

No. 24-6921

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**In the Supreme Court of the United States**

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BENJAMIN KOHN,  
*Petitioner,*

v.

STATE BAR OF CALIFORNIA ET AL.,  
*Respondents.*

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

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**REPLY BRIEF FOR PETITIONER**

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## **INTRODUCTION**

This petition presents exceptionally important questions of how sovereign immunity is invoked and whether a court that declares itself without power to hear a claim simultaneously possesses the power to dismiss that claim forever. It clearly cannot. The Ninth Circuit affirmed a fact-based "with prejudice" jurisdictional dismissal that extinguished federal claims without adjudicating the merits. In numerous circuits, Petitioner's claims would receive leave to amend. In the Ninth Circuit alone, the courthouse door was permanently barred, with no opportunity to cure the alleged defect. These substantial circuit splits create an untenable geographic lottery for federal rights.

## **ARGUMENT**

### **I. THE CIRCUIT SPLITS ARE SUBSTANTIAL AND MATURE**

Respondents' characterization of well-documented circuit conflicts as "illusory" cannot withstand scrutiny. Their brief confirms the depth of lower court confusion and the urgent need for this Court's resolution of these circuit conflicts. These splits are not minor technical disagreements, but outcome-determinative conflicts on fundamental questions of federal jurisdiction and procedure.

#### **A. The Circuits are Divided on Whether Sovereign Immunity is Truly Jurisdictional or Merely an Affirmative Defense**

Respondents claim "unanimity" that sovereign immunity is properly raised under Rule 12(b)(1). Brief in Opposition ("BIO") 2. This claim obscures profound conceptual disagreements that flow directly from this Court's explicit reservation of the question. In *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 391 (1998), this Court expressly declined to decide whether Eleventh Amendment immunity is jurisdictional,<sup>1</sup> noting that the question remains open despite lower courts' widespread assumption that it is. This Court reserved the question for good reason: sovereign immunity defies every principle of subject-matter jurisdiction—it can be waived, forfeited, and invoked selectively—attributes antithetical to true jurisdictional constraints. The *Schacht* reservation appears to reflect this Court's recognition that sovereign immunity's characteristics fit poorly with traditional jurisdictional analysis.

### **1. The Seventh Circuit's Analytically Rigorous Approach**

The Seventh Circuit has squarely confronted sovereign immunity's essential nature and concluded it is not jurisdictional. In *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 822 (7th Cir. 2016), "the court properly treated the Tribe's motion to dismiss for lack of subject matter jurisdiction under [Rule] 12(b)(1) as a motion to dismiss for failure to

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<sup>1</sup> *Schacht*, 524 U.S. at 391 ("Even making the assumption that Eleventh Amendment immunity is a matter of subject matter jurisdiction—a question we have not decided..."). Prior "jurisdictional bar" sovereign immunity dicta in this Court's opinions never established it implicated subject-matter jurisdiction, which is what Rule 12(b)(1) covers.



state a claim for which relief can be granted under [Rule] 12(b)(6).” The court examined the fundamental attributes of jurisdictional limitations and found that sovereign immunity lacks every one of them. *Id.* True jurisdictional defects cannot be waived, yet sovereign immunity is quintessentially waivable. True jurisdictional defects cannot be forfeited, yet sovereign immunity can be lost through litigation conduct. True jurisdictional defects must be raised *sua sponte* by courts, yet defendants must affirmatively assert sovereign immunity. True jurisdictional defects place the burden on plaintiffs to establish jurisdiction, yet defendants bear the burden of proving sovereign immunity applies.

Respondents attempt to limit *Meyers* to tribal immunity, but this misreads the Seventh Circuit's decision, which addressed sovereign immunity's fundamental attributes, not the identity of the sovereign. BIO 15. The court examined cases involving tribal, federal, and state immunity, concluding that the doctrine's waivable nature is incompatible with true jurisdictional defects regardless of which sovereign asserts it. *Meyers*, 836 F.3d at 822. (citing *Sung Park v. Indiana Univ.*, 692 F.3d 828, 830 (7th Cir. 2012), which involved state immunity). The analytical framework applies equally to all forms of sovereign immunity.

The Third Circuit similarly observed that this Court has "never even decided 'that Eleventh Amendment immunity is a matter of subject-matter jurisdiction,'" and "certainly never suggested that the immunity-from-liability defense could be jurisdictional." *In re Venoco*, 998 F.3d 94, 109 (3d Cir.

2021). This growing recognition that sovereign immunity does not fit within jurisdictional frameworks underscores the need for this Court's guidance.

## **2. Sovereign Immunity is an Affirmative Defense**

This Court's precedents establish that sovereign immunity possesses the essential characteristics of an affirmative defense, not subject-matter jurisdiction. Three fundamental attributes distinguish sovereign immunity from true jurisdictional limitations:

First, **waivability**. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) (“The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary’s subject-matter jurisdiction.”). This distinction is not semantic — it goes to the heart of what jurisdiction means. True jurisdictional limits are nonwaivable because they define constitutional and statutory limits of judicial power. For example, litigants cannot consent to otherwise lacking federal jurisdiction over state law claims between non-diverse parties, yet states routinely waive immunity through litigation conduct, statutes, and contracts. Sovereign immunity thus operates as the sovereign’s waivable personal defense, not a limitation on judicial power.

Second, sovereign immunity is **forfeitable**. *Schacht*, 524 U.S. at 389. True jurisdictional defects can be raised anytime, even on appeal, and cannot be created by litigation conduct. But states can lose

immunity by litigation conduct, such as failing to timely assert it. That sovereign immunity can be forfeited proves it's not truly jurisdictional.

Third, **defendants bear the burden** of proving immunity applies. *Leitner v. Westchester Community College*, 779 F.3d 130, 134 (2d Cir. 2015). This burden allocation is backwards for jurisdictional issues, where plaintiffs must establish that jurisdiction exists. That defendants must prove immunity applies, rather than plaintiffs having to prove otherwise, reveals its true nature as an affirmative defense.

These characteristics—waivability, forfeitability, and burden allocation—fundamentally distinguish sovereign immunity from subject-matter jurisdiction, which is nonwaivable, nonforfeitable, and must be raised *sua sponte* by courts. The conceptual incoherence of treating sovereign immunity as jurisdictional has real consequences. Had Petitioner filed in the Seventh Circuit, his plausible allegations would have been presumed true, Respondents' declaration would have been inadmissible at the pleading stage, and discovery would have proceeded.

### **B. The Ninth Circuit's Approach to Jurisdictional Dismissals "With Prejudice" Implicates Intolerable Circuit Splits and Defies Basic Jurisdictional Logic**

Even assuming sovereign immunity is jurisdictional under Rule 12(b)(1), dismissal with prejudice was reversible error. A court without jurisdiction cannot render binding judgments.

## **1. The Issue was Properly Preserved**

Respondents allege waiver, BIO 18, where none exists. Not only can jurisdictional errors be raised at any time, but from the outset Petitioner challenged this dismissal's finality, arguing the district court could not "resolve a factual dispute between the parties for the purpose of dismissing Mr. Kohn's claims with prejudice." CA9 Dkt.36, p.35. He maintained this position throughout his opening brief (*id.* at 15, 37 n.13, 50, 60), reply brief (CA9 Dkt.81, p.22), and rehearing petition (CA9 Dkt.153, pp.11-12). Far from waived, the jurisdictional issue was clearly preserved regardless of which preservation standard applies.

Especially given Respondents' own acknowledgment that dismissal with prejudice aligned with Ninth Circuit precedent in *Ruiz v. Snohomish County Public Utility District No. 1*, 824 F.3d 1161, 1168 (9th Cir. 2016), BIO 25, Petitioner adequately preserved this issue before a panel bound by that precedent.

## **2. The Circuit Split Is Deep and Irreconcilable**

The Second Circuit holds that "where a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice." *Hernandez v. Conriv Realty Associates*, 182 F.3d 121, 123 (2d Cir. 1999). The Fifth Circuit agrees: Rule 12(b)(1) dismissals should be "without prejudice" because they are "not a determination of the merits." *Mitchell v. Bailey*, 982 F.3d 937, 944 (5th Cir. 2020). The Tenth Circuit likewise explains that courts "*incapable* of reaching a disposition on the merits" must dismiss

without prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006). The Eleventh Circuit recently reaffirmed this principle, vacating a with-prejudice dismissal because “[d]ismissals for a lack of jurisdiction are not judgments on the merits.” *Dupree v. Owens*, 92 F.4th 999, 1007 (11th Cir. 2024).

The Ninth Circuit alone permits with-prejudice jurisdictional dismissals, through legal fiction. *Ruiz*, 824 F.3d at 1168. As published Ninth Circuit precedent establishing its outlier rule in this 4-1 circuit split, *Ruiz* also disproves Respondents’ theory, BIO 18, that the issue is “splitless.”

The practical consequences of this split are stark. In the Second, Fifth, Tenth, or Eleventh Circuits, Petitioner would have received the opportunity to cure any jurisdictional defect. In the Ninth Circuit alone, the "with prejudice" label permanently bars the claims despite the court's acknowledgment that it never addressed their merits.

Respondents' attempt to sever the 'with prejudice' label from the denial of leave to amend is unavailing. While both leave to amend (curing deficiencies with the existing action) and refile (bringing a new action) serve different purposes, both remain available when dismissal is without prejudice. Below, the dismissal was made 'with prejudice' precisely because the district court concluded, based on its erroneous legal analysis, that any amendment would be futile. A district court "abuse[s] its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Here, the court's pleading stage

denial of leave was premised entirely on its erroneous legal conclusions.

Rule 41(b) is crystal clear, explicitly providing that dismissals "for lack of jurisdiction" do not "operate as an adjudication on the merits." The Ninth Circuit's attempt to create dismissals that are simultaneously "with prejudice," yet somehow not on the merits, defies both the Rule's plain text and basic logic. "Without jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). A court cannot exercise judicial power it lacks to create binding preclusive effects. The Ninth Circuit is responsible for a mature, outcome-determinative split that demands resolution.

## **II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THESE CRITICAL QUESTIONS**

Respondents' vehicle objections lack merit. The legal questions are cleanly presented, the procedural posture poses no obstacle, and any disputes over whether the State Bar received Federal Financial Assistance ("FFA") under Petitioner's advocated procedural standard are best left for remand to allow for an amended complaint, appropriate discovery, and better developed record.

### **A. The Questions Presented Are Pure Issues of Law Suitable for Review**

The law-of-the-circuit doctrine prevented the courts below from considering whether sovereign immunity is jurisdictional under Rule 12(b)(1), but that poses no obstacle to this Court's review. The

"with prejudice" issue was squarely presented to—and decided by—the Ninth Circuit.

This Court routinely reviews interlocutory decisions presenting important legal questions that would otherwise evade review. See *Johnson v. Jones*, 515 U.S. 304, 309-10 (1995); *Mitchell v. Forsyth*, 472 U.S. 511, 524-25 (1985). The questions here are pure legal issues requiring no factual development, and absent *certiorari*, the Rehabilitation Act claims' dismissal with prejudice would become final, so review cannot be premature.

### **B. Respondents' Vehicle Objections Ironically Illustrate Vehicle Quality**

Respondents argue the lower courts' reliance on Rule 12(b)(1) would be harmless error as they contend Rule 12(b)(6) would produce the same outcome. BIO 27. Not so.<sup>2</sup> The boundaries of what constitutes FFA-receipt<sup>3</sup> can and should be resolved on remand; it does not impair vehicle suitability for resolving the questions presented, and should not be

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<sup>2</sup> The Ninth Circuit's decision below expressly relied on Rule 12(b)(1)'s applicability and Respondents' factual declaration to affirm dismissal with prejudice, and at fn.2 the Panel acknowledged that which procedural standard applied was outcome-determinative for leave to amend the Rehabilitation Act claims, which denial of leave it overturned for the claims that *were* reviewed under Rule 12(b)(6).

<sup>3</sup> Respondents' reliance on *Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986) is misplaced. That decision's narrow interpretation of 'program or activity' was precisely what prompted Congress to enact the Civil Rights Restoration Act of 1987, which explicitly broadened the statute's scope.

decided without the benefit of an amended complaint, discovery, and developed record.<sup>4</sup>

While Respondents frame the complaint's lack of detail on FFA-receipt as a vehicle flaw, that instead reflects how information and evidence thereupon is typically within the sole possession of defendants and inaccessible to plaintiffs at the pleading stage. That ironically makes this context—a frequently-litigated element of many federal civil rights claims—an *ideal* vehicle for resolving what procedures apply to invoking sovereign immunity.

Permitting Respondents' Rule 12(b)(1) factual challenge to resolve an FFA-receipt dispute creates an inescapable catch-22: plaintiffs lack notice they'd need to request discovery prior to surviving a motion to dismiss, which discovery courts typically would not grant without them first surviving dismissal. Yet, they cannot do so without evidence obtainable only through discovery. The district court's demand for precise documentation at the pleading stage conflates Rule 8's notice pleading standard with Rule 56's summary judgment standard. As the Seventh Circuit correctly recognized in *Runnion v. Girl Scouts*, 786 F.3d 510, 529 (7th Cir. 2015), "[w]e cannot expect, nor does [Rule] 8 require, a plaintiff to plead information

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<sup>4</sup> The same is true for Respondents' inapposite reliance on wrongly decided—albeit moot—preliminary injunction denials in this and another case—despite the Ninth Circuit's non-futility holding—to speculate that Petitioner cannot state any claim under Rule 12(b)(6), BIO 26, and its renewed attempt—see Petition, p.13 fn.7—to mischaracterize his accommodation requests, BIO 6-7, clarified at CA9 Dkt.101, pp.16-20.



she could not access without discovery." Yet the Ninth Circuit's rule does exactly that.

Although the reasoning may vary amongst circuits, had this case been filed in the Second, Third, Fourth, Fifth, Seventh, Tenth, or Eleventh Circuits, Petitioner would have received leave to amend any pleading deficiencies under their respective procedural rules. The Ninth Circuit's unique approach denied Petitioner these basic procedural protections available in most circuits.

The lack of a clear, uniform nationwide rule on these procedural issues demonstrates this Court's guidance is needed. This case, where procedural uncertainty resulted in a permanent dismissal based on evidence exclusively held by the defense, is an ideal vehicle to provide that clarity.

### **C. The Procedural Questions Warrant Resolution**

Whether sovereign immunity is a jurisdictional issue and whether jurisdictional dismissals can be made with prejudice are recurring questions of national importance.

These questions arise whenever a plaintiff sues a state entity in federal court. The answers determine whether claims receive Rule 12(b)(6)'s protections or face Rule 12(b)(1)'s more permissive standards. These questions control whether dismissals allow leave to amend or permanently bar the courthouse door, and whether plaintiffs can obtain discovery before dismissal or must somehow prove facts within the defendants' exclusive knowledge. This Court's

resolution would provide immediate guidance to parties and courts nationwide, regardless of this case's outcome.

### **III. THE SOVEREIGN IMMUNITY DOCTRINE'S INCOHERENCE NECESSITATES CLARIFICATION**

This Court's members have recognized the doctrinal chaos surrounding sovereign immunity. As Justices Thomas and Gorsuch recently observed, sovereign immunity has been a "recurring source of confusion" in our jurisprudence, and "[t]his Court, it seems, has contributed to the confusion." *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 509 (2021) (Thomas, J., with Gorsuch, J., dissenting).

Question 2 before the Court asks "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."

Complexity, confusion, and conflict over the sovereign immunity doctrine and its often opaque derivative doctrines plague nearly every aspect of its provenance, nature, scope of beneficiary defendants<sup>5</sup>, and of claims and relief barred,<sup>6</sup> exceptions, and

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<sup>5</sup> Respondents allege Petitioner "intentionally relinquished" the issue of whether the State Bar is an "arm of the State." BIO 16. While Petitioner agrees he cannot relitigate that issue unless an exception to the law-of-the-case doctrine manifests, he made no concession should that prospectively occur.

<sup>6</sup> That sovereign immunity varies by claim and relief types contradicts Respondents' alternative theory that it implicates

procedural handling. The weaknesses of *Hans* undermine Respondents’ assertions that *Hans* has proven a “workable principle” that should be accorded the benefit of *stare decisis*. Its perils include incompatible features as exemplified by the present procedural splits.

While the procedural questions can be resolved within existing Supreme Court precedent, the persistent confusion underscores the urgent need for clarity regarding the legacy and vitality of *Hans*.

## CONCLUSION

The circuit splits are mature, the vehicle is clean, and the need is urgent to restore doctrinal coherence to whether citizens can vindicate their federal rights against state actors who violate them. The longer these splits persist, civil rights plaintiffs face unequal access to federal courts based solely on geography, and the sovereign immunity doctrine will continue to metastasize. The petition should be granted.

Dated: July 31, 2025.

Respectfully Submitted,

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personal jurisdiction, if not subject-matter jurisdiction. BIO 20-21.

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