QUESTIONS PRESENTED

In early 2020, several members of the New Hampshire House of Representatives requested that they be allowed to participate in sessions of the House remotely due to disabilities which make them especially vulnerable to serious illness or death from COVID-19. The disabled representatives made their requests for reasonable accommodation pursuant to Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

The petitioners' requests for reasonable accommodations were denied. They sued in District Court for an injunction allowing them to participate remotely in House sessions. The District Court held that the petitioners' remedy was barred by the common law doctrine of legislative immunity.

On appeal, a unanimous panel of the First Circuit reversed the District Court's order. However, the respondent petitioned for rehearing, and ultimately the *en banc* First Circuit, in a 3-2 decision, affirmed the decision of the District Court.

The questions presented are:

What is the scope of the "extraordinary character" exception to legislative immunity?

Does legislative immunity insulate state legislatures and/or legislators from needing to

comply with Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act?

PARTIES TO THE PROCEEDING

Petitioners are Robert R. Cushing, David Cote, Katherine D. Rogers, Kendall Snow, Paul Berch, Diane Langley, and Charlotte Dilorenzo, members of the New Hampshire House of Representatives, as well as the New Hampshire Democratic Party.[1] Petitioners were plaintiffs in the district court and appellants on appeal.

Respondent is the Hon. Sherman Packard, in his official capacity as Speaker of the House of the New Hampshire House of Representatives. Respondent was defendant in the district court and appellee on appeal.

The United States of America was party to the *en banc* proceedings below as *amicus curiae* in support of the Petitioners' position.

CORPORATE DISCLOSURE STATEMENT

Petitioners and Respondent are individuals.

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[1] Leader Cushing and Representative Rogers both passed away during the pendency of this action.

STATEMENT OF RELATED PROCEEDINGS

This case arises from *Cushing, et al. v. Packard*, No. 21-1177 (1st Cir.) (*en banc* opinion issued March 25, 2022), and *Cushing, et al. v. Packard*, No. 21-cv-147-LM (D.N.H.) (order on motion for temporary restraining order or preliminary injunction issued February 22, 2021). Petitioners are not aware of any directly related cases in state or federal courts.

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INTRODUCTION

The question in this case is whether the common law doctrine of state legislative immunity trumps the right of disabled legislators to avail themselves of the protections of federal disability rights statutes.

The District Court in New Hampshire held that legislative immunity barred the disabled legislators' requests for reasonable accommodations. A unanimous panel of the First Circuit disagreed and reversed the District Court, finding that Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act trumped assertions of common law legislative immunity.

The respondent Speaker of the House sought *en banc* rehearing, which was granted. Before the *en banc* First Circuit, the United States appeared as *amicus curiae* supporting the position of the disabled legislators.

A closely divided *en banc* Court of Appeals ultimately affirmed the judgment of the District Court. In a 3-2 decision, the First Circuit held that legislative immunity protected the respondent from needing to comply with Title II and Section 504. The First Circuit also found that choosing between death and effective ouster from the legislature was not an extraordinary circumstance justifying an exception to common law immunity.

The First Circuit's decision creates an extraordinary risk (death) to disabled legislators

just trying to do their job. It extinguishes crucial federal protections for disabled persons contrary to the express purpose of Congress. The Court's decision authorizes the use of legislative immunity as a sword against disabled persons and works directly contrary to the purposes of the doctrine by *preventing* legislators from serving their constituents.

This petition presents several important federal questions upon which there is confusion and disagreement amongst lower courts. Petitioners respectfully request that the Court grant their petition for a writ of certiorari.

OPINIONS BELOW

The opinion and order by the U.S. District Court for the District of New Hampshire is published at 560 F. Supp. 3d 541 (D.N.H. 2021) and is reproduced at Pet. App. 103a. The decision of the three-judge panel of the United States Court of Appeals for the First Circuit is published at 994 F.3d 51 (1st Cir. 2021) and is reproduced at Pet. App. 90a. The decision of the Court of Appeals, sitting *en banc*, is published at 30 F.4th 27 (1st Cir. 2022) and is reproduced at Pet. App. 1a.

JURISDICTION

The *en banc* First Circuit issued its opinion on March 25, 2022. On June 23, 2022, Justice Breyer granted the Petitioners' application (21A845) for an extension of time to file a petition for a writ of

certiorari until August 22, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S. Code § 12131 (Title II of the ADA)

As used in this subchapter:
(1)Public entity
The term "public entity" means—
(A)
any State or local government;
(B)
any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
(C)
the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability
The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S. Code § 12132 (Title II of the ADA)

Subject to the provisions of this subchapter, 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.

29 U.S. Code § 794 (Section 504 of the Rehabilitation Act)

(a)Promulgation of rules and regulations
No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b)"Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—
(1)
(A)
a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
(B)
the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
(2)
(A)
a college, university, or other postsecondary institution, or a public system of higher education; or
(B)
a local educational agency (as defined in section 7801 of title 20), system of career and technical education, or other school system;
(3)
(A)an entire corporation, partnership, or other private organization, or an entire sole proprietorship—
(i)
if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
(ii)
which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B)
the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);
any part of which is extended Federal financial assistance.
(c)Significant structural alterations by small providers
Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d)Standards used in determining violation of section
The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

STATEMENT OF THE CASE

The petitioners are seven legislators elected to serve in the 400-member New Hampshire House of Representatives.[2] In February 2020, the petitioners — who had significant disabilities including stage four cancer — sued the Speaker of the House, Sherman Packard, in his official capacity only. The petitioners sought accommodations under Title II of the Americans with Disabilities Act as well as Section 504 of the Rehabilitation Act.[3] The petitioners requested the accommodation of remote participation in sessions of the House because of the severe threat that exposure to COVID-19 posted to their lives and health.

Packard himself became Speaker after the death of the previous Speaker of the House, who died of COVID-19 shortly after being elected in December 2020. Sessions of the New Hampshire House of Representatives pose a unique risk: the body has 400 members, who sit elbow to elbow in a chamber where social distancing is impossible. COVID-19, of course, is highly transmissible in crowded, indoor venues.

In November 2020, in response to a request from the House, the New Hampshire Supreme Court had issued an opinion advising that the New Hampshire

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[2] The legislator petitioners are joined by the New Hampshire Democratic Party on behalf of the associational rights of New Hampshire Democrats.

[3] References to these two disability rights statutes are used interchangeably in this petition.

Constitution did not prohibit remote participation by representatives in House proceedings. Despite this opinion, a majority of the House — controlled by Republicans — twice voted down rules authorizing remote participation in floor sessions.

Of note, the House of Representatives is closely divided. Many votes have occurred during the pendency of these proceedings which were decided by single-digit margins. Had disabled members been able to participate remotely, their votes may have been dispositive.

A. District Court order

As a result of the refusal to allow remote participation, the petitioners filed suit in New Hampshire's federal court seeking a declaratory judgment and injunction allowing remote participation as a reasonable accommodation. They also moved for a temporary restraining order and preliminary injunction allowing them to participate remotely while the case was being litigated.

The District Court denied the petitioners' request for preliminary/temporary relief after a four-hour hearing which included legal argument and live testimony. Pet. App. 119a. In its February 22, 2021 order, the District Court held that "the Speaker is immune from plaintiffs' suit" because of the doctrine of legislative immunity. *Id.* The Court stated that its holding was applicable whether the lawsuit (which named the Speaker in his official capacity only) sounded against the Speaker individually or whether it sounded against the

State itself. Pet. App. 117a. The Court dismissed the petitioners' arguments that legislative immunity should not apply because of the extraordinary nature of the situation and because Title II and Section 504 abrogated any immunity that might otherwise apply.

B. The Panel decision

The petitioners appealed to the United States Court of Appeals for the First Circuit. A unanimous panel[4] of the First Circuit reversed the District Court in an opinion dated April 8, 2021. The panel determined that Title II and Section 504 abrogate legislative immunity. The panel concluded that although the ADA does not mention legislative immunity, the statute's express application to state governments and governmental entities evinced Congress' clear intent to abrogate the immunity and reach an entity such as the New Hampshire legislature. Pet. App. 98a-99a. The panel also concluded that by accepting federal funds — including CARES Act funding to support legislative operations during the COVID-19 pandemic — any immunity to Section 504 liability had been waived. Pet. App. 99a. The panel therefore vacated the district court order and remanded for further proceedings. Pet. App. 101a.

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[4] One panel member was a District Court judge sitting by designation.

C. Rehearing en banc and entry of the United States as amicus curiae

The Speaker moved for rehearing *en banc*, which the First Circuit granted. Pet. App. 121a. Further briefing was ordered. Pet. App. 122a. The Court also invited the United States to participate as amicus curiae. Pet. App. 123a.

The United States submitted a brief in support of the petitioners and urging reversal of the District Court's decision.[5] The United States argued that "[t]here 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." DOJ brief at *13. The United States concluded that the "Speaker is incorrect that legislative immunity protects his decision to require plaintiffs' in-person attendance — that is, to deny their requests for reasonable accommodations." *Id.*

D. En banc opinion

On March 25, 2022, the *en banc* First Circuit issued an opinion affirming the judgment of the District Court. The First Circuit decision was on a 3-2 vote, with the two members of the original panel in dissent.

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[5] https://www.justice.gov/crt/case-document/file/1423266/download (hereinafter referred to as "DOJ brief").

The majority decision rejected each of the several arguments advanced by the petitioners on appeal. The Court held that the lawsuit did not sound against the State itself — and thus, legislative immunity (a personal immunity) was available — despite the suit being an official-capacity lawsuit. Pet. App. 27a. The Court also found that neither Title II nor Section 504 abrogated legislative immunity because the statutes did not speak explicitly to that issue. Pet. App. 39a. Finally, the majority rejected the petitioners' position that the limits of legislative immunity first posited in *Kilbourn v. Thompson*, 103 U.S. 168 (1880) were exceeded in this case. Pet. App. 46a. As such, the First Circuit affirmed the decision of the trial court. Pet. App. 48a.

E. The dissent

Judge Thompson, joined by Judge Kayatta, strongly dissented. Pet. App. 49a. The dissent characterized the majority opinion as a "decision to turn a blind eye to the effective disenfranchisement of thousands of New Hampshire residents simply because their representatives are disabled." *Id.* The dissent also opined that the majority's decision "opens the floodgates to potential abuse and spells a recipe for disaster in the future." *Id.*

The dissent explained that "applying legislative immunity [in this case] fits neatly into that category of legislative actions of an extraordinary character" first mentioned by the Supreme Court in *Kilbourn*. Pet. App. 57a. Noting that the purpose of legislative immunity was "a protection offered by

the people for their own benefit," Judge Thompson questioned "what benefit would the people gain in immunizing their own disenfranchisement?" Pet. App. 58a. Judge Thompson also noted that the majority opinion was contrary to several decisions of the Supreme Court, including *Powell v. McCormack*, 395 U.S. 486 (1969), and *Bond v. Floyd*, 385 U.S. 116 (1966). Pet. App. 60a-61a. In those decisions, this Court permitted judicial review in situations where a legislator was excluded by his fellow representatives from carrying out his own legislative duties — the precise situation in this case. *Id*. Along with disenfranchisement and ouster, the dissent explains that "subverting the ADA and discriminating against the disabled" are additional extraordinary circumstances of this case. Pet. App. at 62-63a.

Finally, the dissent sharply criticizes the majority decision as "open[ing] the floodgates to a host of rules that are designed to oust various subsets of legislators based on a host of protected characteristics, just as long as the other legislators are clever enough to craft them in an ostensibly neutral way." Pet. App. 68a. Judge Thompson proffers the example of a rule that requires all members to stand to address the legislative body, but one of the members is wheelchair bound. Pet. App. 69a. The dissent provides several other examples of legislative abuse that could arise under the First Circuit's holding. It concludes by describing the "evil that has befallen here" as "forcing out duly elected New Hampshire representatives with disabilities." Pet. App. 75a.

REASONS FOR GRANTING THE PETITION

This petition raises important questions about the limits of common law legislative immunity, upon which there is disagreement in the lower courts. *See* S. Ct. R. 10. It also raises questions of exceptional national importance about the supremacy of federal statutory law and the rights of disabled persons to participate in the legislative process without risking injury or death. Certiorari is warranted so that the Court can resolve these exceptionally important questions.

I. This case is an opportunity for the Court to explain the "extraordinary character" exception to legislative immunity first recognized in *Kilbourn v. Thompson*, 103 U.S. 168 (1880)

A. The First Circuit's decision immunizes state actors who make disabled persons choose between death and disenfranchisement

Legislative immunity, upon which the First Circuit relied to deny the plaintiffs' ADA claims, is a federal common law doctrine. *United States v. Gillock*, 445 U.S. 360, 372 n.10 (1980). It is "axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk v. United States*, 290 U.S. 371, 383 (1933).

The purpose of legislative immunity is to "insure[] that legislators are free to represent the

interests of their constituents," *Powell v. McCormack*, 395 U.S. 486, 503 (1969), and to allow legislators to "execute the functions of their office," *Tenney v. Brandhove*, 341 U.S. 367, 374 (1951). Ironically, the decision below actively *prevents* legislators from representing their constituents.

A majority of the *en banc* First Circuit held that this common law doctrine will immunize a state actor who forces a disabled legislator to choose between the risk of serious injury/death and disenfranchising their constituents. This decision failed to respect this Court's instruction that legislative immunity will not immunize "extraordinary" offenses by legislators.

B. "Extraordinary character"

In *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880), this Court suggested that there may "be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." This "extraordinary character" exception to immunity endures, but the Supreme Court has never had occasion to define its contours. *See Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951) (Black, J., concurring).

The Court has, though, often reiterated that legislative immunity should not be "extend[ed] beyond what is necessary to preserve the integrity of the legislative process," *United States v. Brewster*, 408 U.S. 501, 517 (1972); *see also Forrester v. White*, 484 U.S. 219, 224 (1988) (courts

must be "careful not to extend the scope of the [legislative immunity] protection further than its purposes require."); *Gravel v. United States*, 408 U.S. 606, 620 (1972) ("The three cases reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings.").

The First Circuit's decision renders meaningless this Court's recognized exception to legislative immunity. As the dissent recognized, the decision below "effectively oust[s] disabled members from that august assembly [the New Hampshire House of Representatives] . . . turn[ing] a blind eye to the effective disenfranchisement of thousands of New Hampshire residents simply because their representatives are disabled." Pet. App. 49a. The majority decision "has no limiting principle at all." Pet. App. 74a. "[I]t gives carte blanche to legislatures to strategically silence legislative opponents — and effectively disenfranchise their constituents — so long as they can conjure up some facially neutral rationale for the rule." *Id.* Further, as the dissent noted, the majority's decision "opens the floodgates to potential abuse and spells a recipe for disaster in the future." *Id.*

Forcing a choice between death and disenfranchisement is an act of an extraordinary nature. This is especially true when the person being compelled to make the choice is a disabled person, protected by federal civil rights law, and an

elected representative. The First Circuit erred when it foreclosed all judicial inquiry into the extraordinary circumstances facing the plaintiffs.

Heretofore the Court has not had occasion to define the parameters of legislative immunity and its application to "extraordinary" situations. This is an important question of federal law that should be settled by this Court. This Court should therefore review the decision below in order to explicate the boundaries of common law legislative immunity and reverse the error of the First Circuit.

II. This case would allow the Court to decide whether legislative immunity shields legislators from complying with the Americans with Disabilities Act and Rehabilitation Act

A. The decision below elevates a personal common law immunity over federal civil rights law and enables discrimination against disabled persons

As noted above, state legislative immunity is a common law doctrine. This distinguishes it from the federal Speech and Debate Clause, which is enshrined in the Constitution. As a result, the two immunities are not coterminous: for example, the Speech or Debate Clause immunizes criminal acts within the legislative sphere, but common law immunity does not. *Compare Gillock*, 445 U.S. at 373, *with United States v. Johnson*, 383 U.S. 169, 184-85 (1966).

This is because "the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power," especially when "impair[ing] the legitimate interests of the Federal Government" would result in "only speculative benefit to the state legislative process." *Gillock*, 445 U.S. at 373 ("the judicially fashioned doctrine of official immunity does not reach so far as to immunize criminal conduct," and potentially other "important federal interests," that have been "proscribed by an Act of Congress").

The First Circuit held that the broad and remedial anti-discrimination purposes of the ADA and Rehab Act could be stymied by an assertion of a personal common law immunity. This was error.

The Court of Appeals based its decision on the fact that Congress did not *specifically* mention the term "legislative immunity" within the ADA. According to a majority of the First Circuit, Congress could only abrogate common law legislative immunity by specifically naming the doctrine, or by specifically calling out state legislatures in the statute's scope.

This holding guts the protections of the ADA and should be corrected by this Court. As the unanimous First Circuit panel noted, a "statute may express a congressional intent sufficient to overbear a common-law doctrine without expressly mentioning the doctrine." Pet. App. at 98a (citing *United States v. Texas*, 507 U.S. 529, 534 (1993)). Read as a whole, it is clear that the intent of

Congress was to make the ADA applicable to *all* government functions regardless of immunity.

To start, "state government" — and all its components — is the express target of Title II of the ADA. 42 U.S.C. § 12131(1)(A). A state legislature is clearly within that definition. *Pulliam v. Allen*, 466 U.S. 522, 541 (1984) ("[A] State acts only by its legislative, executive, or judicial authorities[.]"); 28 C.F.R. § Pt. 35, App. B §135.102 ("Title II coverage . . . includes activities of the legislative and judicial branches of State and local governments.").

The ADA's declared purpose also demonstrates Congress's intent relative to immunities. The statute is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" by "invok[ing] the sweep of congressional authority." 42 U.S.C. § 12101(b). The Act's objectives were informed by Congress's findings that disabled persons have a "right to fully participate in all aspects of society" and that "individuals who have experienced discrimination on the basis of disability often had no legal recourse." *Id.* at (a). "All aspects of society" includes voting, *id.*, and "participat[ing] fully in our political processes." 135 CONG. REC. S10765 (daily ed. Sept. 7, 1989). Moreover, one of the explicit purposes of the ADA is to create "strong, consistent, *enforceable* standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(3) (emphasis added). To that end, the ADA provides that: "In *any* action against a State for a violation of the requirements of this Act, remedies

(including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State." 42 U.S.C. § 12202 (emphasis added).

In short, "[t]he Americans With Disabilities Act is a plenary civil rights statute designed to halt *all* practices that segregate persons with disabilities and those which treat them inferior[ly] or differently." 136 CONG. REC. H2599 (daily ed. May 22, 1990) (statement of Rep. Dellums) (emphasis added); *see also Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) ("Central to the Act's primary objection, Congress extended the statute's range to reach *all* governmental activities." (emphasis added)). This purpose would hardly be furthered if, as the court below concluded, a personal common law immunity could stymie the reach of the ADA.

The interplay of state legislative immunity and federal disability rights statutes is an important issue of federal law deserving of consideration by this Court. The *en banc* First Circuit's decision undermines a crucial federal law and sows discrimination against disabled persons. The Court should grant certiorari to resolve these important issues.

III. This case is an ideal vehicle for the Court to clarify the import of official capacity lawsuits in the Title II context and the application of legislative immunity to claims against the State

A. The First Circuit concluded that an official capacity action does not sound against the State

The defendant in this action is the Speaker of the New Hampshire House of Representatives, in his official capacity only.[6] Petitioners argued below that their ADA claims sounded against the State. The First Circuit disagreed, holding that the petitioners' claims were "not claims against the State itself." Pet. App. at 21a.

The First Circuit's holding contravenes the express direction of this Court that "an official-capacity suit against a state officer . . . is no different from a suit against the State itself." *Hafer v. Melo*, 502 U.S. 21, 26 (1991); *see also Karcher v. May*, 484 U.S. 72, 78 (1987) ("We have repeatedly recognized that the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder."); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.").

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[6] Of note, the petitioners have amended their Complaint in the District Court to include the State of New Hampshire, the New Hampshire House of Representatives, and the Clerk of the House as defendants.

In light of these holdings, it is difficult to understand why the First Circuit concluded that the real party in interest was the individual legislator, rather than the State itself.

Unfortunately, as described below, existing Supreme Court precedent has created confusion regarding the import of an official capacity action and its interplay with various immunity doctrines. *See Bd. of Trs. of Univ. of Ala v. Garrett*, 531 U.S. 356 (2001). The Court should review the decision below to clarify how official capacity actions are treated.

B. Legislative immunity cannot be held by the State, contrary to the suggestion of the First Circuit, and there is a circuit split on this issue

Whether this action should be considered one against a government entity is a critical question because when "the real party in interest" in a lawsuit "is the governmental entity [rather than an individual] . . . the only immunities available . . . are those that the governmental entity possesses." *Hafer*, 502 U.S. at 25.

In its opinion, the First Circuit suggested, in dicta, that even if the House of Representatives or the State of New Hampshire themselves had been named as defendants, legislative immunity would still bar the suit. *See* Pet. App. 80a n.12; 84a n.21. This dicta contravenes the repeated

pronouncements of the Supreme Court that legislative immunity is a *personal* immunity that cannot be employed by a government entity. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 677 n.* (1996); *Hafer*, 502 U.S. at 29; *Forrester*, 484 U.S. at 224; *Scheuer v. Rhodes*, 416 U.S. 232, 239-241 (1974); *Doe v. McMillan*, 412 U.S. 306, 319 n.13 (1973); *Tenney*, 341 U.S. at 379 (Black, J., concurring); *see also Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 515 (1975) (Marshall, J., concurring) ("[T]he protection of the Speech or Debate Clause is personal.").

There has been confusion among the lower courts on this issue because of certain statements made by this Court in *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980). 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 disciplinary rules governing the conduct of attorneys." *Consumers Union*, 446 U.S. at 721. Virtually all of the Court's discussion of legislative immunity in *Consumers Union* focused on the immunity of *individual* legislators. *Id.* at 731-33. However, the Court also stated that it had "little doubt that if the Virginia Legislature had enacted the State Bar Code," then "the legislature, its committees . . . could successfully have sought dismissal on the grounds of absolute legislative immunity." *Id.* at 733-34.

The District Court and First Circuit both cited this language for the proposition that a

governmental entity itself could shield itself with legislative immunity. However, as the *amicus* United States argued before the First Circuit, this position relies on a misreading of *Consumers Union*. DOJ Brief, at *15 n.4, *18 ("Correctly understood, the Supreme Court's decision in *Consumers Union* does not preclude this suit."). In short, that case involved 42 U.S.C. § 1983, under which a "person" is the only proper defendant. The State (or rather, Commonwealth) of Virginia was therefore not truly a defendant in *Consumers Union*. Actions under Title II and Section 504, in contrast, lie properly against the State itself.

There is a disagreement amongst the lower courts on this point. The decision below, and other cases cited by the First Circuit, hold that legislative immunity can be exercised in an official capacity action despite the fact that an official capacity action sounds against the government itself. On the other hand, several courts in different circuits have held otherwise. As the Fifth Circuit recently stated: "[U]nder Supreme Court precedent, absolute legislative immunity is a doctrine that protects individuals acting within the bounds of their official duties, not the governing bodies on which they serve. Thus, even if the actions of the state agency's members are legislative . . . the state agency itself as a separate entity is not entitled to immunity[.]" *Wilson v. Houston Cmty. College Sys.*, 955 F.3d 490, 500 (5th Cir. 2020) (cleaned up); *see also Marks v. Tennessee*, 562 F. App'x 341, 344 n.2 (6th Cir. 2014) (in Title II case, court did not "rely on absolute judicial immunity, because [plaintiff] only seeks relief against the State"); *Duffy v. Riveland*, 98 F.3d

447, 452 n.4 (9th Cir. 1996); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 623 F. Supp. 1466, 1482 (W.D. Wash. 1985), *aff'd* 823 F.2d 1349 (9th Cir. 1987) ("It should be noted that both legislative and official immunity are available only to individuals and not to the governmental entities themselves."); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 288 (2nd Cir. 2003) ("The real party in interest in an official-capacity suit is the governmental 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.").

There is therefore a split amongst the circuit courts about whether a government entity itself is entitled to assert legislative immunity. The Court should accept this case to resolve that split.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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