Cir. 1999) (citations omitted), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

In sum, *Harwood* and *Consumers Union* are binding on this Court and control the outcome of this appeal. These decisions, whether taken in isolation or together, compel the conclusion that legislative immunity bars the plaintiffs' claims. The district court correctly concluded as much when denying the plaintiffs' motion

for a temporary restraining order or preliminary injunction. This Court should reach the same conclusion and affirm the trial court's decision.

II. The plaintiffs' attempts to complicate an otherwise straightforward issue lack merit.

A. Legislative immunity extends to official-capacity claims for prospective relief.

The plaintiffs argued below that legislative immunity does not apply to claims brought against a state official in his or her official capacity. *E.g.*, App. 394–398. On appeal, the plaintiffs appear to abandon this categorical argument, and instead attempt to distinguish official-capacity claims brought under the ADA and Rehabilitation Act from those brought under § 1983. *See* Pls.' Br. 23–42. While unavailing, *see infra* Sections II.B & II.C, this pivot is understandable. There is overwhelming support for the proposition that legislative immunity extends to official-capacity claims.

As the district court observed, this Court "explicitly stated in *Harwood* that legislative immunity applies regardless of whether the plaintiff seeks prospective relief or damages." *Cushing*, 2021

WL 681638, at *5 (citing *Harwood*, 69 F.3d at 630). The PACER docket for the district court proceedings in *Harwood* indicates that both the Speaker and the doorkeeper were named in their official capacities. App. 424. *Consumers Union* likewise involved claims brought against the Supreme Court of Virginia "and its chief justice *in his official capacity*." 446 U.S. at 721 (emphasis added). Tellingly, no judge or Justice in either case thought the distinction between individual- and official-capacity claims significant enough for legislative-immunity purposes to even comment upon it.

To the contrary, *Harwood* and *Consumers Union* are replete with language suggesting that the rationale underpinning legislative immunity comfortably extends to official-capacity claims. For instance, in *Consumers Union*, the Supreme Court emphasized that the purpose of legislative immunity "is to insure that the legislative function may be performed independently without fear of outside interference." 446 U.S. at 731. The Court thus noted that legislators are protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Id.* at 732. The Court made clear that it

was not contemplating merely the pecuniary burden of mounting a defense, but more generally the fact that "a private civil action, whether for an injunction or damages, creates a distraction and forces legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Id.* at 733 (cleaned up).

Similarly, this Court noted in *Harwood* that immunity under the Speech or Debate Clause "is not afforded '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.'" 69 F.3d at 630 (quoting *Brewster*, 408 U.S. at 507). This Court observed that immunity under the Speech or Debate Clause and absolute legislative immunity are "essentially coterminous." *Id.* at 629. The Court further noted that legislative immunity attaches to acts a legislator or legislative aide "performs in his official capacity," so long as those acts involve "'purely legislative activities.'" *Id.* at 630 (quoting *Brewster*, 408 U.S. at 512). And in her dissenting opinion, Judge Lynch observed that legislative immunity "is not

simply a defense to liability but it is also an immunity from suit," *id.* at 639 (Lynch, J., dissenting), an observation this Court has subsequently reaffirmed, *see Romero-Barcelo*, 75 F.3d at 28 (noting that legislative immunity "affords protection not only from liability but from suit").

These statements make clear that legislative immunity protects legislators from having to defend against *all* lawsuits challenging their legitimate legislative activities, regardless of how they are sued or what relief is sought. Any conclusion to the contrary would blow a sizable hole in the protection legislative immunity confers. As the Third Circuit has observed, lawsuits seeking prospective relief against state legislators for acts undertaken in their legislative capacities are "of necessity against [those legislators] in their official capacities." *Larsen v. Senate of Com. of Pa.*, 152 F.3d 240, 254 n.5 (3d Cir. 1998). Yet it is only to acts performed in a legislative capacity that legislative immunity attaches in the first place. *See Bogan*, 523 U.S. at 54. Thus, if legislative immunity did not apply to official-capacity claims, it would functionally never apply to a claim against a legislator for

declaratory or prospective injunctive relief. Such a scenario is incompatible with *Consumers Union*. *See* 446 U.S. at 732.

It bears noting, too, that every other circuit to have considered the issue has held or strongly implied that legislative immunity extends to official-capacity claims for prospective relief.[4] The district court correctly observed as much in its decision. *See Cushing*, 2021 WL 681638, at *5. The plaintiffs have not identified *any* court of appeals decision that takes a contrary position. And the closest thing defense counsel have found is an offhand statement in an Eighth Circuit opinion that legislative immunity is a personal defense, *see Roach v. Stouffer*, 560 F.3d 860, 870 (8th Cir. 2009), which the Eighth Circuit has subsequently disavowed as inconsistent with *Consumers Union*, *see Church v. Missouri*, 913 F.3d 736, 754 n.3 (8th Cir. 2019).[5]

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[4] *See, e.g.*, *Church v. Missouri*, 913 F.3d 736, 753–54 (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, 1254 (11th Cir. 2005); *Larsen*, 152 F.3d at 253 & n.2; *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991); *Alia v. Mich. Sup. Ct.*, 906 F.2d 1100, 1102 (6th Cir. 1990).

[5] The statement in *Roach* was based on language in the Second Circuit's decision in *Almonte v. City of Long Beach*, 478 F.3d 100, 106 (2d Cir. 2007), and dictum in the Supreme Court's decision in *Kentucky v. Graham*, 473 U.S. 159 (1985). *See Roach*, 560 F.3d at 870. The Second Circuit has since limited *Almonte* to claims brought against *local* officials, *see State Emps. Bargaining*

The circuits thus take a consensus view that legislative immunity extends to claims for prospective relief brought against state officials in their official capacities. This consensus confirms that *Harwood* and *Consumers Union*, which are in any event controlling on this issue, are by no means outliers. Nor was the district court's decision below. This Court should affirm that decision.

B. *Ex parte Young* governs official-capacity claims for prospective relief under the ADA and Rehabilitation Act.

Against this overwhelming wave of authority, the plaintiffs seek refuge in the ADA and Rehabilitation Act. They contend that *Harwood*, *Consumers Union*, and the other cases cited above involved claims for prospective relief under § 1983, which, because the State and its instrumentalities retain Eleventh Amendment immunity under § 1983, could only be brought as official-capacity claims under the *Ex parte Young* doctrine. They contend that because the ADA and Rehabilitation purport to abrogate Eleventh Amendment immunity, an official-capacity claim brought under

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Agent Coal. v. Rowland, 494 F.3d 71, 86 (2d. Cir. 2007) ("*Rowland*"), and, as discussed below, numerous courts have rejected similar *Graham*-based attempts at limiting *Consumers Union*, *see infra* II.C.

either provision is in fact a claim against the sovereign itself. They thus argue that, while legislative immunity might extend to a § 1983 claim brought against a state official under *Ex parte Young*, it does not apply outside of that context.

This argument fails for several reasons, not least of all because it is based on a false distinction. While this Court does not appear to have addressed the question, *every* other numbered circuit has held that an official-capacity claim for prospective relief brought under the ADA or Rehabilitation Act *is* a claim brought pursuant to *Ex parte Young*.[6] These holdings are in keeping with the Supreme Court's conclusion that Title I of the ADA can be enforced "by private individuals in actions of injunctive relief under *Ex parte Young*." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (citation omitted) ("*Garrett*"). They are also consistent with this Court's

[6] *See Nat'l Ass'n of the Deaf v. Fla.*, 980 F.3d 763, 774 (11th Cir. 2020); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 496 (4th Cir. 2005); *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 606 (7th Cir. 2004); *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 414 (5th Cir. 2004); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 289 (2d Cir. 2003); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1187 (9th Cir. 2003); *Koslow v. Commonwealth of Pa.*, 302 F.3d 161, 179 (3d Cir. 2002); *Carten v. Kent State Univ.*, 282 F.3d 391, 396 (6th Cir. 2002); *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1233 (10th Cir. 2001); *Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001).

conclusion that *Ex parte Young* provides an avenue for private individuals to enforce other federal statutes through claims for prospective injunctive relief. *See, e.g.*, *Rosie D. ex rel. John D. v. Swift*, 310 F.3d 230, 237, 237 n.6 (1st Cir. 2002) (concluding that the Medicaid Act, insofar as it provides a private right of action, can be enforced through a claim for prospective injunctive relief under *Ex parte Young*).

That official-capacity claims for prospective relief under the ADA or Rehabilitation Act would arise, if at all, under the *Ex parte Young* doctrine makes sense for several reasons. For one, such a claim—like one brought under § 1983—seeks a remedy that is not available under the terms of the statute itself. Title II of the ADA and Section 504 of the Rehabilitation Act provide for remedies against *entities*, not people. *See* 29 U.S.C. § 794(a)–(b); 42 U.S.C. § 12132. Courts have therefore consistently held that "neither Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials." *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 380 F.3d 98, 107 (2d Cir. 2001); *see also Stanek v. St. Charles Cmty. Unit Sch. Dist.*

No. 303, 783 F.3d 634, 644 (7th Cir. 2015) (collecting cases). Courts have nonetheless reasoned that the *Ex parte Young* doctrine provides an avenue to enjoin a state *official's* conduct for violations of the ADA or Rehabilitation Act, much like it does under § 1983. *See supra* n.6. In this way, *Ex parte Young* serves the same function under the ADA and Rehabilitation Act that it does under § 1983: it provides an avenue to seek prospective relief against a state official when no such avenue exists in the statute.

More fundamentally, however, *Ex parte Young* also provides a means to maintain a lawsuit under the ADA or Rehabilitation Act (as it does under § 1983) that would otherwise be barred by the Eleventh Amendment. The ADA and Rehabilitation Act do not categorically abrogate Eleventh Amendment immunity. The abrogation of Eleventh Amendment immunity under the Rehabilitation Act is only triggered upon the acceptance of federal funding. 28 U.S.C. § 2000d-7. The Supreme Court has held that Congress lacked the authority to abrogate Eleventh Amendment immunity for claims under Title I of the ADA, notwithstanding language to the contrary in the statute. *See Garrett*, 531 U.S. at

363–73. And the Supreme Court has never held that the abrogation of Eleventh Amendment immunity for Title II claims is absolute; rather, it has only permitted such claims in cases "implicating the fundamental right to access the courts," *Tennessee v. Lane*, 541 U.S. 509, 533 (2004), and when there has been an actual violation of the Fourteenth Amendment, *United States v. Georgia*, 546 U.S. 151, 158–59 (2006).

The Supreme Court has nonetheless indicated that a plaintiff may maintain a Title I claim for prospective relief under *Ex parte Young* notwithstanding the Eleventh Amendment. *Garrett*, 531 U.S. at 374 n.9. Courts have extended that reasoning to claims brought under Title II and the Rehabilitation Act. *See, e.g.*, *Guttman v. Khalsa*, 669 F.3d 1101, 1127 (10th Cir. 2012) ("[T]he Supreme Court reaffirmed [in *Garrett*] that an *Ex parte Young* ADA claim can proceed even if the state defendants are protected by sovereign immunity."); *see also supra* n.6 (collecting cases). They have done so based on the same legal "fiction" that underpins "all *Ex parte Young* cases." *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1188 (9th Cir. 2003) (citation and quotation marks

omitted). As the Sixth Circuit put it, "an official who violates Title II of the ADA does not represent the state for the purposes of the Eleventh Amendment, yet he or she nevertheless may be held responsible in an official capacity for violating Title II, which by its terms applies only to public entities." *Carten v. Kent State Univ.*, 282 F.3d 391, 397–98 (6th Cir. 2002) (cleaned up).

Accordingly, the plaintiffs' attempt to distinguish official-capacity claims for prospective relief under the ADA and Rehabilitation Act from those brought under § 1983 is both legally and logically flawed. In either context, such a claim arises under the *Ex parte Young* doctrine. The plaintiffs do not appear to dispute that legislative immunity extends to official-capacity claims brought under § 1983. The district court correctly observed that "there is no reason to conclude that [legislative immunity] would apply in § 1983 actions but not" those brought under the ADA or Rehabilitation Act. *Cushing*, 2021 WL 681638, at *6.

C. The plaintiffs' reliance on other common-law immunity doctrines is misplaced, as is their contention that their claims are against the State.

The plaintiffs argue that legislative immunity does not apply in this case because it is a personal immunity that can only be held by individuals. In support of this argument, the plaintiffs liken legislative immunity to other common-law immunity doctrines, such as prosecutorial, judicial, and qualified immunity, which courts have held are personal immunities. The plaintiffs contend that legislative immunity cannot apply to their ADA and Rehabilitation Act claims because those claims are really against the State. This argument fails for several reasons.

At the outset, the plaintiffs ignore that legislative immunity is qualitatively different than the other immunity doctrines on which they rely. In *Consumers Union*, the Supreme Court distinguished legislative immunity from prosecutorial immunity, the latter of which only extends to claims for "damages liability," not those for injunctive relief. 446 U.S. at 736 (citations omitted). Four years later, the Supreme Court held that judicial immunity "is not a bar to prospective injunctive relief against a judicial

officer acting in her official capacity." *Pulliam v. Allen*, 466 U.S. 522, 542 (1984). It is likewise well settled that qualified immunity "confers immunity only from individual-capacity suits, such as suits for money damages, that have been brought against government actors." *Nereida-Gonzalez-Tirado Delgado*, 990 F.2d 701, 705 (1st Cir. 1993).

In contrast, legislative immunity is "not afforded simply for the personal or private benefit of [a legislator], but to protect the integrity of the legislative process by insuring the independence of individual legislators." *Harwood*, 69 F.3d at 629 (citation omitted). It applies to acts, not actors, *Bogan*, 523 U.S. at 54–55, and bars damages claims and those for declaratory or injunctive relief, *Consumers Union*, 446 U.S. at 732–33. It is available as a defense on both individual- and official-capacity claims. *See supra* Section II.A. It is accordingly a far broader form of immunity than the other immunity doctrines the plaintiffs rely on.

In resisting this conclusion, the plaintiffs point to dictum in *Kentucky v. Graham*, 473 U.S. 159 (1985) ("*Graham*"). In *Graham* the Supreme Court stated that "[w]hen it comes to defenses to

liability, an official in a personal-capacity action may . . . be able to assert personal immunity defenses," but that "these defenses are unavailable" for official-capacity claims, where "the only immunities that can be claimed . . . are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment." 473 U.S. at 166–67 (cleaned up). The plaintiffs contend that this statement demonstrates that legislative immunity is no different than other common-law immunity doctrines. They are incorrect.

As an initial matter, the plaintiffs overstate what the *Graham* dictum actually says. By its express terms, that dictum is limited to "defenses to liability." *Graham*, 473 U.S. at 166. In contrast, this Court has observed that legislative immunity "affords protection not only from liability but from suit." *Romero-Barcelo*, 75 F.3d at 28. This may well explain why the dictum in *Graham* makes no reference legislative immunity at all and only cites cases involving other immunity doctrines. *See Graham*, 473 U.S. at 166–67 (citing *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutorial immunity); *Pierson v. Ray*, 386 U.S. 547 (1967)

(judicial immunity); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity); *Wood v. Strickland*, 420 U.S. 308 (1975) (qualified immunity)). Moreover, that dictum does not suggest that the *only* immunity available on an official-capacity claim is Eleventh Amendment immunity; it simply identifies Eleventh Amendment immunity as one example of an immunity that an "entity . . . may possess." *Id.* at 167. In other words, a close inspection of the dictum in *Graham* reveals that it says little, if anything, about legislative immunity at all.

But even if that dictum could be read to reference legislative immunity, it would not provide a basis for this Court to ignore *Consumers Union*. The dictum itself does not purport to overrule *Consumers Union*, and the Supreme Court discussed *Consumers Union* approvingly elsewhere in the *Graham* opinion. *See Graham*, 473 U.S. at 166–67. The Supreme Court has admonished lower federal courts to "follow [a] case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation and quotation marks omitted). *Consumers Union*

controls the outcome of this case, and nothing in *Graham* can alter that fact.

Notably, several other circuits have rejected the precise *Graham*-based argument that the plaintiffs advance here. For instance, the Eleventh Circuit, in holding that legislative immunity applies to official-capacity claims, concluded *Consumers Union* controlled its decision, *Graham* notwithstanding. *See Scott*, 405 F.3d at 1253–55. The Second Circuit likewise declined "to ignore the Supreme Court's squarely-applicable precedent in *Consumers Union* simply because of broadly-stated *dicta* in *Graham* not specifically referring to legislative immunity—particularly in view of its approving discussion of *Consumers Union* elsewhere in the opinion." *Id.* at 86–87 (cleaned up). And the Eighth Circuit reached the same conclusion, albeit implicitly, in *Church v. Missouri*, when it concluded that a prior panel opinion, which had cited *Graham* for the proposition that legislative immunity is a personal defense, was contrary to *Consumers Union*. *See Church*, F.3d at 754 n.3 (citing, *inter alia*, *Roach*, 560 F.3d at 870).

For all of these reasons, the plaintiffs' contention that legislative immunity is merely a personal immunity akin to prosecutorial, judicial, and qualified immunity lacks merit. But so, too, does their contention that this somehow matters because their ADA and Rehabilitation Act claims are actually claims against the State. As "master[s] of the complaint," the plaintiffs controlled what claims they brought and against whom they brought them. *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002). There is no credible way to read the plaintiffs' complaint as asserting claims against anyone but the Speaker.

The only defendant listed in the caption of the complaint is "Rep Sherman Packard[,] Speaker of the NH House of Representatives (in his official capacity only)." App. 15. The introductory paragraph likewise states that the plaintiffs "complain against Sherman Packard ('Speaker') ('Defendant') for violations of," *inter alia*, the ADA and Rehabilitation Act. App. 15. The "parties" section lists the Speaker as the only defendant. App. 22. The allegations in the complaint overwhelmingly concern

how the *Speaker* himself is purportedly violating the plaintiffs' rights by refusing to allow them to participate remotely in House floor sessions. *E.g.*, App. 17–19, 21, 23, 28–31, 34, 35, 36–38, 39–40. To that end, the complaint seeks a declaration that the *Speaker* is violating the plaintiffs' rights and an order enjoining the *Speaker's* conduct. *E.g.*, 38, 39, 42–43.

All of this makes clear that the plaintiffs intended to name the Speaker as the defendant, not the State or one of its instrumentalities. But it is further evident from the fact that the plaintiffs also brought a Fourteenth Amendment claim in this case. App. 40–41. The Eleventh Amendment would plainly bar *that* claim were it brought against an arm of the State. *Irizarry-Mora v. Univ. of P.R.*, 647 F.3d 9, 11 n.1 (1st Cir. 2011) ("In the absence of consent, waiver, or abrogation, the Eleventh Amendment bars suit against states themselves regardless of the form of relief sought."). This would remain true if, as the plaintiffs contend, the sovereign is the real, substantial party in interest in this case, as the *Ex parte Young* doctrine does not apply under such circumstances. *See Pennhurst State Sch. & Hosp. v.*

Halderman, 465 U.S. 89, 101–02 (1984). It is thus apparent that the plaintiffs' deliberately chose to plead their Fourteenth Amendment claim as an official-capacity claim against the Speaker. Given that the their ADA and Rehabilitation Act claims arise out of the same purported conduct and seek the same relief, there is every reason to believe that the plaintiffs were just as deliberate when pleading those claims.

The plaintiffs' other litigation choices only confirm as much. For instance, in their complaint, the plaintiffs expressly contended that the Speaker could unilaterally provide them the relief they seek because no rule governed participation in floor sessions. App. 29. They devoted several pages to this argument in their memorandum in support of their motion for a temporary restraining order or preliminary injunction. App. 129–132. The district court rightly rejected it, *see Cushing*, 2021 WL 681638, at *2, *4, and the plaintiffs do not challenge that decision on appeal. Nevertheless, this argument further undermines any suggestion that the plaintiffs sought relief in this case from anyone but the Speaker.

By naming the Speaker as the only defendant, the plaintiffs also avoided any Eleventh Amendment arguments that the State or one of its instrumentalities might have raised if named as a defendant. To the extent those arguments revolved around the extent to which Congress had validly abrogated the Eleventh Amendment under the ADA or Rehabilitation Act, then they would have presented fact-bound and potentially complicated inquiries. *See, e.g.*, *Georgia*, 546 U.S. at 157–60; *id.* at 160 (Stevens, J., concurring) ("Rather than attempting to define the outer limit's of Title II's valid abrogation of state sovereign immunity, the Court's opinion wisely permits the parties . . . to create a factual record that will inform that decision." (internal citation omitted)). It likely inured to the plaintiffs' benefit to avoid those issues, given that they were seeking relief on an "emergency" basis. App. 109. Having enjoyed that benefit, the plaintiffs cannot now "change horses mid-stream, arguing one theory below and a quite different theory on appeal." *Ahern v. Shinseki*, 629 F.3d 49, 50 (1st Cir. 2010).

In sum, the plaintiffs' attempt to liken legislative immunity to other common-law immunity doctrines is misplaced, as is their late-breaking assertion that they really intended to bring their ADA and Rehabilitation Act claims against the State itself. Neither argument provides a basis for this Court to reverse the district court's well-reasoned decision.

D. Legislative immunity would apply even if the plaintiffs brought their claims against the State.

While there is no merit to the plaintiffs' assertion that their ADA and Rehabilitation Act claims are really claims against the State itself, it would make no difference even if they were. In *Consumers Union*, the Supreme Court held that "the *Virginia Court* and its members [were] immune from suit when acting in their legislative capacity." 446 U.S. at 734 (emphasis added). The Court further noted that legislative immunity applies to claims "brought against *the legislature*, its *committees*, or members" challenging acts undertaken in a legislative capacity. *See id.* at 733–34 (emphases added). These statements unequivocally confirm that legislative immunity extends not only to state officials, but to state entities as well. Accordingly, legislative

immunity would bar the plaintiffs' claims even if brought against the State or one of its instrumentalities.

The plaintiffs contend that this Court should decline to follow these statements as dicta. They argue that the statement with respect to the Supreme Court of Virginia is dictum because the court was not a necessary party on appeal. The plaintiffs base this assertion on an observation by the lower court that it "need not concern itself with issues of whether the Virginia Supreme Court is protected from suit by the Eleventh Amendment" because "any injunctive relief granted in favor of the plaintiffs may run against the Chief Justice in his official capacity, or his successor in office in his official capacity." *Consumers Union of U. S., Inc. v. Am. Bar. Ass'n*, 427 F. Supp. 506, 509 (E.D. Va. 1976) (subsequent history omitted). In the plaintiffs view, this observation renders the Supreme Court's holding with respect to the Supreme Court of Virginia nonbinding.

But the mere fact the lower court declined to reach Eleventh Amendment immunity does not mean that the Supreme Court of Virginia was no longer a party to the case. If that were true, then

it is unclear why the Supreme Court would mention the Supreme Court of Virginia in its decision at all. Nor are defense counsel aware of any support for the proposition that a lower federal court can ignore a Supreme Court holding merely because it references a party that might have been able to (but did not) secure dismissal on different grounds prior to the appeal. Indeed, if anything, the Supreme Court of Virginia's apparent failure to press its Eleventh Amendment immunity argument constituted a waiver of that defense. *See New Hampshire v. Ramsey*, 366 F.3d 1, 15–18 (1st Cir. 2004) (discussing waivers of Eleventh Amendment immunity by litigation conduct).

Nor can this Court disregard the Supreme Court's observation in *Consumers Union* that legislative immunity can bar claims brought against "the legislature, its committees, or members." 446 U.S. at 733–34. As noted, the Supreme Court based its conclusion with respect to the Supreme Court of Virginia and its chief justice *on* that observation. *See id.* Even if the observation itself is technically dictum, it is the type of "considered dictum" that this Court may not ignore. *See McCoy v.*

Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (noting that "a carefully considered statement, though technically dictum, must carry great weight and may even be regarded as conclusive" (cleaned up)). And it further confirms that legislative immunity applies to state entities as well as individuals.

The reasoning in *Harwood* confirms this as well. Though *Harwood* solely involved claims against the Speaker and doorkeeper of the Rhode Island House, this Court observed that, "[a]s a rule, a *legislature's* regulation of the atmosphere in which it conducts its core legislative activities—debating, voting, passing legislation, and the like—is part and parcel of the legislative process, and, hence, not subject to judicial veto." 69 F.3d at 635 (emphasis added). It is unclear why this general rule would apply only to claims against officials. As the district court observed, such a conclusion is inconsistent with the Supreme Court's emphasis that legislative immunity applies to actions, not actors. *See Bogan*, 523 U.S. at 54.

In arguing otherwise, the plaintiffs point to decisions holding that municipalities are not entitled to legislative immunity even

though their officers sometimes are. While this is true enough, it in no way saves the plaintiffs' claims. As the Second Circuit noted in *Rowland*, "the Supreme Court has made clear that, due to the historical unavailability of various immunity defenses to local governments, those governments (or 'municipal corporations') are not entitled to the benefit of any immunities that might be available to local officials sued under § 1983." 494 F.3d at 86 (citations omitted). The court went on to note that "[t]he Supreme Court has never reached a similar conclusion with respect to suits against states, or against state agents in their official capacities." *Id.* In light of these observations, case law involving claims against municipalities is of little persuasive value when assessing claims brought against a State or its officials.

In short, the Supreme Court held in *Consumers Union* that legislative immunity is enjoyed by state entities as well as officials. The plaintiffs have not provided any persuasive basis to disregard that holding. The district court therefore properly concluded "legislative immunity may be claimed not only by government officials, but by government entities themselves."

Cushing, 2021 WL 681638, at *3. Legislative immunity would therefore have barred the plaintiffs' claims even if they had been asserted against the State or one of its instrumentalities.

E. The ADA and Rehabilitation Act do not abrogate legislative immunity.

The plaintiffs argue here, as they did below, that the ADA and Rehabilitation Act abrogate legislative immunity. The district court rejected that argument, *see Cushing*, 2021 WL 681638, at *6, and this Court should do likewise. It is by no means clear that Congress has the power to abrogate legislative immunity at all. *See Tenney*, 341 U.S. at 376 ("Let us assume, merely for a moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. *That would be a big assumption*." (emphasis added)). But even assuming that power exists, there is no indication in the ADA or Rehabilitation Act that Congress intended to wield it.

As an initial matter, it bears noting that there is no freestanding waiver of legislative immunity in the Fourteenth Amendment itself. *See Harwood*, 69 F.3d at 634 ("'[N]othing in

the . . . Fourteenth Amendment[] . . . can justify an attempt to inject the Federal Judiciary into the internal procedures of a House of a state legislature." (quoting *Davids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1977) (original bracketing omitted)). Rather, legislative immunity can only be abrogated, if at all, through legislation passed *pursuant* to Section 5 of the Fourteenth Amendment. *Cf. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (discussing Congress' Section 5 powers). Moreover, legislative immunity is "a component of federal common law," *Harwood*, 59 F.3d at 629, and it is a "longstanding . . . principle that statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Texas*, 507 U.S. at 534 (cleaned up). "In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *Id.* (citation and quotation marks omitted).

Both the ADA and Rehabilitation Act postdate the Supreme Court's recognition in *Tenney* that legislative immunity is a

common-law defense available to state legislators. *See* 341 U.S. at 379. The ADA postdates *Consumers Union* as well. Congress accordingly knew that to abrogate legislative immunity under either statute, the statute itself had to "speak directly" to that question. *Texas*, 507 U.S. at 534. Armed with that knowledge, the only immunity Congress purported to abrogate under the ADA and Rehabilitation Act is a *State's* immunity under the Eleventh Amendment. *See* 42 U.S.C. § 2000d-7(a)(1); 42 U.S.C. § 12202.

The plaintiffs contend that an abrogation of Eleventh Amendment immunity necessarily brings with it a waiver of absolute legislative immunity. *Consumers Union* forecloses any such argument. In addition to determining whether legislative immunity barred claims for declaratory and injunctive relief, the Supreme Court also considered in *Consumers Union* whether legislative immunity barred an award of attorney's fees entered by the district court under 42 U.S.C. § 1988. 446 U.S. at 737–39. The Court noted that while it had previously held "that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state

officers" under § 1988, there was no similar indication "that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy legislative immunity." *Id.* at 738. This confirms that determining whether Congress has abrogated Eleventh Amendment immunity and whether it has abrogated absolute legislative immunity are separate and distinct inquiries. The district court rightly rejected the plaintiffs' argument to the contrary. *See Cushing*, 2021 WL 681638, at *6.

The plaintiffs alternatively argue that an intent to abrogate legislative immunity can be inferred from the fact that both the ADA and Rehabilitation Act allow a plaintiff to secure remedies against a State "to the same extent as such remedies are available . . . in a suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2); *see also* 42 U.S.C. § 12202 (containing nearly identical language). This argument fails for several reasons. For one, it is inconsistent with the statutory language. The immediately preceding sentences in both statutes refer specifically to Eleventh Amendment immunity. *See* 42

U.S.C. § 2000d-7(a)(1); 42 U.S.C. § 12202. In light of these specific references, it is hard to conceive why subsequent remedies language would stand as an abrogation of an entirely different, otherwise unmentioned, form of immunity. Indeed, such a construction would violate the general rule that statutes "should not be read as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995). For this reason alone, the plaintiffs' reliance on the "remedies" language in 42 U.S.C. § 2000d-7(a)(2) and 42 U.S.C. § 12202 is misplaced.

That reliance is further misplaced because legislative immunity is not concerned with remedies at all. Rather, *Consumers Union* makes clear that legislative immunity turns on the nature of the conduct challenged *irrespective* of the remedies sought. 446 U.S. at 732. Thus, as this Court has observed, legislative immunity "affords protection not only from liability *but from suit*." *Romero-Barcelo*, 75 F.3d at 28 (emphasis added). Accordingly, statutory language addressing solely the availability of remedies does not (and could not) "speak directly" to the issue of legislative immunity. *See Texas*, 507 U.S. at 534.

That both statutes only reference "the State" is also telling. As discussed above, claims alleging violations of the ADA and Rehabilitation Act by state officials are not confined to actions brought against the State itself. *See supra* Section II.B. The plaintiffs offer no explanation for why Congress would abrogate legislative immunity solely for claims against the State, but not for those brought, for example, against state officials under *Ex parte Young*. It seems far more likely that 42 U.S.C. § 2000d-7 and 42 U.S.C. § 12202 simply mean what that say, and that Congress only intended to abrogate a State's Eleventh Amendment immunity.

Notably, the plaintiffs do not cite, and defense counsel have been unable to identify, any case holding that either the ADA or Rehabilitation Act abrogates legislative immunity. The district court was likewise unable to locate any such case. *See Cushing*, 2021 WL 681638, at *6. The district court did, however, identify several cases in which federal courts "have applied legislative immunity to bar Title II and Rehabilitation Act claims, some of which sought injunctive relief." *See id.* (collecting cases). And, as

the Speaker noted below, courts have routinely applied legislative immunity to bar claims brought under a variety of federal civil rights statutes. App. 170–171 (collecting cases).

Ultimately, no court appears to have concluded in the several decades the ADA and Rehabilitation Act have been in effect that either statute abrogates legislative immunity. There is a simple reason for this: neither purports to do so. The district court correctly rejected the plaintiffs' arguments to the contrary. *See Cushing*, 2021 WL 681638, at *6. This Court should affirm that decision.

F. The plaintiffs' remaining arguments are a backdoor attempt at abrogation where none exists.

Reduced to their essence, the plaintiffs' remaining arguments are just different ways of saying that legislative immunity should not apply to their claims because they believe those claims to be very important. This policy-based contention is often asserted when legislative immunity is raised as a defense, and seemingly just as often rejected. In *Consumers Union*, the Supreme Court held that legislative immunity applied *despite* the

fact the challenged rules almost certainly violated the First Amendment. *See* 446 U.S. at 733–34. This Court similarly held in *Harwood* that legislative immunity bars a constitutional challenge to a legislative rule *even when* that rule "may arguably be wrong as a matter of policy and as a matter of constitutional law." 69 F.3d at 634. These decisions leave no room for a "very-important-claim" exception to absolute legislative immunity. The plaintiffs' contention otherwise is really just a request that this Court find an implicit abrogation of legislative immunity for ADA and Rehabilitation Act claims where none exists in the statute.

While the plaintiffs appeal to "comity," they identify no case in which a federal court has found comity to be a sufficient basis to ignore legislative immunity. This is not surprising, because, again, legislative immunity is a "component of *federal* common law." *Harwood*, 59 F.3d at 629 (emphasis added). Moreover, the comity concerns implicated by legislative immunity counsel *against* a federal court intervening in state legislative processes. *See id.* at 628 (noting that legislative immunity "touches upon policies as basic as federalism, comity, and respect for the

independence of democratic institutions"); *see also Tenney*, 341 U.S. at 378 (noting that courts "are not the place for [legislative] controversies" and that a court should therefore "not go beyond the narrow confines of determining that [a legislature's actions] may be fairly deemed within its province"). The plaintiffs' comity argument tips these concerns on their head.

The plaintiffs' bald suggestion that comity requires this Court to defer to the New Hampshire Supreme Court's decision in *Burt v. Speaker of the House of Representatives* is without merit. The appeal in *Burt* had nothing to do with absolute legislative immunity. Rather, *Burt* presented a narrow issue: whether a constitutional challenge to a House Rule that "prohibits the carrying or possession of any deadly weapon in Representative Hall, as well as in the anterooms, cloakrooms, and House gallery," presented a nonjusticiable political question. 173 N.H. 522, 523–24, 243 A.3d 609, 610 (N.H. 2020). While the New Hampshire Supreme Court held that the question was justiciable, *see id.*, it did not address whether the Speech and Debate Clause in Part I, Article 30 of the New Hampshire Constitution or some other state

common-law immunity doctrine might nonetheless preclude a state court from reaching it, *cf. Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 291, 876 A.2d 736, 749 (2005) ("New Hampshire's Speech and Debate Clause is the equivalent of the speech or debate clause, article I, section 6 of the United States Constitution." (cleaned up)). And the New Hampshire Supreme Court certainly did not hold (nor could it) that a constitutional challenge to a state legislative rule brought in state court somehow abrogates an immunity conferred on state legislators under *federal* common law. *Harwood*, 69 F.3d at 529. The plaintiffs' assertion that *Burt* involved "a suit similar to this one," Pls.' Br. 47, is therefore only true insofar as it stands as a belated acknowledgement that this case also involves a challenge to a legislative rule. Otherwise, *Burt* is inapposite.

The plaintiffs alternatively argue that legislative immunity does not apply because the prohibition on remote participation in floor sessions is invidiously discriminatory. The district court correctly rejected this argument, concluding that the rule in question "is 'not invidiously discriminatory on its face' as it applies

equally to all members of the House." *Cushing*, 2021 WL 681638, at *5 (quoting *Harwood*, 69 F.3d at 633). Moreover, this Court noted in *Harwood* that a rule is not invidiously discriminatory so long as it bears "*some* rational relationship to legitimate legislative purposes." 69 F.3d at 634 (emphasis in original). The evidence presented in the proceedings below demonstrates that there were ample rational bases to prohibit remote access to floor sessions of the full House. *See generally* App. 181–380; Tr. 69–124. This forecloses any argument that the prohibition is invidiously discriminatory, whatever one might think about it as a matter of policy or constitutional law. *See Harwood*, 69 F.3d at 634.

At bottom, this case involves a political disagreement over how floor sessions of the New Hampshire House should proceed during the pandemic. Nearly 70 years ago, the Supreme Court observed that "[i]n times of political passion, dishonest and vindictive motives are readily attributed to legislative conduct and as readily believed." *Tenney*, 341 U.S. at 378 (footnote omitted). The Court nonetheless emphasized that "[c]ourts are not the place

for such controversies." *Id.* These statements remain just as true today as they were when made. *See, e.g.*, *Wash. Suburban Sanitary Comm'n*. 632 F.3d at 181 (noting that legislative immunity "shields [legislators] from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box").

CONCLUSION

Harwood and *Consumers Union* are binding on this Court and control the outcome of this case. Under those decisions, the application of legislative immunity is not a close question. The plaintiffs' arguments for why legislative immunity does not apply are merely valiant efforts to complicate what is ultimately a straightforward case. As explained above, the district court correctly concluded "the Speaker is immune from the plaintiffs' suit challenging his enforcement of a House rule that is closely related to core legislative functions," *Cushing*, 2021 WL 681638, at *7, and this Court should affirm that conclusion.

Respectfully submitted,

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

By his attorney

THE OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

March 25, 2021

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF filers and will be served via the CM/ECF System: S. Amy Spencer, William E. Christie, Israel F. Piedra, and Paul J. Twomey.

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