

United States Court of Appeals For the First Circuit

No. 21-1177

ROBERT R. CUSHING, individually and in his capacity as the
Minority Leader of the N.H. House of Representatives; DAVID
COTE; KATHERINE D. ROGERS; KENDALL SNOW; PAUL BERCH; DIANE
LANGLEY; CHARLOTTE DILORENZO; N.H. DEMOCRATIC PARTY,

Plaintiffs, Appellants,

v.

SHERMAN PACKARD, in his official capacity as
Speaker of the House for the N.H. House of Representatives,

Defendant, Appellee.

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

[Hon. Landya B. McCafferty, U.S. District Judge]

Before

Howard, Chief Judge,
Lynch, Thompson, Kayatta, and Barron, Circuit Judges.

Israel Piedra, with whom Welts, White & Fontaine, PC, William E. Christie, S. Amy Spencer, and Shaheen & Gordon, P.A. were on brief, for appellants.

Anthony J. Galdieri, Senior Assistant Attorney General for the State of New Hampshire, with whom Samuel R. V. Garland, Assistant Attorney General for the State of New Hampshire, and Jennifer S. Ramsey, Assistant Attorney General for the State of New Hampshire, were on brief, for appellee.

Katherine E. Lamm, Attorney, Civil Rights Division, United States Department of Justice, with whom Kristen Clarke, Assistant Attorney General, and Thomas E. Chandler, Attorney, Civil Rights

Division, United States Department of Justice, were on brief, for the United States, amicus curiae.

Joshua L. Gordon was on brief for ABLE - New Hampshire and National Disability Rights Network, amici curiae.

Opinion En Banc

March 25, 2022

BARRON, Circuit Judge, with whom Howard, Chief Judge, and Lynch, Circuit Judge, join. Does either Title II of the Americans with Disabilities Act ("ADA") or § 504 of the Rehabilitation Act ("RHA") authorize a federal court to resolve a dispute among members of a state legislative body about whether votes on bills may be cast remotely rather than in person? That question and others closely related to it arise here from a dispute among members of the New Hampshire House of Representatives ("House") over the proper way for that legislative body to conduct its official proceedings in the face of the threat to health that the COVID-19 virus poses.

Procedurally speaking, the questions come to us in connection with an interlocutory appeal by members of the House, each of whom is alleged to be especially vulnerable to the virus due to a medical condition, and the New Hampshire Democratic Party. The appeal challenges the denial by the United States District Court for the District of New Hampshire of a motion for a preliminary injunction against Sherman Packard, the Speaker of the House. The motion seeks to require the Speaker to institute procedures that would permit the representatives to participate remotely in House proceedings -- including with respect to the casting of votes on bills -- to reduce their risk of being infected with the virus.

The underlying suit names the Speaker, in his official capacity, as the defendant and alleges his violation of both Title II of the ADA and § 504 of the RHA, among other provisions of federal and state law, based on his refusal to grant the representatives' request for that same accommodation. The motion for a preliminary injunction was based on the plaintiffs' ADA- and RHA-related claims.

The District Court denied the motion based on the Speaker's assertion of legislative immunity. See Cushing v. Packard, No. 21-cv-147, 2021 WL 681638 (D.N.H. Feb. 22, 2021). On interlocutory appeal, a panel of our Court unanimously vacated and remanded the District Court's ruling on the ground that Title II of the ADA abrogated, and § 504 of the RHA in this case effected a waiver of, legislative immunity, such that the plaintiffs' claims based on those statutes could be considered on their merits. Cushing v. Packard, 994 F.3d 51 (1st Cir. 2021).

The Speaker at that point petitioned our Court for rehearing en banc, which we granted in an order that vacated the panel's decision. Cushing v. Packard, No. 21-1177, 2021 WL 2216970 (1st Cir. June 1, 2021); see 1st Cir. I.O.P. X(D). Thus, we now must review anew the District Court's denial of the motion for the preliminary injunction.

We are mindful of the seriousness of the threat to public health that the COVID-19 virus poses. Indeed, we have held our proceedings in this case remotely in accord with our own protocols for dealing with that threat. But, our task in this appeal is not to determine the most advisable means of conducting governmental operations during the pandemic. Nor is it to decide how the ADA's and the RHA's requirements to provide reasonable accommodations to those with medical vulnerabilities apply in the face of the peculiar risk that this specific virus presents. It is solely to determine whether the District Court erred in holding that the Speaker's assertion of legislative immunity prevents the plaintiffs from obtaining the preliminary injunctive relief that they seek. Because we conclude that the District Court did not err in so holding, we affirm the denial of the motion for the preliminary injunction and remand the case for further proceedings consistent with this ruling.

I.

A.

On March 13, 2020, New Hampshire Governor Christopher T. Sununu issued an executive order that declared a state of emergency due to the COVID-19 virus's spread. N.H. Exec. Order 2020-04 (Mar. 13, 2020) ("Order"). The Order, among other things, encouraged State government bodies to "conduct meetings through electronic

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