No. _____

In the Supreme Court of the United States

BENJAMIN KOHN,
Petitioner,
v.
STATE BAR OF CALIFORNIA ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Andrew Rozynski
Counsel of Record
EISENBERG & BAUM, LLP
24 Union Square East, Penthouse
New York, NY 10003
(212) 353-8700
ARozynski@eandblaw.com

Counsel for Petitioner

QUESTION PRESENTED

In *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 391 (1998), this Court noted it hasn't yet decided whether sovereign immunity implicates subject matter jurisdiction. Consequently, the circuits are split on whether sovereign immunity is properly reviewed under Rule 12(b)(1) or 12(b)(6). Among circuits applying 12(b)(1), nested splits manifest from further disagreements over what circumstances permit factual challenges to jurisdiction. Moreover, several circuits hold Rule 12(b)(1) dismissals must be *without prejudice* to avoid disclaiming jurisdiction and then exercising it, which rule the decision below splits from to affirm dismissal *with prejudice* of Kohn's Rehabilitation Act claims under Rule 12(b)(1) based on Respondents' assertions that they didn't directly receive federal funding and thus purportedly hadn't waived sovereign immunity.

This petition presents the following questions:

Whether sovereign immunity implicates subject-matter jurisdiction such that it may be resolved through factual challenges under Federal Rule of Civil Procedure 12(b)(1), and if so, may such jurisdictional dismissals be made with prejudice?

Whether this Court should revisit Hans v. Louisiana, 134 U.S. 1 (1890), to clarify whether state sovereign immunity in federal court applies solely to claims based on diversity jurisdiction?

PARTIES TO THE PROCEEDING

Benjamin Kohn, an individual, is the Petitioner and was the Plaintiff-Appellant below.

The State Bar of California, California Committee of Bar Examiners, and their agents in their official capacities, are Respondents here and were Defendants-Appellees below.

LIST OF PROCEEDINGS

Kohn v. State Bar of California, et al., No. 4:20-cv-04827-PJH (N.D. Cal.) (Oct. 27, 2020 judgment).

Kohn v. State Bar of California et al., 87 F.4th 1021 (9th Cir. 2023) (*en banc*) (affirming the district court's holding that the State Bar of California is an "arm of the State" entitled to share in its sovereign immunity upon initial hearing *en banc*–and remanding the remaining issues to the three-judge panel–on Dec.6, 2023).

Kohn v. State Bar of California et al., No. 23-6922, 144 S. Ct. 1465 (2024) (denying cert. on Apr.29, 2024, from Dec.6, 2023 *en banc* 9th Cir. decision).

Kohn v. State Bar of California et al., 119 F.4th 693 (9th Cir. 2024) (affirmed in part, vacated in part, and remanded by the three-judge panel to the district court on Oct.21, 2024; pet. for rehearing and rehearing *en banc* denied on December 31, 2024).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

Louis Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963) 29

PETITION FOR WRIT OF CERTIORARI

This case presents three well-defined Circuit splits warranting this Court's review. Had Petitioner Kohn's Rehabilitation Act claims been adjudicated in circuits on the opposite side of any of these splits, the District Court's dismissal with prejudice under Rule 12(b)(1) would have been vacated and remanded with leave to amend—precisely as occurred with his other claims reviewed under Rule 12(b)(6)[1].

Congress has imposed nondiscrimination requirements on entities receiving Federal Financial Assistance ("FFA") through legislation enacted pursuant to its Spending Clause authority, including the Rehabilitation Act, 29 U.S.C. § 794 ("RA"). Under 42 U.S.C. § 2000d-7, FFA recipients must waive sovereign immunity for claims brought under these statutes.

Following remand from the Ninth Circuit's en banc panel, the three-judge panel affirmed dismissal of Kohn's RA claims with prejudice pursuant to a factual challenge to subject matter jurisdiction under Rule 12(b)(1). The Ninth Circuit held that sovereign

---

[1] To provide this Court a clean vehicle to consider the significant questions presented herein, Kohn doesn't raise all arguments previously made to the Ninth Circuit against Respondents' FFA-receipt determining whether sovereign immunity bars his RA claims.

immunity is jurisdictional and reviewable under this rule, thereby justifying the lower court's examination of FFA receipt as a factual challenge to jurisdiction. Consequently, without permitting discovery or cross-examination, the courts below relied on a subsequently-contradicted declaration from Respondents' CFO stating that "to the best of [his] knowledge," the State Bar received no FFA in 2020.[2]

The courts deemed this declaration prima facie sufficient, requiring Kohn to produce rebuttal evidence prematurely at the pleading stage. His procedural failure to present such evidence was deemed incurable, warranting dismissal "with prejudice" and precluding repleading in his Second Amended Complaint. Each component of this analysis either deepens or creates a Circuit split.

---

[2] Years after dismissal, Respondents disclosed records contradicting the material allegations in this declaration (see CA9 Dkt.149), underscoring that this procedural treatment had been dispositive, and that Kohn could cure any procedural or pleading deficiencies his former counsel—who lacked experience in this area of law—may have committed at the District Court in 2020 while pursuing this action on short notice and simultaneously seeking urgent injunctive relief, while Kohn was simultaneously preparing for the bar exam under peak societal and personal upheaval caused by the Covid pandemic.

First, exacerbating an established Circuit split, the Ninth Circuit erroneously held that sovereign immunity falls under Rule 12(b)(1) rather than 12(b)(6), contradicting the Third and Seventh Circuits[3] on a question this Court expressly reserved in *Schacht*, 524 U.S. at 391 (1998) ("Even making the assumption that Eleventh Amendment immunity is a matter of subject-matter jurisdiction—an issue we have not decided…"). Even assuming the factual dispute implicated sovereign immunity, it should have been reviewed under Rule 12(b)(6), which requires accepting plausibly pleaded facts as true and generally permits leave to amend. The First, Second, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and Federal Circuits[4] align with the Panel in treating sovereign immunity as sufficiently jurisdictional to

---

[3] *Nails v. Pa. Dep't of Transp.*, 414 F. App'x 452, 454 (3rd Cir. 2011); *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 821 (7th Cir. 2016);

[4] See *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001); *T.W. v. N.Y. Bd. of Law Exam'rs*, 996 F.3d 87, 93 (2nd Cir. 2021); *Balfour Beatty Infrastructure v. Mayor & City Council of Balt.*, 855 F.3d at 251 (4th Cir. 2017); *Block v. Tx. Bd. of Law Exam'rs*, 952 F.3d 613, 617 (5th Cir. 2020); *Skatemore v. Whitmer*, 40 F.4th 727, 731 (6th Cir. 2022); *Montin v. Moore,* 846 F.3d 289, 292-93 (8th Cir. 2017); *Hennessy v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 527 (10th Cir. 2022); *Dupree v. Owens*, 92 F.4th 999, 1007 (11th Cir. 2024); *Gensetix v. Bd. of Regents*, 966 F.3d 1316, 1320 (Fed. Cir. 2020).

warrant at least facial challenges under Rule 12(b)(1), though they diverge on specific applications. With virtually every circuit having addressed this fundamental procedural question, further percolation offers minimal benefit. As this issue independently determines the fate of Kohn's RA claims, this case presents an ideal vehicle for resolving this split. [5]

Second, the Panel created two additional Circuit splits in applying Rule 12(b)(1): (1) improperly subjecting sovereign immunity to factual jurisdictional challenges, contrary to the Fourth Circuit's position that such immunity permits only facial challenges under Rule 12(b)(1); and (2) holding that jurisdictional dismissals under Rule 12(b)(1) may be "with prejudice," contradicting uniform holdings from the Second, Fifth, Tenth, and Eleventh Circuits that such dismissals must be without prejudice to avoid the paradox of disclaiming jurisdiction while imposing claim-preclusive effects. With five Circuit Courts having addressed this latter issue, and given the isolated position of the Ninth Circuit's holding, this split too is ripe for resolution, especially as it independently determines the outcome here.

---

[5] This petition presents a clean vehicle for resolving a well-defined procedural question that has significant implications for sovereign immunity jurisprudence and access to judicial remedies under federal nondiscrimination statutes.

OPINIONS BELOW

The December 31, 2024 order of the court of appeals denying rehearing and rehearing *en banc* is reproduced at App.2. The October 21, 2024 decision of the court of appeals affirming the dismissal of Petitioner's RA claims, and vacating and remanding to district court with instructions to grant leave to amend on his Unruh claims, is reproduced at App.3-7. The district court's October 27, 2020, order granting Respondents' motion to dismiss is reproduced at App.8–24, with its entry of judgment at App.25.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2024. A timely filed petition for rehearing and rehearing *en banc* was denied on December 31, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI.

STATEMENT OF THE CASE:

A. Statement of Facts:

1. Respondents' Disability Discrimination:

Petitioner, Benjamin Kohn, is a lifelong California-domiciled JD graduate—and now California-licensed attorney—who suffers or has suffered from a number of distinctly diagnosed conditions, including autism, keratoconus, severe gastroparesis and postoperative dysphagia, pelvic floor dyssynergia, IBS-C, myofascial pain syndrome, motor delays, scapular dyskinesis, occipital neuralgia, cervicalgia, and medication-induced immunodeficiencies.

Consequently, Kohn petitioned Respondents for disability accommodations on several administrations of the California bar exam, and for each of those exams his requests were partially denied without any lawful basis–nearly always without meaningful explanation–against the recommendations of several treating doctors in sworn affidavits supported by detailed medical lab, imaging, and diagnostic procedure testing, and comprehensive neuropsychological evaluation reports.

As but one example of Respondents' unlawful practices, for the first time following appeal for the February 2020 exam, prior to and after which Respondents refused to detail their reasons for most

denials, Respondents disclosed that they had never considered affidavits from Kohn's primary care physician, Dr. Dresden, because Dresden had interpreted, applied, and supplemented—but had not personally performed—the over twenty hours of neuropsychological testing performed by Kohn's prior psychologist evaluator, Dr. Preston.

As Dr. Preston had died at the end of 2017 and was thus unavailable to elaborate, to continue pursuing his denied accommodations for the then-July 2020 exam Respondents effectively insisted that Kohn subject himself to extraordinarily expensive and burdensome, in-person retesting–during pre-vaccine Covid pandemic conditions from which Kohn had elevated disability-based risks–before they would consider any autism-related elaborations on why Kohn's disabilities warranted his requested accommodations not already attested by the deceased Dr. Preston.

Although Kohn indulged Respondents by retesting at great personal risk, burden, and expense immediately upon the lift of State and local shelter-in-place orders, submitting the completed report on June 4, 2020, Respondents retaliated against his good faith early production of that new documentation as an addendum prior to appeal by delaying any decision for the then-September 2020 exam until August 27, 2020, just after their deadline for Kohn to appeal that decision. According to Respondents, Kohn's submission of the improperly-demanded, cumulative

retesting results on June 4, 2020—a full six weeks before Respondents' deadline to submit a *new* petition and 77 days after Kohn submitted his initial, still-pending petition that he'd submitted long before February 2020 exam results on March 19, 2020, from which he already should've received a decision ready to appeal with the new documentation and the benefit of an iterative response to the March 2020 materials—left Respondents insufficient time to resolve the March requests in a manner that preserved his ability to administratively appeal any denials for the October 2020 exam at all.

Paradoxically, during this same period, Respondents were unable to timely disclose how the exam would be administered for examinees to request *any* format-specific accommodations or those addressing Covid, and first published standard conditions four days before the final deadline to request accommodations with completed medical evaluator forms.

On August 27, 2020, Respondents partially denied Kohn's requests for the October 2020 exam–including all those pertaining to mitigating Covid safety risks for any potential in-person testing–and confirmed for the first time it would require Kohn to test in-person despite Kohn's disability-based elevated Covid risk factors and their offering remote testing standard to nondisabled examinees.

Beyond Respondents' failures to reasonably accommodate Kohn's multitude of disabilities, Kohn

challenged certain aspects of their procedural rules for seeking testing accommodations as facially unlawful under the ADA, including the use of single-sentence denials lacking fair notice of the reasoning, prohibition on live hearings, excessively burdensome documentation requirements, and months-long, non-collaborative administrative review timelines, which force capriciously short appeal deadlines when permitting an appeal at all, prolongs resolution of basic fact misconceptions over multiple unnecessary exam retake cycles, and forecloses equal opportunity to timely register and competitively prepare for the next scheduled exam administration. Invidiously, these timelines allocate nearly all of the time between semiannual administrations of the exam to State Bar staff to handle their side of the process, while requiring disabled applicants to, at best, turnaround in mere days what Respondents insist requires months to evaluate.

For the October 2020 exam, Kohn further challenged, as disparate treatment against disabled examinees Respondents' "forced in-person policy," which required applicants with certain accommodations that could've been securely implemented remotely with slightly more staff effort and expense to instead travel to and test at nonstandard in-person test centers–during the pre-vaccine phase of the Covid pandemic, despite remote

testing having been the standard condition of the October 2020 exam for nondisabled examinees.[6]

Due to Respondents' failures, Kohn was forced to delay his career for years, with the resulting gap between law school graduation and licensure continuing to inflict ongoing and likely lifelong harm to his professional development and ability to secure gainful employment. Moreover, Kohn expended substantial time, effort, and financial resources, registering and preparing for bar exams for which he was not appropriately accommodated. For the October 2020 exam, while Kohn's passage may have mitigated any prejudice to his performance, he still endured, *inter alia*, additional expenses and burdens, such as Covid exposure risks, and hotel and ergonomic furniture transportation expenses, because of the nonstandard forced in-person testing coupled with the denied reasonable accommodation requests.

2. The State Bar's FFA-Receipt:

Kohn's FAC pled generally that the State Bar received FFA, which the Courts below did not hold insufficient under Rule 12(b)(6). Nonetheless, to

[6] Respondents enforced this policy even against applicants–including Kohn–whose treating physicians attested were immunocompromised or otherwise at elevated risk from Covid.

eliminate any doubt that the erroneous procedural handling below was dispositive and that amendment to the FAC wouldn't be futile, Kohn would plead the following elaborations if provided the opportunity:

1. The State Bar, especially its "Legal Services Trust Fund Commission" (LSTFC) subunit, both receives and administers to grantees it selects, funding from the Judicial Council of California, California Housing Finance Administration, and the California Supreme Court, each of which in turn receive direct federal grants that were awarded for similar types of programs or activities as LSTFC administers grants for. In 2023, the State Bar admitted its LSTFC had received a federal "Homeless Prevention 3" grant in 2020.

2. Federal district courts have, at relevant times, donated personnel time and venue to Respondents to jointly hold in-person "attorney oath ceremonies" for their attorney admission programs.

3. Various federal employees have volunteered on State Bar committees, commissions, or its Board, and to teach continuing education offered by the State Bar, as part of the scope of their federal employment duties.

4. "California Changelawyers," a corporation formed, staffed, and operated by the State Bar as a program or activity thereof and provided with office space at its headquarters, received a federal forgivable loan.

5. The State Bar is required by California law to invest certain IOLTA proceeds into federal securities and receive federal interest payments thereupon.

Of course, there has been no discovery on this issue, and Respondents have claimed to have records responsive to Kohn's public records requests that they allege are exempt from disclosure thereunder and have not produced to-date, so it's therefore likely that discovery would unearth additional facts and evidence supporting Respondents' FFA-receipt.

B. Procedural History:

1. The District Court dismissed Kohn's claims with prejudice and without leave to amend.

On July 18, 2020, Kohn sued Respondents in the U.S. District Court for the Northern District of California. Kohn sought declaratory and injunctive relief and monetary damages arising from Respondents' violations of Title II, 42 U.S.C. § 12131, *et seq*.; the Rehabilitation Act, 29 U.S.C. § 794; Cal. Gov't Code § 11135, *et seq*., and § 12944, *et seq*.; and the Unruh Act, Cal. Civ. Code § 51(f). In September 2020, Kohn filed his FAC, which asserted the same claims and alleged additional facts. Kohn moved for a preliminary injunction as to each version of his complaint, which the District Court denied.

On October 27, 2020, the District Court granted Respondents' motion to dismiss under Rules 12(b)(1)

and 12(b)(6), without the benefit of a hearing, and without granting Kohn leave to amend. The District Court held that Kohn's ADA Title II claims were barred by Eleventh Amendment immunity; that the court lacked subject matter jurisdiction over Kohn's RA claims based on the State Bar's assertion that it does not receive direct federal funding and its theory that a resulting lack of statutory coverage implicated its federal question jurisdiction; that the Unruh Act never applies to government entities; and that the California Government Code provisions are inapplicable to the State Bar.

The District Court entered final judgment in favor of Respondents, and Kohn timely appealed as to his Title II, RA, and Unruh damages claims, conceding his declaratory/injunctive claims had become moot, and declining to appeal the District Court's dismissal of the Cal. Gov. Code claims.[7]

2. The Ninth Circuit *sua sponte* grants initial hearing *en banc*, decides that the State Bar is an "arm of the State," and remands remaining issues to three-

[7] While the District Court's decision improperly–under Rule 12(b)(6)–credited portions of Respondents' version of disputed facts and their mischaracterizations of Kohn's allegations, *i.e.* what accommodations Kohn requested, those disputes are immaterial to the questions presented by this petition.

judge panel for decision in first instance.

After oral argument on Kohn's appeal, the Ninth Circuit took the unusual step of *sua sponte* voting to hear the matter *en banc* before a decision from the assigned three-judge panel.

Following supplemental briefing and oral argument, the *en banc* panel majority held that the State Bar is an "arm of the State" and thus entitled to share in California's sovereign immunity, though two judges concluded the opposite and dissented. The *en banc* panel remanded the remaining issues presented by the appeal to the originally-assigned three-judge panel. This Court, in No.23-6922, denied *certiorari* from the Ninth Circuit's *en banc* ruling on the "arm of the State" issue on April 29, 2024, 144 S. Ct. 1465 (2024).

3. The Ninth Circuit three-judge panel affirms dismissal on RA claims, but vacates dismissal and remands for Title II and Unruh claims.

The Panel's October 21, 2024 published opinion vacates the dismissal of Kohn's Title II claims, and remands those claims to District Court with instructions to grant Kohn leave to amend and reconsider its analysis under *U.S. v. Georgia*, 546 U.S. 151, 159 (2006) regarding whether those Title II

claims validly abrogate sovereign immunity. In a concurrently-filed memorandum disposition, the Panel affirmed the dismissal of Kohn's RA claims with prejudice and without leave to amend under Rule 12(b)(1), holding that sovereign immunity can be established by factual challenges to subject matter jurisdiction thereunder even where the factual dispute is identical to one of the substantive elements of the underlying claims, and relying on the purported relationship between FFA-receipt and sovereign immunity to conclude that such Rule 12(b)(1) review had been proper. The Panel found Respondents' CFO's declaration alleging that he was unaware of any direct federal funding to the State Bar in 2020 *prima facie* sufficient to require rebuttal evidence from Kohn at the pleading stage, and held that Kohn's procedural failure to present such evidence below was incurable and had warranted dismissal "with prejudice," such that Kohn cannot replead his RA claims in his SAC or present such evidence upon remand. The Panel vacated the District Court's dismissal of Kohn's Unruh claims under Rule 12(b)(6), holding that the California Supreme Court had–after the District Court's decision–rejected the District Court's bright-line rule against Unruh's application to government entities, and that Kohn should be granted leave to amend to plead how either the State Bar generally or the bar exam function specifically involved sufficiently businesslike attributes for statutory coverage under Unruh

applying the California Supreme Court's new standard.

4. The Ninth Circuit denied Kohn's timely petition for rehearing and rehearing *en banc*, but stayed its mandate pending this Petition for *Certiorari*.

With an extension of time granted by the Ninth Circuit, Kohn timely filed his petition for panel rehearing and rehearing *en banc* on November 26, 2024. The Ninth Circuit denied the petition on December 31, 2024. On January 6, 2025, the Ninth Circuit granted Kohn's motion to stay its mandate pending this petition.

REASONS FOR GRANTING PETITION:

This case presents a fundamental, unresolved constitutional question with profound practical consequences for litigants nationwide: whether sovereign immunity is properly evaluated under Rule 12(b)(1) or Rule 12(b)(6). The Court's resolution of this question would provide essential guidance to lower courts confronting this threshold jurisdictional issue that frequently determines whether plaintiffs can effectively vindicate their federal rights.

A. Courts of Appeals are divided over whether sovereign immunity is properly invoked under Rule 12(b)(1) or 12(b)(6).

The Circuit split on this question has created a system where identically situated litigants face dramatically different procedural standards depending solely on venue. This inconsistency undermines the uniform application of federal law and produces fundamentally inequitable outcomes. While the technical distinction between Rules 12(b)(1) and 12(b)(6) might appear procedural, this case powerfully demonstrates how this seemingly technical distinction produces outcome-determinative results when complex immunity questions involve disputed factual predicates.

As the preceding analysis demonstrates, this Circuit split has fully matured, with nearly every Circuit having adopted a position. Had Kohn's Rehabilitation Act claims been evaluated in the Third or Seventh Circuits—where sovereign immunity is reviewed under Rule 12(b)(6)—he would have received leave to amend his pleadings to establish the State Bar's receipt of Federal Financial Assistance, a substantive element necessary to state a viable RA claim. The constitutional protections afforded by the Eleventh Amendment should not vary based on geographic accident.

1. This Court has expressly reserved the question of the proper procedural mechanism for sovereign immunity challenges.

Despite numerous opportunities to address this issue, this Court has never squarely resolved whether sovereign immunity should be analyzed under Rule 12(b)(1) or 12(b)(6). In *Schacht*, 524 U.S. at 391 (1998), the Court explicitly acknowledged it had not yet decided this question. While the Court has reviewed sovereign immunity determinations from cases employing both procedural frameworks, it has never directly confronted or resolved which approach is correct.

The persistence of this unresolved question has significant consequences beyond mere procedural technicality. When sovereign immunity is treated as a factual jurisdictional issue under Rule 12(b)(1), as occurred here, plaintiffs face the extraordinary burden of producing evidence before discovery to overcome a constitutional defense. This procedural posture effectively transforms sovereign immunity from a waivable defense into an insurmountable jurisdictional bar that can be raised at any time and supported by extra-pleading evidence unavailable to the plaintiff at the pleading stage.

This case presents an ideal vehicle for resolving this entrenched Circuit split. The question is cleanly presented, outcome-determinative, and addresses a constitutional issue that affects countless litigants seeking to vindicate their rights against state entities across diverse federal statutory schemes.

2. The Choice and Application of Rule 12(b)(1) Below Is Fundamentally Flawed.

The Ninth Circuit's holding not only creates a problematic circuit split demanding resolution, but is substantively incorrect. Although sovereign immunity possesses certain jurisdictional characteristics derived from the Eleventh Amendment's text, the doctrine as developed by this Court has evolved far beyond those textual boundaries. Unless this Court intends to fundamentally restructure sovereign immunity jurisprudence (*see infra* Section C),the proper application of the Federal Rules of Civil Procedure requires examining the doctrine's complete attributes rather than selectively focusing on isolated characteristics.

Sovereign immunity's fundamental attributes overwhelmingly resemble an affirmative defense rather than a pure jurisdictional bar. These attributes include:

First, as this Court explained in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997), "[t]he Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction." This sovereign immunity can be waived through consent, as further confirmed in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 676 (1999).

The Fourth Circuit similarly recognized this principle in *Hutto v. South Carolina Retirement System*, 773 F.3d 536, 543 (4th Cir. 2014).

Second, sovereign immunity can be forfeited when not timely and affirmatively asserted, as established in *Schacht*, 524 U.S. at 389 (1998), *In re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002), and *Hutto*, 773 F.3d at 543 (4th Cir. 2014).

Third, Congress can abrogate sovereign immunity under appropriate circumstances, as recognized in *United States v. Georgia*, 546 U.S. at 158-59 (2006), applying the principles articulated in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Fourth, defendants bear the burden of establishing sovereign immunity, as held in *ITSI T.V. Productions v. Agricultural Associations*, 3 F.3d 1289, 1292 (9th Cir. 1993) and *Hutto*, 773 F.3d at 543 (4th Cir. 2014).

Fifth, sovereign immunity is constrained by established doctrinal exceptions, consistent with the "two-tiered" reading of Article III that historically distinguished between "Cases" where state sovereign immunity did not apply and "Controversies" where it did. *See* Schultz, *Sovereign Immunity and the Two Tiers of Article III*, 29 GEO. MASON L. REV. 287, 302-08 (2021) (explaining that the Constitution's text extends judicial power to "all Cases" in Article III's first tier, which logically precludes sovereign immunity defenses in those categories). These exceptions include this Court's fiction in *Ex Parte Young*, 209 U.S. 123 (1908), which allows constitutional claims against state officials while

preserving immunity for the state itself, and various "plan of the Convention" precedents where the Court has recognized immunity surrenders in contexts such as bankruptcy proceedings, *Central Virginia Community College v. Katz*, 546 U.S. 356, 373 (2006), federal eminent domain authority, *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2252 (2021), and military powers, *Torres v. Texas Department of Public Safety*, 142 S. Ct. 2455, 2460 (2022). These exceptions align with the understanding that judicial power must "correspond with the legislative," as articulated by Madison at the Virginia ratifying convention. *See* Schultz, 29 GEO. MASON L. REV. at 317, 342-44

Sixth, sovereign immunity's applicability depends on the type of defendant and relief sought, as established in *Ex Parte Young*, 209 U.S. 123 (1908), *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977), and *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 96, 101 (1984).

Seventh, sovereign immunity occasionally varies based on the plaintiff's identity, as recognized in *United States v. Texas*, 143 U.S. 621, 646 (1892) and *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904).

Notably, unlike true jurisdictional barriers, sovereign immunity's availability does *not* depend on the egregiousness of the defendant's alleged conduct or how "clearly established" the violated right may have been.

The Ninth Circuit previously recognized this distinction correctly in *ITSI T.V. Productions*, stating

that "sovereign immunity does not implicate a federal court's subject matter jurisdiction in any ordinary sense," rendering Rule 12(b)(1) review inappropriate. 3 F.3d at 1292; see also *Tritchler v. County of Lake*, 358 F.3d 1150, 1153-54 (9th Cir. 2004); cf. *Hutto*, 773 F.3d at 543 (4th Cir. 2014).

These characteristics collectively demonstrate that sovereign immunity functionally operates as a defense to the complaint rather than a pure jurisdictional limitation, making Rule 12(b)(6) the appropriate procedural mechanism for its evaluation. But also see *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (treating tribal sovereign immunity as an issue properly addressed under Rule 12(b)(1)). The Ninth Circuit's contrary approach not only contradicts its own precedent but fundamentally mischaracterizes the nature of sovereign immunity as developed through this Court's jurisprudence.

B. Under Rule 12(b)(1), Courts of Appeals are divided over the procedural boundaries of jurisdictional challenges.

The procedural limitations on jurisdictional fact-finding at the pleading stage under Rule 12(b)(1) and whether jurisdictional dismissals can be made with prejudice are issues of exceptional importance. Full discovery and witness cross-examination constitute critical safeguards for fundamental fairness in our legal system and ensure the orderly administration of justice when adjudicating factual disputes. Permitting defendants to circumvent these carefully

designed procedural protections raises significant policy and prudential concerns that warrant careful consideration.

Given Rule 12(b)(1)'s frequent utilization across federal litigation, the implications of permitting this procedural treatment extend well beyond the immediate parties and claims in this case. Moreover, the Circuit Courts remain divided on two critical questions: (1) what circumstances, if any, permit factual challenges to jurisdiction under Rule 12(b)(1), and (2) whether Rule 12(b)(1) can be used to dismiss claims with prejudice, as occurred in this case. This Court's guidance is essential to secure uniform application of federal law and prevent numerous wrongful dismissals.

1. This Court has not resolved when sovereign immunity may be invoked through factual jurisdictional challenges, nor whether Rule 12(b)(1) jurisdictional dismissals must be without prejudice.

Petitioner's research has not identified any case where this Court has reviewed a decision in which sovereign immunity was raised as a factual challenge to jurisdiction under Rule 12(b)(1), let alone where the propriety of such challenges was directly presented. The closest relevant guidance appears in *Bell v. Hood*, 327 U.S. at 682-83 (1946).

In *Bell*, this Court held that factual challenges to subject matter jurisdiction under Rule 12(b)(1) are generally impermissible when the factual dispute is

intertwined with the substantive merits of the underlying claim, such that the same factual question controls both jurisdiction and an element of the plaintiff's claim. For federal question cases such as this one, the Court recognized an exception only for claims that are "clearly frivolous" or "insubstantial and asserted solely for the purpose of obtaining federal jurisdiction." Neither court below found Kohn's Rehabilitation Act claims met this standard, nor could they reasonably do so, particularly since this case asserted federal ADA Title II claims arising from the same factual nucleus that would have established federal question jurisdiction regardless.

The Ninth Circuit's attempt to distinguish *Bell* as not addressing sovereign immunity—and its split with the Fourth Circuit over whether sovereign immunity can ever properly be asserted through a factual challenge—demonstrates that *Bell* provides insufficient guidance. This Court should clarify that the rule remains applicable even when the purportedly jurisdictional component involves sovereign immunity. Even if sovereign immunity were genuinely jurisdictional, what matters under *Bell* is the presence of overlap with the claim's merits, not the nature of the jurisdictional component itself.

Similarly, the question of whether Rule 12(b)(1) dismissals for lack of jurisdiction must be made without prejudice has not been squarely addressed by this Court, likely because the Ninth Circuit's decision below created this split by deviating from a widely accepted principle of law.

2. The Ninth Circuit's overly permissive approach to jurisdictional fact-finding under Rule 12(b)(1) is incorrect.

Even assuming sovereign immunity is jurisdictional and properly reviewed under Rule 12(b)(1), and further assuming that Federal Financial Assistance receipt implicated immunity in this case, sovereign immunity assertions should be limited to facial jurisdictional challenges where immunity would bar claims even presuming the truth of all plausibly pleaded facts. This approach, adopted by the Fourth Circuit in *Balfour Beatty Infrastructure v. Mayor & City Council of Balt.*, 855 F.3d 247, 251 (4th Cir. 2017) reconciles the "jurisdictional" characterization of sovereign immunity without enabling defendants to resolve factual disputes before plaintiffs have an opportunity to conduct discovery or cross-examine declarants.

Even the Eleventh Circuit, which permits some sovereign immunity invocations as factual challenges under Rule 12(b)(1), has held that an identical challenge in an identical context—a Rule 12(b)(1) factual challenge to jurisdiction over Rehabilitation Act claims based on a declaration denying the defendant's receipt of Federal Financial Assistance—was improper. *National Association of the Deaf*, 980 F.3d at 775 (11th Cir. 2020).

Alternatively, consistent with *Bell*, if factual challenges are permitted, they should be strictly limited to disputes wholly distinct from substantive elements of the underlying claims. In the sovereign immunity context, an appropriate example would be

disputes over whether the defendant had expressed pre-filing consent to the plaintiff's suit. However, Federal Financial Assistance receipt disputes, which constitute a substantive element of every Rehabilitation Act claim and typically involve evidence primarily in the defendant's possession, should remain outside this framework. While the Ninth Circuit attempted to distinguish *Bell* based on sovereign immunity, the *Bell* holding turned on the presence of an intertwined merits issue, not the absence of a jurisdictional component.

3. The courts below exceeded their jurisdiction by dismissing Kohn's Rehabilitation Act claims with prejudice under Rule 12(b)(1).

Dismissing claims with prejudice under Rule 12(b)(1) creates a logical contradiction—disclaiming jurisdiction while simultaneously exercising it. This contradiction arises because dismissal with prejudice carries claim-preclusive effects that can only be imposed by a court with proper jurisdiction. *Hernandez v. Conriv Realty Associates*, 182 F.3d at 124 (2nd Cir. 1999); *Brereton v. Bountiful City Corp.*, 434 F.3d at 1217 (10th Cir. 2006). Sovereign immunity presents no exception to this principle. *Mitchell v. Bailey*, 982 F.3d at 944 (5th Cir. 2020); *Dupree v. Owens*, 92 F.4th at 1007 (11th Cir. 2024).

Petitioner has identified no federal appellate decision other than the one below that holds otherwise. The practical effect here is profound: Kohn

could easily cure the pleading and evidentiary defects regarding Federal Financial Assistance receipt upon remand. The circumstances of excusable neglect below and Respondents' reliance on a demonstrably debunked declaration to secure dismissal render this deprivation of opportunity a miscarriage of justice.

Sovereign immunity has become so unworkably complex, and evolved so many opaque derivative doctrines, that nearly every aspect of its provenance, nature, scope of beneficiary defendants, types of claims and relief barred, exceptions, and procedural handling has sharply divided judges at every level of the federal judiciary.

Furthermore, Federal Rule of Civil Procedure 41(b) explicitly excludes dismissals for lack of jurisdiction—including sovereign immunity dismissals under Rule 12(b)(1)—from operating as adjudications "on the merits." Fed. R. Civ. P. 41(b); see *Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996) ("Because sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1) and not with prejudice."); *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006) ("[D]ismissals for lack of jurisdiction should be without prejudice because the court, having determined that it lacks jurisdiction over the action, is incapable of reaching a disposition on the merits of the underlying claims."); This aligns with Rule 41(b)'s clear text and purpose, preventing courts from improperly exercising jurisdiction by imposing prejudicial dismissals where jurisdiction does not exist.

Finally, under Federal Rule of Civil Procedure 41(b), jurisdictional dismissals are explicitly excepted from prejudicial effect. Fed. R. Civ. P. 41(b); see *Cox v. Sasol N. Am., Inc.*, 544 F. App'x 455, 456–57 (5th Cir. 2013) (per curiam) ("A dismissal under Rule 12(b)(1) is a dismissal for lack of subject-matter jurisdiction. 'A dismissal with prejudice is a final judgment on the merits.' Accordingly, to dismiss with prejudice under Rule 12(b)(1) is to disclaim jurisdiction and then exercise it.") (internal citations omitted); see also *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 124 (2d Cir. 1999) ("[A] dismissal for lack of subject matter jurisdiction is not an adjudication of the merits, and hence… should be made without prejudice."). The Ninth Circuit's decision below thus contravenes not only established circuit consensus but also the plain language and purpose of Rule 41(b), necessitating this Court's review.

C. This Court should reconsider its Hans sovereign immunity doctrine, or alternatively, address the procedural questions presented while preserving this challenge.

The sovereign immunity doctrine established in *Hans v. Louisiana*, 134 U.S. 1 (1890), warrants reexamination as it lacks textual foundation, historical accuracy, and coherent rationale. This doctrine has generated more circuit splits and 5-4 Supreme Court decisions than perhaps any other area of constitutional law, creating an unworkable

framework that frustrates congressional intent and frequently leaves individuals without remedies for federal rights violations.

As Justice Brennan observed decades ago, this doctrine "lacks a textual anchor, a firm historical foundation, or a clear rationale." *Atascadero State Hospital v. Scanlon*, 473 U.S. at 258 (1985) (Brennan, J., dissenting). The subsequent forty years have only witnessed further expansion and complexity, confirming Justice Brennan's prediction of increasing incoherence and subjectivity in application.

The *Hans* decision is demonstrably erroneous for several reasons:

First, *Hans* incorrectly characterized pre-constitutional sovereign immunity. Historical scholarship indicates that any immunity enjoyed by pre-Independence colonies or post-Independence, pre-Constitution states was significantly narrower than the modern doctrine suggests. John Gibbons, *The Eleventh Amendment and State Sovereign Immunity*, 83 Colum. L. Rev. 1889, 1895-1899 (1983); Louis Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963).

Second, primary sources demonstrate the founders were divided over whether the unamended Constitution would incorporate immunity for state law claims under diversity jurisdiction, with most assuming states would lack constitutional immunity to federal claims. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201 (2001) at 1206-1210; Antonin Scalia, *Historical Anomalies in Administrative Law*, 1985 Yearbook 103-104 (1985)

("[a]t the time of Marbury v. Madison, there was no doctrine of domestic sovereign immunity...").

Third, while *Chisholm v. Georgia*, 2 U.S. 419 (1793), undoubtedly provoked negative reactions, *Hans* mischaracterized both the unanimity and scope of that opposition. Rather than universal objection to states ever being federal court defendants, many critics specifically objected to federal courts judging states' compliance with their own laws absent consent. Others were primarily concerned about Revolutionary War debt repayment. *Pennhurst*, 465 U.S. at 151 (1984) (Stevens, J., dissenting), citing cases.

Fourth, *Hans* obscured earlier post-Eleventh Amendment decisions of this Court that contradict its reasoning, including *Cohens v. Virginia*, 6 Wheat. at 378, 403 (1821); *Worcester v. Georgia*, 31 U.S. 515, 570 (1832) (McLean, J., concurring); and *Rhode Island v. Massachusetts*, 37 U.S. 657, 658 (1838). *See* Schultz, *Sovereign Immunity and the Two Tiers of Article III*, 29 GEO. MASON L. REV. 287, 330-34, 339-42 (2021) (explaining that Hans conflicts with earlier Supreme Court precedent, including: *Cohens*, which held that state sovereign immunity did not apply to "all cases described" in Article III's first tier "without making in its terms any exception whatever"; *Rhode Island*, which explicitly distinguished between Article III's two tiers, noting that "the constitution does not, in terms, extend the judicial power to all controversies" in the second tier; and *Worcester*, which affirmed federal courts' authority to enforce federal law against states despite sovereign immunity claims).

Fifth, perhaps most significantly, Congress expressly rejected a draft of the Eleventh Amendment that would have textually accomplished precisely what *Hans* claimed the amendment implicitly required. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 283-290 (1985) (Brennan, J., dissenting); Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1873-75 (2010) (documenting Senator Albert Gallatin's proposal of an amendment that would have expressly exempted only "cases arising under treaties" from sovereign immunity protection, which the Senate voted down 23-2 on January 14, 1794); *see also* 4 ANNALS OF CONG. 30-31 (1794) (recording the Senate proceedings where Gallatin's proposed amendment was rejected before Senator Strong's version was approved). The legislative history demonstrates that Congress specifically chose language that addressed only diversity jurisdiction cases, not those arising under federal law. *See* Schultz, *Sovereign Immunity and the Two Tiers of Article III*, 29 GEO. MASON L. REV. 287, 325-26 (2021) (explaining that Strong's proposal, which eventually became the Eleventh Amendment, was understood not to affect federal question cases in Article III's first tier).

This case presents an ideal vehicle for reconsidering *Hans* for several reasons:

First, unlike in *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), where Justice Scalia's concerns about vehicle suitability prevented reconsideration despite five justices questioning *Hans*, no such procedural

obstacles exist here. Congress expressly made both the Rehabilitation Act and ADA Title II applicable to states and explicitly stated its intent to abrogate sovereign immunity through 42 U.S.C. §§ 2000d-7 and 12202. Petitioner preserved this challenge below and presents it squarely in this petition.

Second, this case exemplifies a situation where injunctive relief was effectively unavailable due to carefully constructed procedural timelines that ensure administrative remedies are exhausted only weeks before each exam administration, making injunctive relief unripe until verging on mootness. As Justice Brennan noted, this scenario often leaves damages as a plaintiff's sole recourse. *Atascadero St. Hosp.*, 473 U.S. at 257 fn.9 (1985) (Brennan, J., dissenting).

Third, California provides no adequate state court forum for vindicating federal rights in the attorney admissions context. California law divests lower state courts of jurisdiction over claims arising from attorney admissions, including bar exam accommodations, reserving such jurisdiction exclusively to the California Supreme Court. *Morrowatti v. State Bar of Cal.*, No.B196392, 2007 WL 4532857, at *1 (Cal. Ct. App. Dec.27, 2007) (citing Cal. Bus. & Prof. Code § 6066). The California Supreme Court's discretionary review process is incompatible with the time-sensitive nature of accommodations requests. Timely accommodation decisions in advance of exam administrations are integral to the substantive protected rights under Title II and Section 504, not merely procedural considerations. Under Cal. Rules Ct. 9.13(d),

petitioners must wait for the completion of administrative processes before seeking judicial review, which typically concludes mere weeks before scheduled exam dates. This timeline renders the California Supreme Court's discretionary review process—which lacks expedited procedures for disability accommodation matters—structurally incapable of providing meaningful relief before exams occur, effectively precluding enforcement of federal rights in the sole state forum with jurisdiction.

Fourth, addressing the Hans doctrine now would provide significant judicial economy benefits by narrowing the issues to be considered on remand for Kohn's Title II and Unruh Act claims. The Ninth Circuit has already remanded these claims with instructions to reconsider abrogation under *U.S. v. Georgia* and to permit Kohn to amend his complaint. A favorable ruling reconsidering Hans would streamline this analysis by eliminating sovereign immunity as a barrier to Kohn's damages claims under both Rehabilitation Act and Title II frameworks, allowing the district court to proceed directly to the merits and potentially avoiding additional rounds of appellate review on immunity questions. This comprehensive resolution would better serve the interests of justice and judicial efficiency than the piecemeal approach necessitated by the current doctrine

While this Court requires "special circumstances" to overturn precedent, several factors support reconsidering *Hans*:

First, the *Hans* doctrine has proven unworkable, as evidenced by decades of inconsistent application, circuit splits, and 5-4 Supreme Court decisions.

Second, the doctrine systematically produces unjust results by frustrating congressional intent and denying remedies for federal rights violations.

Third, *Hans* has sown significant doctrinal dissonance and contradictions among this Court's precedents.

Fourth, the decision has remained controversial throughout its history and has often been reaffirmed by narrow majorities.

Finally, the magnitude of *Hans*'s legal error meets either Justice Thomas's "demonstrably erroneous" standard or the "egregiously wrong" standard.

In these circumstances, stare decisis considerations alone cannot justify maintaining the fundamentally flawed *Hans* doctrine. The Court should either reconsider *Hans* or, at minimum, resolve the procedural questions presented while explicitly preserving this challenge for future consideration.

CONCLUSION

For the above reasons, this Court should grant this petition.

Respectfully Submitted,

/s/ Andrew Rozynski

Andrew Rozynski
Counsel of Record
EISENBERG & BAUM, LLP
24 Union Square East, Penthouse
New York, NY 10003
(212) 353-8700
ARozynski@eandblaw.com

Counsel for Petitioner

Dated: March 31, 2025.