No. 24–6921

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

BRIEF FOR *AMICUS CURIAE* OF DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS CALIFORNIA, ET AL., IN SUPPORT OF PETITIONER

Ian McGirk Webb
Counsel of Record
11339 Sinclair Avenue
Dallas, Texas 75218
(214) 470-8553
Ian.McGirk.Webb@gmail.com

I. INTERESTS OF THE AMICI[1]

Disability Rights Education and Defense Fund (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to advancing and protecting the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy, and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability rights laws. DREDF uses strategic litigation to protect and advance the rights of disabled people. Over many years, DREDF litigation has improved accessibility, reformed systems, and set precedents that benefit the disability community. DREDF has participated in advocacy in which responding entities that administer important programs have asserted sovereign immunity under Title II of the Americans with Disabilities Act and/or the nonreceipt of federal financial assistance under Section 504 of the Rehabilitation Act. To advance the enforcement of disability rights principles in these contexts, DREDF has an interest in narrowing the doctrine of sovereign immunity and ensuring robust investigation including formal discovery into a recipient's relationship to federal financial assistance.

---

[1] Rule 37.6 Disclosure: Parties were notified 10 days in advance of the intention of an amicus to file this amicus brief, as required by the Rules. No counsel for a party authored the brief in whole or in part. No person other than the amicus, its members or counsel, made a monetary contribution intended to fund the preparation or submission of the brief.

For these reasons, DREDF supports the petition under consideration.

Disability Rights California (DRC) is the federal- and state-mandated protection and advocacy organization dedicated to advancing the rights of the disability community in California. DRC was established in 1978 and is the largest disability rights legal advocacy organization in the nation. DRC has extensive policy and litigation experience and is recognized for its expertise in the interpretation of civil rights laws affecting individuals with disabilities, including the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, Section 504 of the Rehabilitation Act, as amended ("Section 504"), 29 U.S.C. § 794, and coextensive state law. DRC has a strong interest in the outcome of this case as it raises important questions regarding the archetypal law Section 504—a legal basis for much of our advocacy. This litigation implicates the proper interpretation and application of Section 504 and Title II of the ADA. Weakening of these laws diminishes the ability for DRC to assist persons with physical, developmental, intellectual, and mental health disabilities. We add our support with the other organizations listed on this amicus brief.

The Center for Justice, Civil Rights, and Liberties, Inc., aims to enhance and broaden the rights of disadvantaged individuals, such as those who suffer from mental illness and other disabilities, immigrants and those living in poverty. CJCRL aims to accomplish this through systemic litigation to ultimately assist those with the greatest need for broad-based legal assistance and help further

democratic values embedded in the Federal and State Constitutions.

The Coelho Center for Disability Law, Policy and Innovation collaborates with the disability community to cultivate leadership and advocate for disability rights and justice through systemic change. Housed at Loyola Marymount University, The Center was founded in 2018 by former California Congressman Anthony "Tony" Coelho. Representative Coelho was instrumental to the passage of the Americans with Disabilities Act of 1990 (ADA) and other congressional efforts to champion the rights of people with disabilities. The Center advances the lives of people with disabilities through interdisciplinary research, education, community engagement, and advocacy. A pillar of the Center's work is to bring attention and solutions to the barriers that exist for people with disabilities interested in entering the legal field.

Hearing Loss Legal Fund ("HLLF") is a non-profit organization that seeks to preserve the legal rights of the Deaf and Hard-of-Hearing community. HLLF will provide legal funding for specific legal needs of the Deaf and Hard-of-Hearing ("D/HH") community that are not provided by the other non-profit organizations that serve this community. It will also provide legal education and advocacy to the D/HH community across the United States. Furthermore, HLLF may support, encourage and/or partner with educational and legal institutions on legal studies and law-review articles to advance the knowledge and education of the legal rights of the Deaf and Hard-of-Hearing.

Washington Civil & Disability Advocate (WACDA) is a Seattle-based nonprofit disability rights organization. WACDA is committed to providing legal services to people with disabilities regardless of their ability to pay. WACDA is committed to a multifaceted approach to increasing accessibility and inclusion in Washington state and beyond. In addition to systemic accessibility focused litigation, WACDA assists with disability education and awareness efforts, including informing the disability community on disability rights and effective self-advocacy.

The **Autistic Women & Nonbinary Network (AWN)** provides community support, and resources for Autistic women, girls, transfeminine and transmasculine nonbinary people, trans people of all genders, Two Spirit people, and all people of marginalized genders or of no gender. AWN is committed to recognizing and celebrating diversity and the many intersectional experiences in our community. AWN's work includes solidarity aid, community events, publications, fiscal support, and advocacy to empower disabled and autistic people in their fight for disability, gender, and racial justice.

SarkarLaw represents attorney applicants against the State Bar of California who—like Mr. Kohn—have been treated unfairly and unjustly in their quest to serve our courts as an attorney. SarkarLaw was amicus curiae in the matter below before the Ninth Circuit and has served as amicus curiae before this Court in Lawyers United, Inc. v. U.S. No. 21-507 (S. Ct. 2022), 2022 WL 516467.

Abdnour Weiker is a private education law firm with offices in Ohio, Michigan, and Pennsylvania. Amicus has pursued hundreds of claims asserting the rights of students with disabilities under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.; 42 U.S.C. § 1983; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.; and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 et seq.

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

IV. SUMMARY OF THE ARGUMENT

Persons with disabilities suing to protect their rights under Section 504 of the Rehabilitation Act often find their claims barred when a defendant organization's assertion of sovereign immunity results in a dismissal, an issue-preclusive ruling, or a final judgment that forecloses additional discovery while clarifying further what facts should have been sought through discovery. Only through adequate discovery can such plaintiffs hope to obtain the facts that might enable them to demonstrate that an organization is "a program or activity receiving Federal financial assistance" and is consequently ineligible to assert sovereign immunity. The risk of such a manifestly unjust result is most egregious when the evaluation of sovereign immunity occurs in the form of a Rule 12(b)(1) proceeding followed by a dismissal with prejudice, as happened with Mr. Kohn.

A partial solution would be to forbid such dismissal with prejudice and to require that assertions of sovereign immunity, if allowable at the pleadings stage, occur through a Rule 12(b)(6) proceeding. A more comprehensive solution would be to require that evaluations of sovereign immunity be postponed beyond the pleadings phase to the merits phase, allowing discovery to continue until as far into the proceeding as possible. The Circuit Courts of Appeals are presently split on whether assertions of sovereign immunity may be resolved during the merits phase or must be resolved beforehand.

Even then, however, any final judgment will necessarily preclude further discovery while likely

clarifying more than was articulable beforehand about which facts are needed in order to prove or disprove a particular assertion of sovereign immunity. The only complete cure for this injustice and a host of related ones is to reverse this Court's decision in *Hans v. State of Louisiana*, whose misunderstanding of the Eleventh Amendment and of sovereignty itself is the basis of the States' sovereign immunity against assertions of both federal-question and supplemental jurisdiction to protect the right of those most vulnerable.

V. REASONS WHY CERTORARI SHOULD BE GRANTED

A. The Defense of Sovereign Immunity is a Form of Affirmative Defense, Whose Fair Evaluation Requires that Discovery Continue as Far into Proceedings as Possible.

Whether an assertion of sovereign immunity falls within the outer bounds of sovereign immunity is a legal and factual question of profound complexity, ever being clarified and ever in need of clarification. Consider the following example, in which the Ninth Circuit Court of Appeals explained its finding that a defendant State organization was *not* a "program or activity receiving Federal financial assistance" and was therefore entitled to sovereign immunity against a plaintiff's claims under the Rehabilitation Act. This excerpt typifies the difficulty plaintiffs face in discerning what kinds of facts will prove determinative in a ruling on sovereign immunity—particularly when the dispositive question is whether

a defendant organization is "a program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). To the extent that courts treat such rulings as issue-preclusive or do not allow further discovery responsive to the newly clarified laws and facts, a defendant organization's assertion of sovereign immunity may be almost unassailable:

> Because the Commission (of which OPDS is a subunit) and the Judicial Department are distinct entities within Oregon's judicial branch, we next must consider whether these entities are sufficiently independent from one another to constitute separate "department[s]" or "agenc[ies]" under section 504. . . . Oregon's statutes demonstrate that these entities, though part of the same branch of government, have distinct funding sources and administrative apparatuses. With regard to their funding, the Commission is financed through an account in the State's "General Fund," Or. Rev. Stat. § 151.225(1), whereas the Judicial Department is financed through an "Operating Account" in the State Treasury that is "separate and distinct from the General Fund." *Id.* § 1.009(1). In terms of their administration, the Chief Justice of the Oregon Supreme Court is "the administrative head of the judicial department of government," including OPDS. *Id.* § 1.002(1). The Chief Justice's statutory authority over the Commission,

> however, is considerably more circumscribed . . . .

Sharer v. Oregon, 581 F.3d 1176, 1179–1180 (9th Cir. 2009).

Congress may exercise its Spending Power to attach conditions to the receipt of Federal funds, overriding sovereign immunity in organizations that receive them. Const. Art. I, § 8, cl. 1; *South Dakota v. Dole*, 483 U.S. 203 (1987). Section 504 of the Rehabilitation Act accordingly reads as follows: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her 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." 29 U.S.C. § 794(a). With this powerful language, Section 504 of the Rehabilitation Act offer persons with disabilities a means of asserting their Federal rights against State organizations otherwise sovereignly immune. *See South Dakota v. Dole*, 483 U.S. at 203–204.

However, practitioners working to protect the rights of persons with disabilities describe the impossibility of discerning—without adequate discovery—whether an organization is a "program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). General knowledge that federal funds go somewhere into the vast web of organizations related to the defendant organization is not enough. *See, e.g., Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc) ("A State and its instrumentalities can avoid Section 504's waiver requirement on a piecemeal basis, by simply accepting federal funds for some departments and declining

them for others."). Failure to designate in pleadings the correct "department" or "parent organization" receiving Federal funds often results in dismissal following a defendant's assertion of sovereign immunity—foreclosing the additional discovery needed to determine whether the designation of a different "department" or "parent organization" would have overcome the assertion. This manifestly unjust outcome becomes most egregious when, as in Mr. Kohn's case, the dismissal is with prejudice.

A partial solution would be to prohibit such dismissals with prejudice and to require that assertions of sovereign immunity be made under Rule 12(b)(6) motions rather than Rule 12(b)(1) motions. This, at least, would require the courts to evaluate whether a defendant organization is entitled to sovereign immunity as a matter of law or as is apparent on the face of the complaint. Such a requirement would accord with this Court's requirement that sovereign immunity, although jurisdictional (*Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996)), may be waived by a defendant (*Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985)) and need not be raised by a court *sua sponte*, that is, by its own initiative, as matters of subject-matter jurisdiction must be (*Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998)). Such a requirement would also accord with the holdings of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuit Courts of Appeals that sovereign immunity is "akin to an affirmative defense, which the defendant bears the burden of demonstrating." *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014) (citing *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237–39 (2d

Cir.2006); *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61 (1st Cir. 2003); *Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002); *Skelton v. Camp,* 234 F.3d 292, 297 (5th Cir. 2000); *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995); *Baxter v. Vigo Cnty. Sch. Corp.*, 26 F.3d 728, 734 n. 5 (7th Cir. 1994), superseded by statute on other grounds as recognized in *Holmes v. Marion Cnty. Office of Family & Children*, 349 F.3d 914, 918–19 (7th Cir. 2003); *ITSI TV Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1292 (9th Cir. 1993)). This cure is only partial because, under certain circumstances not at issue in Mr. Kohn's case, a Rule 12(b)(6) motion can be converted to a motion for summary judgment—providing a backdoor to an early termination of proceedings prior to adequate discovery.

A more comprehensive solution would be to require that assertions of sovereign immunity be evaluated at the merits phase rather than the pleadings phase. This would allow discovery to continue as far as possible into the litigation—after as much clarification as possible on what facts must be shown to invalidate an assertion of sovereign immunity despite the remarkable fact that "[a] State and its instrumentalities can avoid Section 504's waiver requirement on a piecemeal basis, by simply accepting federal funds for some departments and declining them for others." *Jim C. v. United States*, 235 F.3d at 1081.

The Circuit Courts are sharply divided on whether assertions of sovereign immunity may be evaluated at the merits stage or must be evaluated beforehand. *Nair v. Oakland County Comm. Mental*

Health Auth., 443 F.3d 469, 476 (6th Cir. 2006). Four Circuit Courts have held that sovereign-immunity questions "must be resolved before the merits." *Id.* (citing *United States v. Tex. Tech Univ.*, 171 F.3d 279, 285-86 (5th Cir.1999); *In re Jackson,* 184 F.3d 1046, 1048 (9th Cir. 1999); *Martin v. Kansas*, 190 F.3d 1120, 1126 (10th Cir.1999); *Seaborn v. Fla. Dep't of Corr.*, 143 F.3d 1405, 1407 (11th Cir. 1998)). Seven Circuit Courts, including the Sixth Circuit in *Nair v. Oakland County Community Mental Health Authority*, have held instead that "sovereign immunity questions need not be addressed before the merits." *Id.* (citing *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 250 (3d Cir. 2003); *Strawser v. Atkins*, 290 F.3d 720, 730 (4th Cir. 2002); *Gordon v. City of Kansas City, Mo.*, 241 F.3d 997, 1005 n. 7 (8th Cir. 2001); *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 890, 898 (D.C. Cir. 1999); *Parella v. Ret. Bd. of the R.I. Employee Ret. Sys.*, 173 F.3d 46, 53–57 (1st Cir.1999); compare *Kennedy v. Nat'l Juvenile Det. Ass'n*, 187 F.3d 690, 696 (7th Cir. 1999) with *Floyd v. Thompson*, 227 F.3d 1029, 1035 (7th Cir. 2000)) (and adding for its own Sixth Circuit holding, "[W]e conclude that the federal courts have discretion to address the sovereign-immunity defense and the merits in whichever order they prefer.").

The jurisprudence of the Second Circuit provides the following example of a case in which discovery was closed after premature, pleadings-phase evaluation of sovereign immunity, even when new legal clarifications made new factual considerations relevant. In *T.W. v. New York State Board of Law Examiners, et al.*, No. 22-1661 (2d Cir. 2021) ("*T.W. I*"), the plaintiff sued the New York State Board of Law Examiners under Title II of the ADA

and under Section IV of the Rehabilitation Act for having failed to provide accommodations that she needed due to complications of a major head injury. *T.W. v. New York State Board of Law Examiners, et al.*, No. 22-1661, at 6–8 (2d Cir. 2024) (*T.W. II*). When the Board of Law Examiners filed a Rule 12(b)(1) motion asserting sovereign immunity, the district court determined that the Board of Law Examiners was a "'program or activity' of a department or agency that itself accepts federal funds." *Id.* at 9. As such, the district court held at the conclusion of its pleadings-stage factfinding investigation that the Board had waived sovereign immunity. *Id.* The Board then filed an interlocutory appeal. *Id.* The Second Circuit reversed the district court's decision, reasoning that the recipient of federal funds had been *not* the New York's Unified Court System (of which the Board might have been considered a "program or activity") but rather the Courts of Original Jurisdiction, and so the Board had not waived sovereign immunity. *Id.* at 10. Thus ended *T.W. I.* The plaintiff was allowed no further discovery. Had such discovery been permitted, it might have shown the Board to be in fact ineligible to assert sovereign immunity under the rules clarified by the Second Circuit's decision.

An amicus brief in T.W.'s request for rehearing drew attention to the fact that the Second Circuit's decision in *T.W. I* had effectively changed the substantive law governing which facts may prove or disprove that a defendant organization within that Circuit is "a program or activity receiving Federal financial assistance" and is thereby subject to the Rehabilitation Act. *See* Brief of *Amici Curiae* in Support of Plaintiff-Appellee T.W.'s Petition for a Rehearing or Rehearing *En Banc*, *T.W. v. New York*

State of Board Examiners, et al., No. 22-1661, p. 23 (2d Cir. 2021).

This exemplifies the broader problem. Due to the factual and legal complexity of determining what is truly "a program or activity receiving Federal financial assistance," any final assessment of an assertion of sovereign immunity—especially at the appellate level, as in *T.W. v. New York State Board of Law Examiners*—will be expressly or implicitly a clarification on which rules of law matter to that assessment. These, in turn, clarify what facts must be pleaded and proven. Discovery may be continued and the final judgment postponed as far as possible; even so, the precise nature of the facts that must be found through discovery in order to overcome an assertion of sovereign immunity will be fully known only once the final judgment is rendered and discovery closed. Sovereign immunity thus asserts itself against the claims of Mr. Kohn and others like him with ungovernable might.

Claims under a host of widely differing Federal statutes that hinge upon whether an organization is a "program or activity receiving Federal financial assistance" may suffer the same fate. These statutes include Titles VI and IX of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), and the Religious Land Use and Institutionalized Persons Act. The following passage from an amicus brief in *T.W. v. New York State Board of Law Examiners* touches upon several of the immense variety of claims barred by sovereign immunity under rules that narrowly define what it means to be a "program or activity receiving Federal financial assistance":

> [Under the older rules effectively reinstated by *T.W. I*,] university athletics programs [were] outside the scope of Title IX. . . . Discrimination by a high school's National Honor Society's chapter was exempted from federal civil rights law because the National Honor Society's chapter was not a program that received federal funding. . . . [I]f a deaf attorney litigating a criminal appeal were denied a sign language proceedings interpreter by the Court of Appeals, that attorney may now have no remedy under Section 504. Similarly, a *pro se* party with limited English proficiency would not have a remedy under Title VI if denied interpreting or translation services . . . because of their race or national origin.

Brief of *Amici Curiae* in Support of Plaintiff-Appellee T.W.'s Petition for a Rehearing or Rehearing *En Banc*, *T.W. v. New York State of Board Examiners, et al.*, No. 22-1661, p. 24 (2d Cir. 2021).

The only way ultimately to overcome such manifestly unjust results is to address the inconsistent foundations of sovereign immunity itself—by reversing this Court's decision in *Hans v. State of Louisiana*, whose misunderstanding of the Eleventh Amendment and of sovereignty itself prevents assertions of federal-question and supplemental jurisdiction to enforce the Federal rights of those most vulnerable. Only then may their claims find adequate hearing and protection.

B. The Doctrine of Sovereign Immunity Introduced by *Hans* is Inconsistent with the Eleventh Amendment and with the Framers' Intentions.

Even under the limitations set by this Court, State sovereign immunity against federal-question jurisdiction and against supplemental jurisdiction has ballooned from its origins in *Hans v. State of Louisiana* to an extent that Justice Ginsburg described as "beyond the pale." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014) (Ginsburg, J., dissenting) ("[T]he Court has carried beyond the pale the immunity possessed by States of the United States."). Realms of federal law against which the States may assert sovereign immunity include the patent laws, the Age Discrimination in Employment Act, the employment provisions in Title I of the Americans with Disabilities Act, the provisions of the Family and Medical Leave Act requiring that employees be given sick leave, and the Religious Freedom Restoration Act. *See* Douglas Laycock and Richard L. Hansen, Modern American Remedies: Cases and Materials 496 (2019); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 643–644 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 69–70, 83–84 (2000); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363–364 (2001); *Coleman v. Court of Appeals*, 566 U.S. 30 (2012). *See also United States v. Georgia*, 546 U.S. 151, 157–158 (2006) (citing this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997)—which found the Religious Freedom Restoration Act to be inapplicable to the States—as an example of decisions "addressing Congress's ability to abrogate sovereign

immunity" even though the phrase "sovereign immunity" appears nowhere in the *Boerne* opinion).

But this Leviathan of sovereign immunity is inconsistent at its foundations. The Court's decision in *Hans* rested upon profound misunderstandings of the meaning of the Eleventh Amendment, the intentions of the Framers, and the nature of sovereignty itself. The remainder of this Section discusses these problems with *Hans*, as well as the inadequacy of the workaround provided in *Ex Parte Young* that permits suits (for injunctive relief only) against State officials but not against States themselves.

1. The *Hans* Court Misunderstood the Eleventh Amendment, the Framers, and the Nature of Sovereignty in the Republic.

In his dissent to this Court's decision in *Seminole Tribe of Fla. v. Florida*, Justice Souter powerfully rebuts the arguments that others have put forward in favor of *Hans*. To recommend this jurisprudential masterpiece to the Justices' consideration in Mr. Kohn's case, the remainder of this Subsection will summarize some key parts of Justice Souter's argument, with almost inexcusable brevity.

Long forgotten by 1890 was the context of the Eleventh Amendment, whose out-of-context reading by the Court in *Hans* was the central basis of its decision. *Seminole Tribe of Fla. v. Florida*, 517 U.S. at 109–114, 116–118 (SOUTER, J., dissenting). The Eleventh Amendment was authored to prevent federal courts from exercising *diversity* jurisdiction over State governments. *Id.* at 114. But the matter addressed in *Hans* was one of federal question jurisdiction.

The Eleventh Amendment reads as follows: "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.

If the drafters of the Eleventh Amendment had intended to prevent federal courts from exercising federal-question jurisdiction over State governments, the drafters would have mirrored the language of the amendment introduced at that same Congress by Theodore Sedgwick of Massachusetts. This amendment would have prevented Federal courts from exercising either diversity or federal-question jurisdiction over state courts. *Id.* at 111. They did not. *Id.* Moreover, diversity jurisdiction rather than federal-question jurisdiction was the focus of *Chisolm v. Georgia*, the Supreme Court decision reversed by the passage of the Eleventh Amendment. *Id.* at 109.

The main reason given in *Hans* for supposing that the Eleventh Amendment was intended to eliminate federal-question jurisdiction was the "absurdity" that, otherwise, States could harbor jurisdiction over a citizen's federal question claim but not over a noncitizen's federal-question claim. *Id.* at 119. But this was a misreading: there would have been no such absurdity, because "federal question cases are not touched by the Eleventh Amendment, which leaves a State open to federal question suits by citizens and noncitizens alike." *Id.*

This misunderstanding in *Hans* of the context of the Eleventh Amendment carries over into its discussion of the writings of the Framers. *Id.* at 106. Quoting them out of context, *Hans* argues that the words of Madison, Hamilton, and other Framers

suggest an understanding on their part that—under the new constitutional regime—the Federal courts would lack federal-question jurisdiction over the States. *Id.* In fact, the quoted words were written in response to a debate over whether the Federal courts would harbor diversity jurisdiction over the States. *Id.* at 109–114, 116–118.

Hans further errs by accepting the assumption of many late-nineteenth-century jurists that the Framers esteemed the common law—including its doctrine of sovereign immunity—so highly that they impliedly incorporated it into the highest laws of the land. *Id.* at 132–137. In fact, the Framers viewed the common law with skepticism. Only one-by-one, with great caution and care, did the Framers' generation evaluate each principle of common law for acceptance into or rejection by the laws of their Republic. *Id.* at 137.

Nothing in the words of the Framers or their contemporaries implies any understanding that, under the Constitution, the States would enjoy sovereign immunity against exercises of federal-question jurisdiction by federal courts. *Id.* at 142–143. Some of the Framers expressed the opposite understanding. *Id.* at 143.

The fundamental error of *Hans* lay in its author's misunderstanding of the unique kind of sovereignty to which the States had acquiesced. They were to be not separate nations but one Nation. The States and the federal government "split the atom of sovereignty" in a way unparalleled by any other constitutional arrangement in history. *Id.* at 150 (quoting *U. S. Term Limits, Inc. v. Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring)). They were sovereigns still, in a distinct way, but not with

the kind of sovereignty that would enable them to freely violate the laws of the National sovereign—which sovereign immunity toward federal-question jurisdiction would enable them to do.

2. Efforts to Enforce Federal Law by Allowing Suits against Officials, under the Doctrine Clarified in *Ex Parte Young*, are Inadequate for the Relief of Claims Barred by Sovereign Immunity.

Early efforts by this Court to enforce Federal rights against State officials, notwithstanding the bar to suits against States erected by *Hans*, reached their culmination in *Ex Parte Young*. Douglas Laycock and Richard L. Hansen, Modern American Remedies: Cases and Materials 494 (2019). This decision permitted the enjoining of a Minnesota official to prevent his enforcement of a State railroad-rate law in disregard of a Federal court order. That Court "explained suits against officers in their *official* capacity with a transparent fiction" (*Id.*):

> [T]he use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the State in its sovereign governmental capacity. It is simply an illegal act upon the part of a state official . . . . [H]e in that case is stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Ex parte Young, 209 U.S. 123, 159–160 (1908).

Synthesizing this doctrine of *Ex Parte Young* with the doctrine of sovereign immunity issuing from *Hans*, this Court held in *Edelman v. Jordan* that injunctions requiring compliance with Federal law in the future were permitted, while compensation for past violations of Federal law was prohibited unless the State had consented to be sued. Douglas Laycock and Richard L. Hansen, Modern American Remedies: Cases and Materials 488 (2019) (citing *Edelman v. Jordan*, 415. U.S. 651 (1974)).

The unavailability of money damages claims against State officials in their official capacities under the *Ex Parte Young* and *Edelman* paradigm, combined with the difficulty of obtaining injunctions against State officials under present jurisprudence, prevents such suits against officials from providing a viable alternative for persons with disabilities seeking to assert claims against State defendants for rights assured to them by Federal law. Only by the reversal of *Hans* will a full and genuine hearing of the merits of their claims be always possible—to the ultimate benefit of all.

C. **The Court's Remarks on Stare Decisis in *Loper Bright Enterprises v. Raimondo* Support the Overturning of the Wrongly Decided Decision in *Hans v. State of Louisiana.***

Such reversal of an inconsistent and harmful precedent is favored by this Court's recent precedent. In 2024, the Supreme Court overturned a decades-old precedential decision in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. June 28, 2024) (reversing

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). The Court stated in that decision, "*Stare decisis* is not an 'inexorable command.'" *Id.* at 29 (quoting Payne v. Tennessee, 501 U. S. 808, 828 (1991)). The Court then explained, "[T]he *stare decisis* considerations most relevant here—'the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision . . .'—all weigh in favor of letting *Chevron* go." *Id.*

The same factors strongly favor the reversal of *Hans*. The host of "profound flaws" in "the quality of [that precedent's reasoning]" were discussed above. The "[un]workability" of its rule has been manifested in a confusing array of subsequent decisions, as was also true of *Chevron*: "*Chevron's* flaws were nonetheless apparent from the start, prompting this Court to revise its foundations and continually limit its application. It has launched and sustained a cottage industry of scholars attempting to decipher its basis and meaning. And Members of this Court have long questioned its premises." *Id.* at 29.

Similarly, the paradox that States are immune to suits against them to enforce rights established by Federal law—even though Federal law preempts State law—has required a host of subsequent decisions to "revise [the] foundations" and "limit [the] application" of the doctrine of sovereign immunity introduced by *Hans*. *See, e.g., Hafer v. Melo*, 502 U.S. 21 (1991); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Fitzpatrick v. Bitzer*, 427 U.S. 455 (1976); *Cherry v. University of Wisconsin*, 265 F.3d 541 (7th Cir. 2001); *Sossamon v. Texas*, 563 U.S. 277 (2011). Still the inconsistent edifice built on the inconsistent foundation of *Hans* has kept expanding "beyond the

pale." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014) (Ginsburg, J., dissenting).

It must be acknowledged that Justice Souter's dissenting opinion in *Seminole Tribe* argued that *stare decisis* prohibits the reversal of *Hans*, despite his scathing criticism of that decision. *Seminole Tribe of Fla. v. Florida*, 517 U.S. at 130 (SOUTER, J., dissenting). He argued that the Court should instead limit the scope of *Hans* by allowing Congress to abrogate sovereign immunity. *Id.* However, the Court's subsequent decisions—including that of *Loper Bright Enterprises*—have shown that *stare decisis* is even less an "inexorable command" than was once thought.

If *Hans* is reversed, the States will continue to enjoy sovereign immunity toward suits brought in diversity jurisdiction. The Eleventh Amendment secures them such immunity independently of *Hans*. *Seminole Tribe of Fla. v. Florida*, 517 U.S. at 109–114, 116–118 (SOUTER, J., dissenting).

However, the reversal of *Hans* would remove the States' sovereign immunity against supplemental jurisdiction. This type of jurisdiction arises when claims governed by State laws involve a federal question. Sovereign immunity against supplemental jurisdiction was recognized by this Court, citing *Hans*, in *Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 98 (1984)). (The Court so decided even though, as the dissenting Justice Stevens observed, "[n]umerous decisions of this Court have stated the general proposition . . . that a federal court properly vested with jurisdiction may pass on the state or local law question without deciding the federal constitutional issues—and have then proceeded to dispose of the case solely on the nonfederal ground." *Id.* at 160 (Stevens,

J., dissenting) (quoting *Hagans v. Lavine*, 415 U. S. 528 (1974)).

The Eleventh Amendment undistorted by *Hans* erects no sovereign-immunity bar against such exercises of supplemental jurisdiction. *See id.* Reversing *Hans* would thus enable Mr. Kohn and others like him to pursue co-extensive claims under State laws that offer greater protections for persons with disabilities than Federal laws provide, such as the Unruh Act, which are otherwise denied to them by the bar of *Hans*-based sovereign immunity.

Moreover, the removal of sovereign immunity as a bar to supplemental jurisdiction would further the host of policy reasons why this type of jurisdiction exists. In the absence of supplemental jurisdiction, claim-preclusion principles might bar the claims of those who (like Mr. Kohn) are unable to find any State forum harboring mandatory review in which they might either (1) assert rights ostensibly protected under Federal and State law, or (2) present claims for which there is a clearly established procedural mechanism for seeking injunctive relief prior to mootness and prior to irreparable harm, without any waiver of damages claims. *See* Michelle S. Simon, *Defining the Limits of Supplemental Jurisdiction under 28 U.S.C. § 1367: A Hearty Welcome to Permissive Counterclaims*, 296 Lewis & Clark Law Review 295, 297–298 (2005). Additionally, requiring plaintiffs to separately litigate Federal- and State-law claims arising from the same factual nucleus places undue burdens upon judicial resources. *Id.* Such a requirement also increases the risk that differing courts will reach contradictory outcomes on the same disputed facts, undoing the consistency essential to the rule of law.

Significantly, the reversal of *Hans* would not moot the jurisdictional issues described in Part A above. This is true for two reasons. First, even though the reversal of *Hans* would limit sovereign immunity to diversity jurisdiction, the Federal Rules of Civil Procedure must continue to provide a unified procedural framework for evaluating cases. Second, all claimed jurisdictional defects—not only those involving sovereign immunity—raise similar questions and involve similar dangers that the laws governing which facts are most relevant will be clarified only too late, once discovery is unavailable.

VI. CONCLUSION

For the foregoing Reasons, we implore this Court to grant Mr. Kohn's petition for writ of certiorari.

Respectfully submitted,

Ian McGirk Webb
Counsel of Record
11339 Sinclair Avenue
Dallas, Texas 75218
(214) 470-8553
ian.mcgirk.webb@gmail.com