

**Overview of Cushing v. Packard:
The Application of the Americans with Disabilities Act to State Legislators**

What follows is an overview of a recent First Circuit case that adjudicated a challenge regarding whether the New Hampshire House Speaker violated the Americans with Disabilities Act (ADA) by not allowing House members with disabilities to participate remotely in House sessions during COVID-19. Because the decision was not issued by the Second Circuit, the case is instructive, but not binding, on Vermont.

Cushing v. Packard holding: The New Hampshire Speaker of the House’s assertion of legislative immunity prevents Plaintiffs—who are New Hampshire House members with disabilities—from obtaining the preliminary injunctive relief they sought, which was to require the Speaker to allow them to participate and vote remotely in House sessions in order to reduce their risk of exposure to COVID-19 as an accommodation under the ADA¹ and the Rehabilitation Act^{2,3}. The case is now remanded for further proceedings consistent with this ruling.⁴

Here is a summary of the procedural history of the case:

- After the New Hampshire House of Representatives twice voted to prohibit its members from remotely participating in House sessions during the COVID-19 pandemic, multiple members of the New Hampshire House sued the House Speaker in New Hampshire federal district court, alleging that the Speaker’s failure to allow their remote participation violated the ADA and Rehabilitation Act.⁵
- Specifically, the plaintiff House members claimed that their underlying health conditions⁶ substantially increased the risk posed by COVID-19 and that the Speaker’s failure to allow their remote participation in House sessions constituted a refusal to provide reasonable accommodations required under those two federal acts.

¹ As described in Selene v. Legislature of Idaho, 2021 WL 230040, 7-8, the ADA prohibits a qualified individual with a disability from being excluded from participation in or being denied the benefits of the services, programs, or activities of a public entity, including a state or local government. A public entity is required to provide reasonable accommodations when necessary to avoid discrimination on the basis of a disability, unless the public entity can demonstrate that the accommodations would fundamentally alter the nature of its service, program, or activity. The reasonableness of an accommodation depends on the individual circumstances of each case.

² Similar to the ADA, the Rehabilitation Act prohibits the exclusion of a qualified individual with a disability, solely by reason of this disability, from participation in any program or activity receiving federal financial assistance. Selene v. Legislature of Idaho at 10. The Selene case and the New Hampshire’s Cushing #2 (described below) at 55 indicated that the Rehabilitation Act may specifically apply to state legislatures that received CARES Act funds to pay for COVID-19-related expenses.

³ Cushing v. Packard, 2022 WL 884195 (“Cushing #4”) at 1.

⁴ Id.

⁵ Cushing v. Packard, 2021 WL 681638 (“Cushing #1”).

⁶ Plaintiffs are described as being over age 60 and with various health conditions, including prostate cancer, compromised or suppressed immune systems, cardiac problems, diabetes, kidney disease, and respiratory issues. Cushing v. Packard, 994 F.3d 51 (“Cushing #2”), FN1 (2021).

The members sought a temporary restraining order to compel the Speaker to permit them and 23 other House members with serious health conditions to participate remotely in upcoming sessions.⁷

- The New Hampshire District Court denied Plaintiffs’ motion, holding that the Speaker enjoyed legislative immunity in his enforcement of New Hampshire House rules requiring in-person sessions.⁸
- On appeal, a First Circuit panel vacated and remanded, finding instead that the ADA and the Rehabilitation Act did abrogate legislative immunity.⁹ The panel also noted the substantive unknowns that had yet to be decided in the case.¹⁰
- Thereafter, the full First Circuit withdrew and vacated that panel opinion and granted a petition for a rehearing en banc, which was scheduled for September 10, 2021.¹¹
- Notably, that last opinion invited the U.S. Attorney General to file a brief regarding whether legislative immunity applies in this case, and the Attorney General’s office opined that legislative immunity did not apply because the Speaker was not being sued individually, but rather in his official capacity, which was the equivalent of suing the State of New Hampshire, with the state being subject to those two federal acts.¹²
- The full First Circuit opinion was issued on March 25, 2022. The Court affirmed the District Court’s denial of Plaintiffs’ motion for preliminary injunction, holding that the District Court did not err when it held that legislative immunity prevents that injunctive relief (to require the Speaker to allow them to vote remotely).¹³
 - The Court first reviewed the purpose of legislative immunity from civil judicial proceedings, which was recognized prior to the U.S. Constitution and which the Supreme Court of the United States (SCOTUS) explained is for the purpose of protecting the uninhibited discharge of legislative duties for the public good.¹⁴

⁷ Cushing #1 at 1-3.

⁸ Id. at 7.

⁹ Cushing #2 at 52.

¹⁰ Cushing #2 noted that because the District Court in Cushing #1 denied Plaintiffs’ request for injunctive relief, the record lacked findings regarding whether plaintiffs are persons with disabilities under the acts, whether there has been a violation of either act, and if so, what remedies should be provided. Id. at 56. But it also noted that the Rehabilitation Act seemed “particularly apt” in this case, since the New Hampshire Legislature had received federal CARES Act funds to pay for COVID-19-related expenses, including equipment for remote work. Id. at 55. However, it later stated that when balancing Plaintiffs’ claims against the Legislature’s, “[w]e reasonably can expect that a federal court would give considered weight to the views of a state legislature when considering the reasonableness of any proposed accommodation affecting the conduct of that legislature.” Id. at 56 (other citation omitted).

¹¹ Cushing v. Packard, 2021 WL 2216970 (“Cushing #3”), 1.

¹² Brief for the U.S. as Amicus Curiae in Support of Plaintiffs-Appellants and Urging Reversal, 2021 3406347.

¹³ Cushing #4 at 1.

¹⁴ Id. at 7.

- It then found fault with Plaintiffs’ assertions that legislative immunity did not apply because—although they had sued the Speaker in his official capacity—they were actually suing the State.¹⁵
- It then found that, based on SCOTUS caselaw, there was no clear congressional intent in the enactment of the ADA or Rehabilitation Act to abrogate legislative immunity.¹⁶ The Court found that based on SCOTUS caselaw, “if anything, there would appear to be particular reason to presume that Congress would not have abrogated such a longstanding immunity—which is both discrete in nature and unusually salient to the legislative branch—in the statute at issue here [the ADA] without making its intent to do so clear[.]”¹⁷
- Moreover, the Court found that the legislative conduct at issue—the manner of participating and voting in House sessions—was not extraordinary legislative conduct that would allow judicial intervention.¹⁸ The Court noted the Speaker was following the current House rules applicable to all House members in not authorizing remote House member authority.¹⁹
- The Court ended its opinion by emphasizing “that legislative immunity has been incorporated into American law and that federal statutes are appropriately construed with that understanding in place. The [legislative] immunity serves an important democratic end notwithstanding that it insulates elected representatives from legal challenges for certain of their official actions. For that reason, we must be cognizant—as the [SCOTUS] has instructed us to be—of the risks associated with failing to respect the traditional scope of legislative immunity, bounded though it is, out of respect for legislative freedom and thus democratic self-government.”²⁰

¹⁵ *Id.* at 7-12. *See esp.* FNs 9, 12, 13, and 14.

¹⁶ *Id.* at 12-17.

¹⁷ *Id.* at 13.

¹⁸ *Id.* at 17-20.

¹⁹ *Id.* at 19.

²⁰ *Id.* It went on to state, “Too narrow a construction of that immunity . . . invites abuses of its own. Those abuses may involve not only federal judges improperly intruding into internal state legislative affairs but also warring sides in partisan state legislators’ battles improperly enlisting federal judges to participate in them . . . That Congress would be better attuned than the judiciary to the possibility that such abuses might occur in the absence of the immunity seems clear enough.” *Id.* at 20.