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

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QUESTION PRESENTED

Sovereign immunity under the Eleventh Amendment extends to States and "arms of the State." The Ninth Circuit en banc majority held that the factors for determining whether a defendant is an arm of the State should be applied to the entity as a whole—thus leading to a once-and-for-all-purposes determination of the defendant's qualification for sovereign immunity. Under this *entity*-level approach, an entity categorically labeled an arm of the State has sovereign immunity, no matter the type of claim asserted against it. At least five circuits have expressly adopted this entity-level approach. Another six circuits have applied the approach even if without specifically saying so.

The Eleventh Circuit, in contrast, holds that whether an entity is acting as an arm of the State requires an inquiry into the activity alleged as the basis of the plaintiff's complaint. Under this *activity*-level approach, an entity may be an arm of the State for some purposes but not for others.

The question presented here is:

In determining whether an entity can invoke sovereign immunity under the Eleventh Amendment as an arm of the State, should such determination be made at an "entity" level or an "activity" level?

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 capacity, are Respondents here and were Defendants-Appellees below.

RELATED CASES

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

Benjamin Kohn v. State Bar of California et al., No. 20-17316 (9th Cir.) (en banc) (affirmed in part and remanded to three-judge panel on December 6, 2023).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Benjamin Kohn, has autism and other physical and visual impairments. He requested disability accommodations from the State Bar of California for taking the California bar exam. The State Bar refused, and when Mr. Kohn sued to enforce his rights under the Americans with Disabilities Act, the State Bar claimed that it was immune from his claims because it is an "arm of the State."

Whether a litigant can invoke sovereign immunity as a shield against lawsuits is an important question, and one that comes up as a dispositive threshold issue in many cases involving non-state defendants claiming to be an "arm of the State." This Court provided some guidance in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), but the Court stopped short of answering whether the determination of sovereign immunity should be made at the *entity* or *activity* level. The Court was poised to answer that question in *Northern Insurance Co. v. Chatham County*, 547 U.S. 189 (2006), but ultimately a party's concession dictated the outcome of that case without the need to resolve the entity-versus-activity issue. This question has largely been left to the circuit courts to develop their own standards and tests.

Five circuits have formally adopted the view that an entity either is or is not an "arm of the State" and that the activity engaged in by the entity does not matter. Another six circuits have embraced that once-and-for-all-purposes approach without expressly saying so. Under the Eleventh Circuit's test, in contrast, the defendant's entitlement to sovereign immunity depends on whether it "wears a 'state hat'" in

performing the activity alleged as the basis for the plaintiff's claim. *Manders v. Lee*, 338 F.3d 1304, 1319 (11th Cir. 2003) (en banc).

The branch of cases allowing blanket immunity under the entity-level approach is at once over- and under-inclusive of a proper understanding of sovereign immunity. That is because that approach fails to recognize the reality, accounted for in the activity-level approach, that non-state entities might sometimes be acting as an arm of the State and sometimes not.

This case typifies the divergent results produced by the differing legal standards in the circuit courts. The Ninth Circuit en banc majority applied the entity-level approach, holding that the State Bar of California is an arm of the State for all purposes. But the specific activity that prompted the complaint—the administration of a standardized test, including the handling of disability accommodation requests—is not a function that traditionally has been reserved for States and withheld from municipalities and private entities. To the contrary, that function is typically performed by private entities like the National Conference of Bar Examiners. And no one questions that the NCBE—which administers part of the California bar exam—is not immune from ADA lawsuits. *See Enyart v. Nat'l Conf. of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1156 (9th Cir. 2011) (upholding an injunction against the NCBE).

The outcome here thus would have been different if the Ninth Circuit had applied the Eleventh Circuit's better reasoned, activity-level approach.

Nearly every circuit has picked a side (either expressly or in practice) on the constitutional issue presented here, so the issue is unlikely to benefit from further

percolation. The Court should review this case to answer the fundamental threshold question of whether a non-state entity's entitlement to sovereign immunity turns on whether the entity's primary activities or purposes are state functions (entity-level approach) or whether the activity that gave rise to the lawsuit is a state function (activity-level approach).

OPINIONS BELOW

The opinion of the Court of Appeals affirming in part the dismissal of Petitioner's claims has been published and is reproduced at App. 1–66. The District Court's order granting respondents' motion to dismiss is reproduced at App. 67–84.

JURISDICTION

The judgment of the Court of Appeals was entered on December 6, 2023. A motion for leave to intervene and for an extension of time to file a motion for rehearing was denied on December 21, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Eleventh Amendment provides that "[t]he 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. Factual Background.

1. Mr. Kohn seeks but is denied reasonable disability accommodations in taking the California Bar Exam.

Mr. Kohn is a University of Iowa law school graduate—and now a California-licensed attorney—who suffers or has suffered from a number of distinctly diagnosed conditions, including autism, keratoconus, severe gastroparesis, severe postoperative dysphagia, pelvic floor dyssynergia and IBS-C, myofascial pain syndrome, motor delays, scapular dyskinesis, occipital neuralgia, cervicalgia, and medication-induced immunodeficiencies. App. 68.

Mr. Kohn petitioned the State Bar for disability accommodations for the July 2018, February 2019, February 2020, and October 2020 California Bar Exams, which the State Bar partially denied for each exam. *Id.* As a result of the State Bar's failures, Mr. Kohn was forced to delay his career for years, costing him thousands of dollars in studying and registering for bar exams when he was not appropriately accommodated. Opening Br. 12. And for the October 2020 exam, he endured more expenses and burdens, such as hotel expenses and ergonomic equipment transportation because of the forced in-person testing coupled with the denied reasonable accommodation requests. *Id.* 12–13.

2. The State Bar was created to be self-sustaining and to operate with little state control.

California law provides that anyone who practices law in the State must be a member of the State Bar unless holding office as a judge. *See* Cal. Const. Art. VI, Sec.

9. As a "public corporation" independent of the State of California, the State Bar "may sue and be sued," and may "[o]wn, hold, use, manage and deal in and with real and personal property." Cal. Bus. & Prof. Code § 6001(a), (c). The State Bar also maintains its own, separate treasury, Cal. Bus. & Prof. Code § 6063, and California expressly disavows any responsibility for the State Bar's debts, Cal. Bus. & Prof. Code § 6008.1.

Designed to be self-sustaining, the State Bar is empowered by California law to collect annual fees from its members and "to raise . . . additional revenue by any lawful means." Cal. Bus. & Prof. Code §§ 6001(c), 6140. The State Bar exercises this power by raising more than $200,000,000 annually through the collection of mandatory bar fees, voluntary donations, exam fees, grants, and other revenue. Substantially all funds used by the State Bar for carrying out its various functions derive from these non-state sources. These funds are all paid into the "treasury of the State Bar," not any treasury of the State of California. Cal. Bus. & Prof. Code § 6063.

The State Bar is governed by a Board of Trustees comprised of thirteen individuals—five appointed by the California Supreme Court, four by the state legislature, and four by the Governor. Cal. Bus. & Prof. Code §§ 6013.1, 6013.5; Cal. R. Ct. 9.90. The State Bar's Committee of Bar Examiners, a subunit responsible for administering the multi-day California Bar Exam, is composed of nineteen individuals—nine appointed by the Governor and legislature and the rest by the California Supreme Court chosen from a pool of candidates put forth by the State Bar's Board of Trustees. Cal. Bus. & Prof. Code § 6046; Cal. R. Ct. 9.4. Unlike the commissioners

in *Hess*, members of the State Bar's Board and Committee of Bar Examiners are not removable at will by the State once appointed. *See* Cal. Bus. & Prof. Code § 6023.

The State Bar's primary functions include making recommendations to the California Supreme Court on matters of attorney admission, discipline, and rule promulgation. Cal. R. Ct. 9.3, 9.13(d), 9.16(b). Though not specifically required by State law, the State Bar administers the California Bar Exam as just one aspect of determining whether to recommend a bar applicant's admission to practice law in California. *See* Cal. Bus. & Prof. Code § 6046.

The California Supreme Court retains the ultimate authority to resolve all issues pertaining to attorney admission, discipline, and rules of professional conduct. Cal. R. Ct. 9.0(b), 9.13(d); *Giannini v. Comm. of Bar Examiners of State Bar of Cal.*, 847 F.2d 1434, 1435 (9th Cir. 1988) ("Under California law, only the state supreme court, not the Committee of Bar Examiners, has the authority to grant or deny admission to the bar."); *Keller v. State Bar of Cal.*, 496 U.S. 1, 11 (1990) ("The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, nor does it ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court.").

With the state high court's role paramount, the State Bar's essentially "advisory" role in relation to the California Supreme Court's admissions decisions resembles the businesslike attributes of a standardized testing vendor whose product is required or used by state actors. *See Keller*, 496 U.S. at 11 (stating that the services performed by the State Bar "are essentially advisory in nature" and that the State

Bar "is a good deal different from most other entities that would be regarded in common parlance as 'governmental agencies'").[1] Just as state universities require that applicants take exams offered by particular private testing vendors, the California Supreme Court has designated passage of the California Bar Exam and the National Conference of Bar Examiners' Multistate Professional Responsibility Exam as credentials typically required before it grants admission.

The State Bar's office of admissions derives most of its funding from admissions fees, including exam fees charged to register for the bar exam, which are housed in an "admissions fund" separate from the State Bar's "general fund" that is funded by member dues. *See generally* CA9 2-ER-95–245; *see id.* at 239, 249. Neither the California legislature nor the California Supreme Court's approval is required to adjust the exam registration fees that fund the bar exam, even if the legislature may statutorily cap member dues in the same way it restricts, for example, rent increases by private landlords.

B. Procedural History.

1. The District Court dismisses Mr. Kohn's claim without reaching an "arm of the State" analysis.

In July 2020, Mr. Kohn sued the State Bar in the U.S. District Court for the Northern District of California. App. 67. Along with claims that the State Bar failed to reasonably accommodate his disabilities, Mr. Kohn also asserted disparate

[1] "[A]lthough *Keller* never specifically addressed sovereign immunity, its analysis is pertinent and analogous to the immunity question." *Crowe v. Or. State Bar*, 989 F.3d 714, 732 (9th Cir. 2021), *overruled on other grounds by Kohn v. State Bar of Cal.*, 87 F.4th 1021 (9th Cir. 2023) (en banc).

treatment disability discrimination claims and further challenged certain aspects of the State Bar's procedures for seeking testing accommodations as facially unlawful under the ADA. He sought declaratory and injunctive relief and monetary damages arising from the State Bar's violations of Title II, 42 U.S.C. § 12131 et seq.; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Cal. Gov't Code § 11135 et seq., and § 12944 et seq.; and the Unruh Civil Rights Act, Cal. Civ. Code § 51(f). App. 67–68. In September 2020, Mr. Kohn filed his first amended complaint, which asserted the same claims and alleged additional facts. Mr. Kohn moved for a preliminary injunction as to each version of his complaint, which the district court denied. *Id.*

In October 2020, the district court granted the State Bar's motion to dismiss under Rules 12(b)(1) and 12(b)(6), without the benefit of a hearing, and without granting Mr. Kohn leave to amend. *Id.* 83. The district court determined that Mr. Kohn's Title II claims were barred by the Eleventh Amendment, that the court lacked subject matter jurisdiction over Mr. Kohn's Section 504 claims on account of the State Bar's assertion that it does not receive direct federal funding, and that the Unruh Act does not apply to government entities. *Id.* 81, 83. In addressing Mr. Kohn's Title II claims, the district court did not analyze whether the State Bar could invoke sovereign immunity as an "arm of the State"—it simply assumed that the State Bar and the other defendants enjoyed sovereign immunity as "state agencies." *Id.* 80.

The district court entered a final judgment for the State Bar, and Mr. Kohn appealed. *Id.* 84.[2]

2. The Ninth Circuit sua sponte convenes an en banc panel to consider the test for whether an entity like the State Bar is an arm of the State entitled to sovereign immunity.

After oral argument on Mr. 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. App. 8.

The Ninth Circuit requested supplemental briefing on whether the court should continue using its previous test to determine whether a defendant is an arm of the State, which considered various factors viewed at the activity level, *see Ray v. Cnty. of Los Angeles*, 935 F.3d 703, 710 (9th Cir. 2019), and whether the State Bar can assert immunity under whatever test the court were to adopt. CA9 ECF No. 112. Mr. Kohn's supplemental brief raised the issue of what "precise level of abstraction" was required to analyze the "arm of the State" question. Appellant's Supp. Br. 17. Pointing to this Court's decisions in *Regents of the University of California v. Doe*, 519 U.S. 425, 427 n.2 (1997), and *Northern Insurance*, 547 U.S. at 194, Mr. Kohn argued that this Court has acknowledged "that a single entity may act as an arm of the State for some purposes but not others." *Id.*

The en banc court held that the State Bar is an arm of the State and thus entitled to share in California's sovereign immunity as a threshold matter. App. 33.

[2] Mr. Kohn disputes some of the district court's characterizations of his allegations, but those disputes are not material to the threshold immunity question presented by this petition.

Having embraced the entity-level approach and adopted the factors used by the D.C. Circuit in *Puerto Rico Ports Authority v. FMC*, 531 F.3d 868 (D.C. Cir. 2008), the majority focused its analysis on the State Bar's functions and purpose in the abstract rather than on the activity alleged as the basis of Mr. Kohn's claim—the administration of the bar exam. *Id.* 27–28. Two judges dissented because, while they embraced the D.C. Circuit's test, they concluded that the State Bar was not immune. *Id.* 65–66 (Bumatay, J., dissenting).

The majority and dissent disagreed regarding the function of the State Bar. The majority focused on the State Bar's role in licensing and regulating lawyers, including its "core functions of admission and discipline of attorneys." *Id.* 25. The dissent discussed the State Bar's largely "advisory" role, which points away from immunity. *Id.* 56 (Bumatay, J., dissenting).[3]

In a concurring opinion, Judge Mendoza agreed that the State Bar is immune but declined to embrace the entity-level analysis, arguing that an activity-level analysis is better. *Id.* 34. The concurring opinion hesitated to accept the proposition that "once an entity is determined to be an arm of the State under the three-factor test, that conclusion applies unless and until there are relevant changes in the state law governing the entity." *Id.* 43. As Judge Mendoza pointed out, "while this categorical approach to sovereign immunity may make our job easier as judges, it lacks

[3] For the reasons explained in Judge Bumatay's dissent, even under an entity-level approach, the en banc majority's analysis was wrong.

consistent support in our precedent or practice and would lead to anomalous results." *Id.*

In advocating for the activity-level approach, Judge Mendoza stated that "[p]reserving a function-based approach instead of the D.C. Circuit's entity-based approach serves the Eleventh Amendment's twin purposes" of protecting a State's treasury and dignity. *Id.* 44. Judge Mendoza also pointed out that there was nothing in the Ninth Circuit's or this Court's immunity jurisprudence requiring a test that would declare an entity sovereignly immune in perpetuity for all purposes. *Id.* 45.[4]

3. This case presents a clean shot at resolving the entity-versus-activity split.

The Ninth Circuit's en banc decision addressed a single issue—whether the State Bar is an arm of the State for purposes of this disability discrimination lawsuit. App. 8. So the Court's review of the question presented here will not be sidetracked by other issues.[5]

Because Mr. Kohn is a party to this case, with standing to seek review of the Ninth Circuit's decision, this petition is unlike the recently denied petition in *Flinders*

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[4] Although Judge Mendoza suggested that the parties did not brief or argue whether the relevant factors should be viewed at the entity or activity level, Mr. Kohn's opening brief in fact cited then-existing circuit precedent endorsing the activity-level approach, and he again raised the entity-versus-activity distinction in his supplemental brief called for by the en banc panel. *Id.* 43.; Opening Br. 16, 20; Appellant's Supp. Br. 17. Before the Ninth Circuit sua sponte voted to hear the matter en banc, the parties' initial briefing did not take aim at the circuit's then-existing precedent. Any such effort would have been futile because a three-judge panel generally cannot overturn circuit precedent. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003).

[5] The en banc panel remanded the case to the three-judge panel for consideration of other issues. App. 33.

v. State Bar of California, Case No. 23-790. Mr. Flinders alleged that he was denied admission to the State Bar on account of his age, and he sought a writ of certiorari to the California Supreme Court regarding his denial of admittance to practice law in California. But that case did not properly present the sovereign immunity issue because the Supreme Court of California decision not to admit him to practice law did not involve a question of sovereign immunity. Although Mr. Flinders apparently hoped that this Court would also review the Ninth Circuit's decision in Mr. Kohn's case, as a non-party he lacked standing to request that review. And though Mr. Flinders had a case pending in the Ninth Circuit when he petitioned for certiorari, that court had not decided his appeal by then.

REASONS FOR GRANTING PETITION

A. The question of when a defendant is an arm of the State is vital, and circuit courts are divided over how to implement Supreme Court precedent.

This case raises an important question that has not been answered by this Court. Sovereign immunity, especially for non-state defendants claiming complete immunity from suit, is a dispositive threshold question that deprives many litigants of their fundamental right to their day in court.

Additionally, the circuit courts are split on this issue, causing cases to be won or lost based on where the suit is brought. The reach of the Eleventh Amendment should not depend on where the lawsuit is filed.

1. This Court's arm-of-the-State cases have not answered whether the availability of sovereign immunity should be determined at the entity- or activity-level.

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Court considered whether a regional planning agency, created by a compact between two States, was entitled to immunity as an arm of the State. 440 U.S. 391, 393 (1979). The Court did not expressly answer whether that determination should be made at the activity-level. But in holding that the planning agency was not an arm of the State, the Court observed that the agency's purpose (regulation of land) was traditionally performed by local governments and that the agency's performance of that function "gave rise to the specific controversy at issue in this litigation." *Id.* at 402.

In *Hess*, the Court considered whether the Eleventh Amendment immunized a bi-state port authority from a personal injury suit brought by railroad workers under federal law. 513 U.S. at 32. Looking to the Eleventh Amendment's twin reasons of "solvency" and "dignity," the Court identified several factors in determining whether an entity is "an arm of the State" entitled to immunity or simply a political subdivision not so entitled: (1) the State's potential liability for a judgment for the plaintiff; (2) the State's degree of control over the entity's actions; (3) whether State or local officials appoint the entity's board members; and (4) whether the entity's functions fall within the traditional purview of State or local government. *Id.* at 44–45, 47, 51–52. The Court did not clarify, however, whether these factors should be analyzed regarding the entity as a whole or with respect to the entity's activity alleged as the basis of the plaintiff's complaint.

Three years later, this Court decided another "arm of the State" case. In *Regents*, the Court held that it is the State treasury's potential legal liability for the judgment, not whether the State will in fact pay for the judgment, that controls the State treasury factor. 519 U.S. at 431. The Court again left unanswered whether it is appropriate to consider, for sovereign immunity purposes, "the character of the function that gave rise to the litigation." *Id.*

More recently, in *Northern Insurance*, this Court addressed whether a county had immunity in a suit alleging a tort committed by a county employee after the county's drawbridge fell and collided with the plaintiff's boat. 547 U.S. at 191. Although the case appeared to present an opportunity for the Court to address the entity-or-activity question, it turned out that a party's concession dictated the outcome. The Court's analysis began with the well-settled principle that local governments, such as municipalities and counties, are not themselves States or arms of the State. *Id.* at 193 ("Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties."). And the county conceded that it was not entitled to immunity under the Eleventh Amendment. But the Court acknowledged that the county would have been entitled to immunity if "it was acting as an arm of the State . . . in operating the drawbridge," *id.* at 194, which supports an activity-level analysis.

2. Circuit courts are split on this threshold issue, with differing approaches leading to different outcomes for similar entities.

With no direct answer in the Court's cases, the circuits have diverged on whether the arm-of-the-state analysis should be undertaken at the entity or activity level.

The First and Fourth Circuits, for example, interpreted *Hess* and *Regents* as focusing on the entity at issue, and the First Circuit added a question found nowhere in either opinion: "[h]as the state clearly structured the *entity* to share its sovereignty?" *Fresenius Med. Care Cardiovascular Res. Inc. v. Puerto Rico*, 322 F.3d 56, 68 (1st Cir. 2003) (emphasis added); *see also Gray v. Laws*, 51 F.3d 426, 435 (4th Cir. 1995) ("[T]he primary consideration of Eleventh Amendment immunity is whether the state is liable for the judgment against the employee, *not the function performed by the employee*." (emphasis added)). This language was then echoed by the D.C. Circuit in *Puerto Rico Ports Authority* (written by then-Judge Kavanaugh) in establishing a new three-factor test for sovereign immunity. 531 F.3d at 873 ("Under the three-factor test, an entity either is or is not an arm of the State: The status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors.").

Following the lead of those courts, the Eighth Circuit formally adopted this entity-level approach. *Pub. Sch. Ret. Sys. of Mo. v. State St. Bank & Tr. Co.*, 640 F.3d 821, 827, 830 (8th Cir. 2011). Six more circuits have used the entity-level approach, even if they have not adopted the "entity-level" nomenclature. *See*, *e.g.*, *Gorton v. Gettel*, 554 F.3d 60, 62 (2d Cir. 2009); *Karns v. Shanahan*, 879 F.3d 504, 513 (3d Cir. 2018); *United States v. Univ. of Tex. Health Science Ctr.–Houston*, 544 Fed. App'x 490, 494–95 (5th Cir. 2013); *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774–75 (6th Cir.

2015); *Parker v. Franklin Cnty. Comm. Sch. Corp.*, 667 F.3d 910, 926–29 (7th Cir. 2012); *Colby v. Herrick*, 849 F.3d 1273, 1276–77 (10th Cir. 2017).

Unlike those circuits' entity-level approach, consistent with language in *Northern Insurance*, the Eleventh Circuit has held that an "arm of the State" analysis must be conducted in light of the particular function that it was serving. *See Walker v. Jefferson Cnty. Bd. of Educ.*, 771 F.3d 748, 757 (11th Cir. 2014) ("Whether [an entity] is an 'arm of the [s]tate' must be assessed in light of the particular function in which the [entity] was engaged when taking the actions out of which liability is asserted to arise."). The Ninth Circuit, too, initially adopted the activity-level approach before the en banc panel overturned that precedent. *See Ray*, 935 F.3d at 710 (asking if the proper approach is whether the entity performs key state functions "in general" or whether it performs key state functions "in carrying out the particular function at issue," and concluding that the activity-level approach is correct and consistent with *Northern Insurance*); App. 19 (adopting entity-level approach).

A court undertaking an activity-level approach considers whether the party claiming immunity "wears a 'state hat'" when engaged in the activity alleged as the basis of the plaintiff's complaint. *Manders*, 338 F.3d at 1319. Applying that approach, the Eleventh Circuit denied immunity to an emergency communications district in a lawsuit by an employee who alleged that he was demoted because of a disability in violation of the ADA. *McAdams v. Jefferson Cnty. 911 Emergency Communs. Dist.*, 931 F.3d 1132, 1134–36 (11th Cir. 2019). Although the Alabama legislature controlled much of the communications district's conduct, in finding that the state

control factor "weighs strongly against" immunity, the court reasoned that "there is no evidence that the State of Alabama exerts any control *over the particular function at issue here*: personnel decisions within a communications district." *Id.* at 1135 (emphasis added).

The Ninth Circuit's majority's decision here that the State Bar is immune from a suit alleging ADA violations, compared with *McAdams*, illustrates how the grant of immunity can turn on whether a court uses the entity- or activity-level approach. Both the Ninth Circuit here and the Eleventh Circuit in *McAdams* considered substantially similar versions of the *Hess* factors.[6] But where they diverged was in the entity-versus-activity distinction.

Because the Ninth Circuit en banc majority adopted the "entity-based approach," App. 19–20, the court analyzed the degree of control the State exercises over the State Bar and the type of functions it performs *in the abstract*, *e.g.*, *id.* 29 ("The legislature's power over the State Bar's fundraising ability and annual budget further illustrates the state's control over the State Bar."). In undertaking that entity-level analysis, the court concluded that the state intent and control factors weighed in

[6] The Ninth Circuit en banc majority adopted a test that combines the various "arm of the State" factors from *Hess* and other cases into three factors: (1) the State's intent about the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury. App. 16. The Eleventh Circuit's test formulates four factors: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Manders*, 338 F.3d at 1309. Though these articulations are not identical, both circuits' formulations roughly capture the *Hess* factors and are not meaningfully different *other than in the choice of analyzing the factors at the entity or activity level*.

favor of immunity. *Id.* 27, 29. But the court did not consider whether the State exercises control specifically over the State Bar's decisions on accommodation requests from exam takers. Nor did the court consider whether decisions on disability accommodation requests are traditionally a state function.

Had the Ninth Circuit instead adopted an activity-level approach, the State Bar would not have been given immunity. California does not assert direct control or oversight of the State Bar *with respect to its disability accommodation decisions for the bar exam*. Unlike the actual admission of a bar applicant, over which the California Supreme Court retains full control, *see Giannini*, 847 F.2d at 1435, the State Bar's accommodation decisions are subject to, at best, very little practical or legal control by the State. *See* Cal. R. Ct. 9.13(d).

The administration of a professional licensing exam, including the resolution of disability accommodation requests for that exam, is not traditional state activity. Cases from multiple circuits, including the Ninth Circuit, support ADA actions against entities that administer this type of testing. *See*, *e.g.*, *Enyart*, 630 F.3d at 1156 (ADA action arising from the NCBE's administration of Multistate Professional Responsibility Exam and the Multistate Bar Exam); *Ramsay v. Nat'l Bd. of Med. Exam'rs*, 968 F.3d 251 (3d Cir. 2020) (ADA action regarding the National Board of Medical Examiners' administration of a medical licensing exam); *Langston By and Through Langston v. ACT*, 890 F.2d 380, 385 (11th Cir. 1989) (action regarding college admissions testing).

So by switching from an entity-level analysis to an activity-level analysis, the state intent and control factors both flip to weighing against immunity. And the Ninth Circuit stated that the third factor (treasury) "presents a closer call," but shrugged off its significance as "not dispositive." The Ninth Circuit's choice to adopt the entity-level approach was thus dispositive. Although the State Bar may wear a "state hat" for some functions—such as in the charging of membership fees and the disciplining of attorneys—that does not support a conclusion that the State Bar is an "arm of the State" when administering exams and resolving disability accommodation requests. By (incorrectly) applying the entity-level approach, the Ninth Circuit thereby granted wholesale immunity to the State Bar regardless of whether its activity giving rise to the suit was a state function. *See* App. 44–45 ("An arm of the state is not the state, and its dignity interest is relevant insofar as it functions as an arm of the state.") (Mendoza, J., concurring).

The legal context here—a claim under the ADA—is far from the only one in which the split in approaches leads to different results, in effect rendering federal law unenforceable depending on the jurisdiction. For example, county sheriffs who are sued for how they carry out their responsibilities are either immune or not depending largely on which circuit they reside in. *Compare Couser v. Gay*, 959 F.3d 1018, 1031 (10th Cir. 2020) (engaging in entity-level analysis to conclude that, when performing law enforcement functions, a county sheriff is a county official not entitled to sovereign immunity), *with Myrick v. Fulton Cnty.*, 69 F.4th 1277, 1296 (11th Cir. 2023) (engaging in activity-level analysis to conclude that county sheriff could invoke

sovereign immunity with respect to force policy, discipline, and training of officers). And under the entity-level approach, when a county sheriff's department is categorically considered an arm of the State, plaintiffs are left without a remedy even for claims based on "entirely locally dictated policies." *See* Kelsey Joyce Dayton, *Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine*, 86 U. Chi. L.R. 1604, 1650 (2019).

B. The entity-level approach creates problematic rulings that are both overinclusive and underinclusive.

The entity-level approach adopted by the Ninth Circuit here makes it impossible for courts to correctly incorporate *Hess*'s monetary judgment factor, and its once-and-for-all-purposes quality creates anomalous results.

First, the entity-level approach conflicts with one of the key considerations under any "arm of the State" analysis required by *Hess*: the monetary judgment factor. Because any analysis of the monetary judgment factor requires an analysis of whether the State will be liable for any judgment *in the case at issue*, the entity-level approach is incompatible with *Hess*.

Circuits that adopt the entity-level approach downplay or misconstrue the monetary judgment factor. The Fifth Circuit, for example, considers the monetary judgment factor by asking if a judgment for the plaintiff will impact the state treasury and *also if the State is responsible for general debts and liabilities*. *Cozzo v. Tangipahoa Par. Council-President Gov't*, 279 F.3d 273, 282 (5th Cir. 2002). In the Fourth Circuit, courts first ask "whether the state treasury will be liable for the judgment." *Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996).

Any analysis of the treasury factor, as this Court has enunciated, must consider whether the state treasury will pay if the plaintiff secures a judgment, which in turn requires an analysis of the specific activity or conduct of the alleged "arm of the State." To hold otherwise misreads *Hess*'s monetary judgment factor.

This problem is even more clear here because the Ninth Circuit en banc panel punted on the treasury factor, finding that it was "not dispositive." This sidesteps the Court's pronouncements that "the state treasury factor is the most important factor to be considered." *Hess*, 513 U.S. at 49. And this, most-important factor weighs against immunity here.

In *Lewis v. Clarke*, the Court made clear that the treasury factor favors the defendant only if "any judgment '*must* be paid out of a State's treasury.'" 581 U.S. 155, 165 n.4 (2017) (quoting *Hess*, 513 U.S. at 48). As the en banc majority conceded, "[t]here is no dispute that California law makes the State Bar responsible for its own debts and liabilities, so California would not be liable for a judgment against the State Bar." App. 29. Despite its fiscal independence, the State Bar argued that its funds are state funds because a California statute says that State Bar property is held for essential public and government purposes. *Id.* 29–30. And the Ninth Circuit majority recited that argument in suggesting that this factor was a "closer call." *Id.* 31. But the State Bar's argument is foreclosed by *Lewis*, which held that even when a statute requires the sovereign to indemnify the defendant, that "does not somehow convert the suit . . . into a suit against the sovereign." 581 U.S. at 164–66; *see also Regents*, 519 U.S. at 431 ("[N]one of the reasoning in our opinions lends support to

the notion that the presence or absence of a third party's undertaking to indemnify the agency should determine whether it is the kind of entity that should be treated as an arm of the State."). Yet here, California disavows any obligation to indemnify the State Bar, *see* Cal. Bus. & Prof. Code § 6008.1, so the State Bar's position on the treasury factor is even weaker. Given that this factor asks whether a judgment against the defendant implicates *the State's* solvency, the State Bar's financial independence means there can be no genuine question that this factor cuts against immunity for the State Bar.

Second, under the entity-level approach, what should be minor considerations receive outsized weight. For example, the Ninth Circuit majority here emphasized the state officials' appointment of the State Bar's leadership. But as Judge Bumatay observed, "that appointment power *alone* doesn't demonstrate control sufficient to find immunity. In fact, the Court has explicitly rejected such a myopic view of control." App. 61; *see Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) ("While the Governor appoints four of the board's five members, the city of St. Louis is responsible for the board's financial liabilities, and the board is not subject to the State's direction or control in any other respect. It is therefore not an 'arm of the State' for Eleventh Amendment purposes." (citations omitted)); *Hess*, 513 U.S. at 44 (denying immunity to the port authority even though all 12 commissioners were state appointed).

Third, the entity-level approach, in offering wholesale immunity even for non-state functions, is overinclusive. It allows an entity that performs some state

functions to benefit from this immunity in pursuit of functions disconnected from any state function.

One example can be seen in public universities, which unquestionably engage in private activities, such as pursuing their proprietary rights in a patent. Despite the inherently private nature of patent prosecution, public universities dubbed an "arm of the State" successfully invoke blanket sovereign immunity to block collaborative research partners from challenging the inventorship of patents arising out of that research, *see Ali v. Carnegie Inst. of Wash.*, 684 F. App'x 985, 992 (Fed. Cir. 2017), and to avoid liability for commercially profiting from the use and sale of a patent holder's product, *see Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334, 1339–40 (Fed. Cir. 2006). Public universities also use their immunity to dictate venue for their own patent enforcement lawsuits and to avoid being compelled to join a patent infringement lawsuit brought by an exclusive licensee of the university's patent. *See* App. 46 (Mendoza, J., concurring). Their private counterparts have no such privilege. *See* Christopher M. Holman, *State Universities Push the Limits of Eleventh Amendment Sovereign Immunity at the Federal Circuit*, 39 Biotech. L. Rep. 347, 360 (2020) ("[State universities] exploit the patent system as a sword, while largely insulating themselves from liability or judicial intervention through the shield of Eleventh Amendment state sovereign immunity.").

Finally, the entity-level approach is also underinclusive in that it can exclude non-state entities that act as an agent for the State in a limited capacity. For example, the Sixth Circuit, which endorses the entity-level approach, has held that a state-

run gas authority was not entitled to sovereign immunity. *See Town of Smyrna v. Mun. Gas Auth. of Ga.*, 723 F.3d 640, 651 (6th Cir. 2013). But by making such a ruling, that court essentially held that any activity the gas authority performs is subject to suit, even legitimate state activities. What happens, then, if Georgia, as part of a push for cleaner emissions, requires the gas authority to send the State quarterly reports on its revenue? The gas authority, in making such reports, would not be immune from suit. Yet the Georgia Lottery Corporation, a similar entity that also reports profits and revenue to the State, is entitled to sovereign immunity for those actions. 723 F.3d at 650.

The Court should grant certiorari to resolve the circuit split and instruct lower courts to consider the "arm of the State" factors at the *activity* level.

CONCLUSION

With a clear circuit split on an important issue with ramifications on the reach of virtually any federal law, this Court should answer whether "arm of the State" factors should be analyzed at the entity-level or through the lens of the specific activity alleged as the basis of the complaint. The Court should grant the petition for certiorari on the Question Presented.

Respectfully submitted,

By: ***/s/ Chantel L. Febus***

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Counsel for Petitioner

March 5, 2024

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENJAMIN KOHN, *Plaintiff-Appellant*, v. STATE BAR OF CALIFORNIA; CALIFORNIA COMMITTEE OF BAR EXAMINERS, and Their Agents in Their Official Capacity, *Defendants-Appellees*.	No. 20-17316 D.C. No. 4:20-cv-04827-PJH OPINION

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted En Banc September 20, 2023
San Francisco, California

Filed December 6, 2023

Before: Mary H. Murguia, Chief Judge, and Johnnie B. Rawlinson, Sandra S. Ikuta, John B. Owens, Daniel A. Bress, Danielle J. Forrest, Patrick J. Bumatay, Jennifer Sung, Gabriel P. Sanchez, Holly A. Thomas and Salvador Mendoza, Jr., Circuit Judges.

Opinion by Judge Owens;
Partial Concurrence by Judge Mendoza;
Partial Concurrence and Partial Dissent by Judge Bumatay

SUMMARY*

Eleventh Amendment Immunity

The en banc court (1) affirmed in part the district court's dismissal of attorney Benjamin Kohn's action against the State Bar of California and the California Committee of Bar Examiners under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and California law; and (2) remanded to the original three-judge panel for consideration of the remaining issues.

In the State Bar's role in the admission of attorneys, it acts under the authority and at the direction of the California Supreme Court. Kohn sought monetary damages and other relief based on the State Bar's refusal to provide him with certain test-taking accommodations for the bar exam. The district court dismissed the action on the basis of Eleventh Amendment immunity.

The en banc court reaffirmed that the California State Bar enjoys Eleventh Amendment immunity from suit in federal court. The en banc court held that Eleventh Amendment immunity extends not only to suits in which a state itself is a named party, but also to suits against an "arm

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

of the state." The Ninth Circuit's version of the test for determining whether an entity is an arm of the state applied the so-called *Mitchell* factors. The en banc court concluded that the *Mitchell* factors test should be reshaped in light of developments in Supreme Court doctrine and the Ninth Circuit's experience applying the *Mitchell* factors. Accordingly, the en banc court adopted the D.C. Circuit's three-factor test, which considers: (1) the state's intent as to the status of the entity, including the functions performed by the entity; (2) the state's control over the entity; and (3) the entity's overall effects on the state treasury.

Applying this updated three-factor test, the en banc court held that the California State Bar is an arm of the state and entitled to sovereign immunity. The en banc court concluded that the first factor, California's intent as to the State Bar, strongly favored the conclusion that it is an arm of the state, as did the second factor, the state's control over the State Bar. The en banc court concluded that the third factor, the State Bar's effects on the state treasury, presented a closer call but was not dispositive.

Concurring in part, Judge Mendoza agreed with the majority that the *Mitchell* factors were out of step with the Supreme Court's jurisprudence and that the California State Bar is an arm of the state for sovereign immunity purposes. He wrote separately to caution against adopting the D.C. Circuit's approach to weighing the sovereign immunity factors, and he disagreed with the majority's wholesale embrace of the D.C. Circuit's entity-based approach to sovereign immunity.

Concurring in part and dissenting in part, Judge Bumatay, joined by Judge Sung, wrote that he agreed with

the majority's abandonment of the *Mitchell* factors in favor of the D.C. Circuit's more streamlined approach, looking at intent, control, and overall effects on a state's treasury to determine whether an entity is an arm of the state. Judge Bumatay, however, disagreed with the majority's application of this new approach, and he would hold that each of its factors cuts against finding sovereign immunity for the California State Bar.

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OPINION

OWENS, Circuit Judge:

For nearly forty years, the California State Bar has enjoyed Eleventh Amendment immunity in federal court. *See, e.g.*, *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985); *Hirsh v. Justs. of the Sup. Ct. of Cal.*, 67 F.3d 708, 715 (9th Cir. 1995) (per curiam). Appellant Benjamin Kohn, a licensed California attorney, seeks to change that. He contends that the State Bar is not an "arm of the state," and he can sue it without restriction. Consistent with every other circuit, we reaffirm that the State Bar enjoys Eleventh Amendment protection in federal court and update our arm of the state jurisprudence to better reflect the Supreme Court's most recent guidance.

I. FACTUAL AND PROCEDURAL BACKGROUND

The California State Bar is the "administrative arm" of the California Supreme Court "for the purpose of assisting in matters of admission and discipline of attorneys." *In re Rose*, 993 P.2d 956, 961 (Cal. 2000) (quoting *In re Att'y Discipline Sys.*, 967 P.2d 49, 59 (Cal. 1998)); *see also* Cal. R. Ct. 9.3 ("The State Bar serves as the administrative arm of the Supreme Court for admissions matters."). Under the California Constitution, "[e]very person admitted and licensed to practice law in [the] [s]tate is and shall be a member of the State Bar . . . ." Cal. Const. art. VI, § 9. The State Bar "acts under the authority and at the direction of the Supreme Court[,]" which has "inherent jurisdiction over the practice of law" in the state. Cal. R. Ct. 9.3. As part of its role in the admission of attorneys, the State Bar examines candidates' qualifications, administers the bar exam, and

certifies candidates to the California Supreme Court. *Id.*; Cal. Bus. & Prof. Code §§ 6046, 6060(g).

The claims in this case stem from the State Bar's admission function. Kohn filed a federal complaint against the State Bar seeking monetary damages and other relief. He alleged that its refusal to provide him with certain test-taking accommodations violated Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, sections of the California Government Code, and California's Unruh Civil Rights Act.[1] The State Bar moved to dismiss the lawsuit on several grounds, including that the Eleventh Amendment prohibited the action from going forward.[2]

The district court agreed with the State Bar. It granted the motion to dismiss and quoted *Hirsh*'s clear holding for support: "The Eleventh Amendment's grant of sovereign immunity bars monetary relief from state agencies such as California's Bar Association and Bar Court." *Hirsh*, 67 F.3d at 715. *Hirsh* relied exclusively on *Lupert* for its holding. *Id*; *see also Lupert*, 761 F.2d at 1327 ("The Eleventh

[1] 42 U.S.C. § 12131 *et seq.* (Title II of the Americans with Disabilities Act); 29 U.S.C. § 794 (Section 504 of the Rehabilitation Act); Cal. Gov't Code §§ 11135 *et seq.*, 12944 *et seq.*; Cal. Civ. Code § 51(f) (Unruh Civil Rights Act).

[2] In this opinion, we reach only the issue of whether the State Bar is an arm of the state for purposes of sovereign immunity. We remand the case to the original three-judge panel for consideration of the remaining issues. *See United States v. Dreyer*, 804 F.3d 1266, 1270 n.1 (9th Cir. 2015) (en banc) ("If the Court votes to hear or rehear a case *en banc*, the *en banc* court may, in its discretion, choose to limit the issues it considers." (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 995 (9th Cir. 2003) (en banc))).

Amendment bars this suit against the named agencies as the state did not consent to being sued.").

Normally that would be the end of the story. A nearly forty-year-old precedent that largely has gone unchallenged[3] would control the panel's decision, and en bancs are quite rare. But this story is only getting started.

Lupert and *Hirsh* were largely silent as to why the State Bar enjoyed Eleventh Amendment immunity, and *Hirsh* ignored a long line of caselaw setting out our test (often called the *Mitchell* factors) for determining whether a state agency, like the State Bar, is an arm of the state entitled to such protection. *See, e.g.*, *Jackson v. Hayakawa*, 682 F.2d 1344, 1349–50 (9th Cir. 1982); *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201–02 (9th Cir. 1988). We have applied the *Mitchell* factors and the Eleventh Amendment to

[3] *See, e.g.*, *Viriyapanthu v. State Bar of Cal.*, 813 F. App'x 312, 313 (9th Cir. 2020) (The "State Bar of California . . . [is] entitled to sovereign immunity."); *Vartanian v. State Bar of Cal.*, 794 F. App'x 597, 600 (9th Cir. 2019) (same); *Kinney v. State Bar of Cal.*, 708 F. App'x 409, 410 (9th Cir. 2017) (same); *Haroonian v. Comm. of Bar Exam'rs*, 692 F. App'x 838, 838 (9th Cir. 2017) (same); *Kinney v. State Bar of Cal.*, 676 F. App'x 661, 663 (9th Cir. 2017) (same); *Tanasescu v. State Bar of Cal.*, 569 F. App'x 502, 502 (9th Cir. 2014) (same); *Joseph v. State Bar of Cal.*, 564 F. App'x 302, 303 (9th Cir. 2014) (same); *Khanna v. State Bar of Cal.*, 308 F. App'x 176, 177 (9th Cir. 2009) (same); *Torres v. State Bar of Cal.*, 143 F. App'x 13, 14–15 (9th Cir. 2005) (same); *Taggart v. State Bar of Cal.*, 57 F. App'x 757, 758 (9th Cir. 2003) (same).

We generally have taken the same approach with respect to other state bars. *See, e.g.*, *O'Connor v. Nevada*, 686 F.2d 749, 750 (9th Cir. 1982) (State Bar of Nevada); *Strojnik v. State Bar of Ariz.*, 829 F. App'x 776, 776 (9th Cir. 2020); *Block v. Wash. State Bar Ass'n*, 761 F. App'x 729, 731 (9th Cir. 2019). *But see Crowe v. Or. State Bar*, 989 F.3d 714, 733 (9th Cir. 2021) (per curiam); *infra* pp. 32–33.

a wide range of state entities.[4] Yet we have spent little time over these decades considering whether our law accurately captures the latest Supreme Court thinking.

We sua sponte took this case en banc to decide whether (1) the *Mitchell* factors, described *infra* pp. 11–17, remain the optimal means to conduct an arm of the state analysis; and (2) the California State Bar enjoys Eleventh Amendment protection under a more rigorous scrutiny than it received in *Lupert* and *Hirsh*.

[4] *See, e.g.*, *Ray v. County of Los Angeles*, 935 F.3d 703, 709–11 (9th Cir. 2019) (county); *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 928–34 (9th Cir. 2017) (school districts and county offices of education); *Beentjes v. Placer Cnty. Air Pollution Control Dist.*, 397 F.3d 775, 778–86 (9th Cir. 2005) (air pollution control district); *Aguon v. Commonwealth Ports Auth.*, 316 F.3d 899, 901–04 (9th Cir. 2003) (public corporation created to manage ports); *In re Lazar*, 237 F.3d 967, 982–84 (9th Cir. 2001) (reimbursement program run by state water-resources control board); *Streit v. County of Los Angeles*, 236 F.3d 552, 566–67 (9th Cir. 2001) (county sheriff's department); *Hale v. Arizona*, 993 F.2d 1387, 1399 (9th Cir. 1993) (en banc) (operator of prison labor program), *abrogated on other grounds as recognized by Nwauzor v. GEO Grp., Inc.*, 62 F.4th 509, 514–15 (9th Cir. 2023); *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 380–82 (9th Cir. 1993) (state-created railroad corporation); *ITSI T.V. Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1292–93 (9th Cir. 1993) (state fair and exposition); *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1053 (9th Cir. 1991) (public utilities commission and nonprofit public service corporation); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423–28 (9th Cir. 1991) (community development authority); *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 678–79 (9th Cir. 1991) (state-run workers' compensation program).

II. DISCUSSION

A. Standard of Review

"We review de novo a dismissal on the basis of sovereign immunity or for failure to state a claim upon which relief can be granted." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). Whether an entity is an arm of the state within the meaning of the Eleventh Amendment is a question of federal law. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997) ("*Regents*").

B. The Arm of the State Doctrine and the *Mitchell* Factors

The Eleventh Amendment provides that "[t]he 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. Longstanding Supreme Court precedent has interpreted this Amendment to immunize states from suit in federal court by citizens and noncitizens alike. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) ("*Seminole Tribe*"); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). This immunity extends not just to suits in which the state itself is a named party but also to those against an "arm of the [s]tate." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *accord Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994); *Regents*, 519 U.S. at 429.

There is no standard test for determining whether an entity is an arm of the state for purposes of sovereign

immunity. *See Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61 (1st Cir. 2003) ("The arm of the state analytical doctrine has moved freely . . . applying common principles."). The circuits have developed different approaches to this question based on considerations the Supreme Court has identified as relevant, including "the nature of the entity created by state law," *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 280, whether the state "structured" the entity to "enjoy the special constitutional protection of the [s]tate[] [itself]," *Hess*, 513 U.S. at 43–44 (citation omitted), and the state's legal liability for judgments against the entity, *Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 401–02 (1979).[5]

[5] *See, e.g.*, *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 443 (6th Cir. 2020) ("(1) the [s]tate's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government" (citation omitted)); *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 135 (2d Cir. 2015) (alternating between (1) a six-factor test evaluating entity's structure and treatment under state law and (2) a two-factor test considering extent of state responsibility for judgment and state supervision of the entity); *Walker v. Jefferson Cnty. Bd. of Educ.*, 771 F.3d 748, 751 (11th Cir. 2014) ("(1) how the state law defines the entity; (2) the degree of state control over the entity; and (3) the entity's fiscal autonomy" (citation omitted)); *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 874 (D.C. Cir. 2008) (analyzing state intent, state control, and effects on state treasury); *Bowers v. Nat'l Coll. Athletic Ass'n*, 475 F.3d 524, 546 (3d Cir. 2007) ("(1) whether the payment of the judgment would come from the state; (2) what status the entity has under state law; and (3) what degree of autonomy the entity has"); *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006) (looking to effect of judgment on state treasury and to degree of entity's autonomy

The Supreme Court has directed that "[w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide": the states' dignity and their financial solvency. *Hess*, 513 U.S. at 47, 52.

Our version of the arm of the state test, the so-called *Mitchell* factors, arose from a grab bag of Supreme Court and Ninth Circuit precedent and is normally reduced to the following:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power

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and control over its own affairs); *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 769–71 (7th Cir. 2005) (considering effect of judgment on state treasury, nature of entity's function, and treatment under state law); *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 260–61 (4th Cir. 2005) (considering effect on state treasury; entity's independence from state; entity's involvement in statewide concerns; and state-law treatment of entity); *Fresenius Med. Care Cardiovascular Res., Inc.*, 322 F.3d at 68 (asking (1) whether state has "clearly structured the entity to share its sovereignty" and, if the first stage is inconclusive, (2) whether "damages will be paid from the public treasury"); *Sw. Bell Tel. Co. v. City of El Paso*, 243 F.3d 936, 938 (5th Cir. 2001) ("the relationship between the state and the entity . . . the essential nature of the proceeding, the nature of the entity created by state law, and whether a money judgment against the instrumentality would be enforceable against the state"); *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 974 (10th Cir. 1997) ("degree of autonomy . . . as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state" and "extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing" (citation omitted)).

> to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 250–51 (9th Cir. 1992) (quoting *Mitchell*, 861 F.2d at 201).

This case presents the question of whether we ought to reshape the *Mitchell* factors in light of developments in Supreme Court doctrine and our experience applying them. We conclude that we should.

First, the *Mitchell* factors are out of step with current Supreme Court jurisprudence. Under *Mitchell*, we have placed the greatest weight on the first factor—whether a money judgment would be satisfied out of state funds. *See, e.g.*, *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 (9th Cir. 1991) ("[T]he source from which the sums sought by the plaintiff must come is the most important single factor in determining whether the Eleventh Amendment bars federal jurisdiction." (citations omitted)). Our decision to prioritize the first factor was a "recognition of *Edelman* [*v. Jordan*]," which held that the Eleventh Amendment bars suits that seek to impose liability that "would have to be satisfied out of public funds from the state treasury." *Id.* (citing *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)).

But, since *Edelman* and *Mitchell*, the Supreme Court has clarified that "[t]he Eleventh Amendment does not exist solely in order to 'preven[t] federal-court judgments that must be paid out of a [s]tate's treasury.'" *Seminole Tribe*, 517 U.S. at 58 (second alteration in original) (quoting *Hess*, 513 U.S. at 48). "[I]t also serves to avoid 'the indignity of subjecting a [s]tate to the coercive process of judicial tribunals at the instance of private parties.'" *Id.* (quoting

P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)).

Consequently, the inquiry into whether a state is legally liable for judgments against an entity is important not as "a formalistic question of ultimate financial liability," but because it is "an indicator of the relationship between the [s]tate and its creation." *Regents*, 519 U.S. at 431. Taking heed of this doctrinal development, our sister circuits have moved away from an excessive emphasis on the treasury factor.[6] We, however, have never considered what the Supreme Court's more recent cases require, instead maintaining a primary focus on the treasury factor. Consequently, we have underemphasized the dignity interests of the states, one of the Eleventh Amendment's "twin reasons for being." *Hess*, 513 U.S. at 47.

Kohn asserts that we should continue to prioritize the treasury factor. He anchors his argument in *Hess*'s statement that the "vast majority of Circuits . . . have concluded that the state treasury factor is the most important." 513 U.S. at 49 (ellipsis in original) (citation omitted). But he ignores that *Hess* attached the same level of importance to state dignity. *See id.* at 41, 47, 52. *Hess* involved the potential immunity of a bistate entity created under the Compact

[6] *See, e.g.*, *Bowers*, 475 F.3d at 546 ("[W]e can no longer ascribe primacy to the first factor" of "whether payment comes from the state treasury." (citation omitted)); *Fresenius Med. Care Cardiovascular Res., Inc.*, 322 F.3d at 65–66 (holding that, "[i]n the aftermath of *Hess*," "potential payment from the state treasury is the most critical factor" *only if* "there is an ambiguity about the direction in which the *structural analysis* points" (emphasis added)); *cf. Duke*, 127 F.3d at 978 ("[E]ven after *Hess* and [*Regents*], which emphasized the primacy of the impact on the state treasury as a factor in determining immunity, other factors remain relevant.").

Clause. *Id.* at 35. The Supreme Court recognized that, because bistate entities "occupy a significantly different position in our federal system than do the [s]tates themselves," "[s]uit in federal court is not an affront to the dignity of a Compact Clause entity" or to "the integrity of the compacting States." *Id.* at 40–41.

But this acknowledgment—that a suit against a bistate entity does not threaten its parent state's dignity interest in the same way that a suit against that state itself would—does not mean that the state's dignity interest is less important in determining *whether* a suit against an entity *is* a suit against the state itself. Therefore, we read *Hess* for what it says: that state dignity and solvency are the Eleventh Amendment's "twin reasons for being" and entitled to equal weight. *Id.* at 47, 52; *see also P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 874 (D.C. Cir. 2008) ("*Hess* does not require a focus solely on the financial impact of the entity on the [s]tate. Rather, *Hess* 'pays considerable deference to the dignity interests of the state, focusing on both explicit and implicit indications that the state sought to cloak an entity in its Eleventh Amendment immunity.'" (quoting *Fresenius Med. Care Cardiovascular Res., Inc.*, 322 F.3d at 67)). As a result, our continued elevation of state solvency under the *Mitchell* factors conflicts with the Supreme Court's guidance.

The *Mitchell* factors are not only inconsistent with Supreme Court arm of the state doctrine—they also generate a muddled arm of the state analysis within our Circuit. For example, some of the *Mitchell* factors are of questionable relevance. Consider the third factor, "whether the entity may sue or be sued." *Belanger*, 963 F.2d at 250. Under California law, a variety of state entities, including the State Bar, Cal. Bus. & Prof. Code § 6001, may "sue and be sued."

See, e.g., *Belanger*, 963 F.2d at 254 (school district); *Beentjes v. Placer Cnty. Air Pollution Control Dist.*, 397 F.3d 775, 784 (9th Cir. 2005) (air pollution control district); *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 933 (9th Cir. 2017) (county office of education). But this provision has limited relevance for purposes of federal immunity.

The Supreme Court has explicitly held that a state does not "consent to suit in federal court merely by stating its intention to 'sue and be sued . . . .'" *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (citing *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 149–50 (1981) (per curiam)).[7] Thus, "[a] mere statutory grant of the power to sue or be sued . . . is not enough to waive immunity from suits brought in federal court if it may fairly be construed as limited to a waiver of immunity in the state's own courts." *Durning*, 950 F.2d at 1427 n.4 (citing *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 473–74 (1987)). As a result, we have said that the sue or be sued factor "is entitled to less weight." *Belanger*, 963 F.2d at 254 ("California school districts can sue and be sued in their own name," but "[i]f a school district is a state agency for purposes of the Eleventh Amendment, suits against the

[7] *See also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (declining to find waiver "[i]n the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction"), *superseded by statute as recognized by United States ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939, 943 (9th Cir. 2017); *cf. Biden v. Nebraska*, 600 U.S. 477, 492 (2023) ("Every government corporation . . . is a corporation, after all, with the power[] . . . to sue and be sued," but it "nonetheless remains (for many purposes at least) part of the [g]overnment itself." (internal citations and quotations omitted)).

district in its own name are subject to the same Eleventh Amendment constraints as suits against the state.").

Similar problems arise under factor four—whether the entity has the power to take property in its own name or only the name of the state. Even where an entity can hold property in its own name and thus satisfies factor four, we have said "the property ownership analysis is a close question" if "[state] law . . . treats such property as state property." *Id.* As a result, this factor is also "entitled to little weight." *Id.* Therefore, at least two of the *Mitchell* factors do not do much, if any, work. The caselaw bears this out: While factors three and four are almost invariably satisfied, they do not have a predictable effect on the outcome of any individual case.[8]

We also have wavered as to whether we evaluate the second *Mitchell* factor—whether the entity performs central governmental functions—at the entity or activity level. If the *Mitchell* analysis is entity based, then an entity is either immune or not. But, if the *Mitchell* analysis is activity based, then an entity's immunity from suit may vary depending on the function it performs. In applying *Mitchell*, we have said *both* that we cannot "hold that [an entity] is immune from suit with respect to some of its activities . . . but not others"

[8] *Compare Crowe*, 989 F.3d at 733 (entity could sue and be sued and take property in its own name and *was not* an arm of the state); *Ray*, 935 F.3d at 711 (same); *Beentjes*, 397 F.3d at 784–86 (same); *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1187–89 (9th Cir. 2003) (same); *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1049–51 (9th Cir. 2003) (same), *and Durning*, 950 F.2d at 1427–28 (same), *with Sato*, 861 F.3d at 933–34 (entity could sue and be sued and take property in its own name but *was* an arm of the state); *Aguon*, 316 F.3d at 903 (same); *Belanger*, 963 F.2d at 254 (same), *and Alaska Cargo Transp., Inc.*, 5 F.3d at 381–82 (same).

because "[t]o do so would impermissibly qualify sovereign immunity, which by its nature is absolute," *Durning*, 950 F.2d at 1426, *and* that "we look to whether the [entity], in performing the particular function at issue, performs a central government function," rather than "whether the [entity] performs central government functions in general," *Ray*, 935 F.3d at 710. Scholarly criticism has focused on this inconsistency and argued that it allows lower courts in our Circuit to "twist" the arm of the state doctrine depending on the defendant. *See* Kelsey Joyce Dayton, *Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine*, 86 U. Chi. L. Rev. 1603, 1633 (2019) (arguing that lower courts in the Ninth Circuit "brush aside aspects of" the *Mitchell* factors "in cases that prove especially troublesome").

Notably, we did not always apply the *Mitchell* factors mechanically as a five-part test. For example, in *Franceschi v. Schwartz*, 57 F.3d 828 (9th Cir. 1995) (per curiam), we cited *Mitchell* but analyzed only how "state law treats the entity . . . in an effort to assess the extent to which the entity 'derives its power from the [s]tate and is ultimately regulated by the [s]tate.'" *Id.* at 831 (citations omitted). Thus, our determination that a municipal court was an arm of the state turned on "the extensive control exercised by the state over the municipal courts." *Id.* Likewise, in *Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032 (9th Cir. 1999), we cited *Mitchell* solely for the proposition that we must look to an entity's "nature as created by state law" and "whether [it] performs central governmental functions" to conduct the arm of the state analysis. *Id*. at 1035.

These cases suggest an earlier recognition that the best arm of the state test is not a multi-factor checklist involving potentially irrelevant factors but an analysis that drills down on whether the state "structured" the entity to enjoy

immunity from suit. *Hess*, 513 U.S. at 43 (citation omitted). The D.C. Circuit's test fits the bill. In an opinion by then-Judge Kavanaugh, the D.C. Circuit distilled the developments in the Supreme Court's more recent caselaw into a three-factor test: "(1) the [s]tate's intent as to the status of the entity, including the functions performed by the entity; (2) the [s]tate's control over the entity; and (3) the entity's overall effects on the state treasury." *P.R. Ports Auth.*, 531 F.3d at 873 (citing *Hess*, 513 U.S. at 44–46; *Lake Country Ests., Inc.*, 440 U.S. at 401–02; *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 280–81).

The first factor of intent turns on whether state law expressly characterizes the entity as a governmental instrumentality rather than as a local governmental or non-governmental entity; whether the entity performs state governmental functions; whether the entity is treated as a governmental instrumentality for purposes of other state law; and state representations about the entity's status. *Id.* at 874. The second factor depends on how members of the governing body of the entity are appointed and removed, as well as whether the state can "directly supervise and control [the entity's] ongoing operations." *Id.* at 877. And, the third factor, though relevant, is not dispositive. While Kohn argues that this factor is the most important, we agree with the D.C. Circuit that the Eleventh Amendment "does not require a focus solely on the financial impact of the entity on the [s]tate" because the Eleventh Amendment is equally concerned with "the dignity interests of the state." *Id.* at 874 (citation omitted) (interpreting *Hess*).

We have not updated the *Mitchell* factors since we first articulated them in 1982 in *Jackson*, despite the Supreme Court's intervening decisions in seminal sovereign immunity cases such as *Regents*, *Hess*, and *Seminole Tribe*.

Had we revisited our arm of the state jurisprudence after these cases, as several of our sister circuits have, *see supra* note 6, we would have realized that the *Mitchell* factors had failed to keep up.

By contrast, the D.C. Circuit test is consistent with current Supreme Court precedent. The intent and control factors advance the states' dignity interests, and the treasury factor protects the states' financial solvency. As a result, this test best promotes the Eleventh Amendment's "twin reasons for being." *Hess*, 513 U.S. at 47. Since the D.C. Circuit's three-factor test better encapsulates the current state of the law than the *Mitchell* factors and avoids their problems, we adopt it here and no longer endorse the *Mitchell* factors.

We likewise adopt the D.C. Circuit's rule that "[u]nder the three-factor test, an entity either is or is not an arm of the [s]tate: The status of an entity does not change from one case to the next based on the nature of the suit, the [s]tate's financial responsibility in one case as compared to another, or other variable factors." *P.R. Ports Auth.*, 531 F.3d at 873. The Supreme Court declined to resolve this question in *Regents*. 519 U.S. at 428 n.10 ("Nor is it necessary to determine whether there may be some state instrumentalities that qualify as 'arms of the [s]tate' for some purposes but not others."). However, an entity-based approach complies better with the D.C. Circuit's test, which builds an analysis of an entity's functions *into* its intent prong but does not so narrowly limit its overall scope. *See P.R. Ports Auth.*, 531 F.3d at 874. And, like the D.C. Circuit, other circuits evaluate immunity at the level of the entity.[9]

[9] *See, e.g.*, *Lowe v. Hamilton Cnty. Dep't of Job & Fam. Servs.*, 610 F.3d 321, 331 (6th Cir. 2010) (declining to extend immunity to an entity after

The entity-based approach also makes sense as a matter of principle. We agree with our statement in *Durning* that "sovereign immunity . . . by its nature is absolute." 950 F.2d at 1426. The possibility that immunity may be waived or abrogated does not diminish this point. Waiver and abrogation are second-stage inquiries as to whether, *if* an entity is immune, that immunity may be overcome. *See Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2462 (2022); *cf. Fin. Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 346 (2023) ("[W]e assume without deciding that Puerto Rico is immune from suit in federal district court, and that the Board partakes of that immunity. We address only whether, accepting those premises, [the statute] effects an abrogation."). But waiver and abrogation do not undermine the absolute nature of the first-stage question of whether immunity exists.

An entity-based approach also better promotes consistency, predictability, and finality because it settles an entity's immunity "unless and until there are relevant changes in the state law governing the entity." *P.R. Ports Auth.*, 531 F.3d at 873. By contrast, an activity-based approach would allow parties to relitigate an entity's immunity simply by articulating the challenged activity at a different level of generality. Thus, even once an entity was deemed immune, it still could be "subject[ed] . . . to the coercive process of judicial tribunals at the instance of private parties," undermining the very purpose of immunity. *Seminole Tribe*, 517 U.S. at 58 (quoting *P.R. Aqueduct &*

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considering all its functions, not just the function at issue, in reliance on *Regents* permitting such an entity-based approach); *Hudson v. City of New Orleans*, 174 F.3d 677, 682 n.1 (5th Cir. 1999) (rejecting the view that "we look at the [specific] function of the [entity] being sued . . . in our Eleventh Amendment analysis" (citation omitted)).

Sewer Auth., 506 U.S. at 146); *cf. Maliandi v. Montclair State Univ.*, 845 F.3d 77, 92–93 (3d. Cir. 2016) (rejecting the approach of parsing claim-specific Eleventh Amendment immunity as "untenable—both practically and in principle").

Though our decision to implement the D.C. Circuit's test represents a change in our jurisprudence, this new framework is unlikely to lead to different results in cases that previously applied the *Mitchell* factors and held an entity entitled to immunity. The D.C. Circuit test does not overemphasize the treasury factor or rely on considerations that are minimally relevant to the immunity analysis, aspects of *Mitchell* that could erroneously lead to a conclusion of no immunity. Although each case will be decided on its own facts, we have no reason to believe that our decision today will substantially destabilize past decisions granting sovereign immunity to state entities within the Ninth Circuit. Indeed, that is the case here as to the California State Bar, as we now explain.

C. Applying the Updated Three-Factor Test Confirms that the California State Bar is an Arm of the State

Though we update our test, the California State Bar's status remains the same: It is an arm of the state and entitled to sovereign immunity.

i. Intent

First, California's intent with respect to the State Bar supports immunity. California law "characterizes" the State Bar as a "governmental instrumentality." *P.R. Ports Auth.*, 531 F.3d at 874 (citing *Hess*, 513 U.S. at 44–45 (considering whether legislation "type[d]" the entity "as a state agency")). The State Bar is codified in the California Constitution,

which prescribes that "[e]very person admitted and licensed to practice law in this State is and shall be a member of the State Bar . . . ." Cal. Const. art. VI, § 9; *cf. In re New York*, 256 U.S. 490, 501 (1921) (in determining that a suit against a defendant in his official capacity was a suit against the state, the Court noted that the defendant's office was "established and its duties prescribed by the Constitution of the state"). Further, "[a]ll property of the State Bar is . . . held for essential public and governmental purposes in the judicial branch of the government," *id.* § 6008, and "[b]onds, notes, debentures, and other evidences of indebtedness of the State Bar are . . . issued for essential public and governmental purposes in the judicial branch of government," *id.* § 6008.2.

The state legislature's characterization of an entity is not the only important metric for the intent factor—state court treatment is also relevant. *See, e.g.*, *Hess*, 513 U.S. at 45 ("State courts . . . repeatedly have typed the Port Authority an agency of the [s]tates . . . ."). The California Supreme Court's description of the State Bar as its "administrative arm" for attorney discipline and admission purposes cuts decisively in favor of the State Bar's immunity. *E.g.*, *In re Rose*, 993 P.2d at 961, 974; *In re Att'y Discipline Sys.*, 967 P.2d at 59. As does the California Supreme Court's reference to the State Bar as "a constitutional entity within the judicial article of the California Constitution." *Obrien v. Jones*, 999 P.2d 95, 100 (Cal. 2000).

The dissent focuses on the State Bar's status as a "public corporation" under the California Constitution to argue that "California law treats the State Bar the same way as it treats independent municipalities," which "cuts strongly against sovereign immunity." But, as the various definitions of "public corporation" cited by the dissent indicate, the term

"public corporation" can mean different things in different places. For example, as the dissent acknowledges, while certain provisions of California law define "public corporation[s]" as "municipal corporation[s]" or "political subdivision[s]," *see, e.g.*, Cal. Gov't Code § 67510, others use the term "public corporation" to refer to the state of California, *see, e.g.*, *id.* §§ 6300, 12100.50, or even the United States, *see, e.g.*, Cal. Pub. Cont. Code § 21561.

These varied definitions indicate that the designation "public corporation" merely means that something is not private. *See, e.g.*, Cal. Water Code § 12000 ("As used in this part, 'person' means any person, firm, association, organization, partnership, business trust, corporation, or company, but not including any public corporation or other public entity."). Beyond that, context matters. As a result, labeling the State Bar as a "public corporation" begs the question of whether it is an arm of the state, which is why we apply the three-factor test. While California's designation of the State Bar as a "public corporation" may be inconclusive regarding its intent with respect to the State Bar, the State Bar's codification in the California Constitution and treatment by the California Supreme Court clarifies any ambiguity as to whether California law "characterizes" the State Bar as a "governmental instrumentality." *P.R. Ports Auth.*, 531 F.3d at 874 (citing *Hess*, 513 U.S. at 44–45); *see also Hagman v. Meher Mount Corp.*, 155 Cal. Rptr. 3d 192, 195 (Cal. Ct. App. 2013) (citing State Bar's status as a "public corporation" under the California Constitution for the proposition that "'public corporation' is a term of art used to designate certain entities that exercise governmental functions").

The dissent's reliance on *Keller v. State Bar of California*, 496 U.S. 1 (1990), is likewise misplaced because

the California state legislature has since restructured the State Bar in ways that indicate a stronger intent to treat it as an arm of the state. After *Keller*, the state legislature converted the State Bar's conference of delegates into a private entity. 2002 Cal. Stat. 2355, 2356–58 (amending Cal. Bus. & Prof. Code § 6031.5). It moved the functions and activities of the State Bar's sixteen specialty law sections to a new voluntary private corporation, the California Lawyers Association, which explicitly "shall not be considered a state, local, or public body for any purpose." *See* The Nonprofit Association Act, 2017 Cal. Stat. 3349, 3357–58 (codified at Cal. Bus. & Prof. Code §§ 6056, 6056.3). It took the power to appoint members to the State Bar's governing body away from the Bar's members, granting total control over appointment to the three branches of the state government. 2017 Cal. Stat. at 3353–54 (amending Cal. Bus. & Prof. Code §§ 6011, 6013.1, 6013.3, 6013.5). Finally, today, the Bar regulates "licensees" rather than "members" who pay "fees" rather than "dues." 2018 Cal. Stat. 4356, 4357 (amending Cal. Bus. & Prof. Code § 6002). This separation of the State Bar's associational and regulatory functions evinces California's intent for the State Bar to be an arm of the state.

Moreover, the State Bar "performs functions typically performed by state governments." *P.R. Ports Auth.*, 531 F.3d at 875 (citing *Hess*, 513 U.S. at 45). "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the [s]tates . . . . The [s]tates prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers." *Leis v. Flynt*, 439 U.S. 438, 442 (1979). "The interest of the [s]tates in regulating lawyers is especially great since lawyers are

essential to the primary governmental function of administering justice . . . ." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

The state legislature has tasked the State Bar with the "[p]rotection of the public" in its "licensing, regulatory, and disciplinary functions." Cal. Bus. & Prof. Code § 6001.1. The State Bar carries out "the core functions of admission and discipline of attorneys," which go to the heart of California's interest in regulating lawyers. *Obrien*, 999 P.2d at 100 (citation omitted). It examines candidates' qualifications for admission and administers the bar exam, which is a prerequisite to practicing law in the state; it also certifies candidates for admission to the California Supreme Court. Cal. Bus. & Prof. Code §§ 6046, 6060(g); Cal. R. Ct. 9.3. The California Supreme Court has explicitly stated that the State Bar's "assistance . . . in the disciplinary process is an integral part of the judicial function." *Obrien*, 999 P.2d at 100. Consequently, the State Bar performs governmental functions. *See In re Wade*, 948 F.2d 1122, 1124 (9th Cir. 1991) (per curiam) ("In conducting disciplinary proceedings, the [Arizona State] Bar is enforcing its police or regulatory power.").

We also consider whether the State Bar is "treated as a governmental instrumentality for purposes of other [California] laws." *P.R. Ports Auth.*, 531 F.3d at 874, 876 (citing *Hess*, 513 U.S. at 44–45). The State Bar is subject to California public-records and open-meeting laws. Cal. Bus. & Prof. Code § 6001. Its property is tax-exempt. *Id.* § 6008.

Though California law authorizes the State Bar to "sue and be sued," *id.* § 6001, this provision "may fairly be construed as limited to a waiver of immunity in the state's own courts," *Durning*, 950 F.2d at 1427 n.4 (citing *Welch*,

483 U.S. at 473–74); *see also supra* pp. 14–16. Individuals can challenge "[d]eterminations and recommendations of the bar in matters of discipline and admission" in the California Supreme Court. *Saleeby v. State Bar of Cal.*, 702 P.2d 525, 529 (Cal. 1985).[10] The California Court of Appeal has reasoned that these matters remain within the California Supreme Court's exclusive "original jurisdiction over the admissions process," as the "enactment of a comprehensive statutory scheme . . . established a public agency . . . without diminishing the court's authority over admissions." *Smith v. Cal. State Bar*, 261 Cal. Rptr. 24, 28 (Cal. Ct. App. 1989). Thus, the most reasonable construction of the "sue and be sued" provision is as part of this statutory scheme to establish the conditions under which the State Bar may be sued in *state* court, not as a waiver of federal sovereign immunity.

The dissent asserts that California law treats the State Bar "as distinct from state agencies" because it provides that "[n]o law of this state, restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies . . . shall be applicable to the State Bar, unless the [l]egislature expressly so declares." Cal. Bus. & Prof. Code § 6001. But the California Supreme Court has interpreted this provision in the exact opposite way: "That the legislature considered the State Bar as at least akin to a state public body or agency . . . is illustrated by the last paragraph of section 6001, where it appears the [l]egislature felt the necessity of providing that laws prescribing

[10] *See also* Cal. Bus. & Prof. Code § 6066 (authorizing California Supreme Court review of Bar certification decisions); *id.* § 6082 (authorizing California Supreme Court review of Bar reinstatement decisions); Cal. R. Ct. 9.13 (setting forth procedures for review of Bar decisions).

procedures for state bodies . . . did not apply to the State Bar, thus indicating that the [l]egislature considered the State Bar in their category." *Chron. Publ'g Co. v. Superior Ct.*, 354 P.2d 637, 645 (Cal. 1960) (in bank). In sum, the State Bar "is treated as a governmental instrumentality for purposes of other state laws." *P.R. Ports Auth.*, 531 F.3d at 874, 876 (citing *Hess*, 513 U.S. at 44–45).

Accordingly, the first factor—California's intent as to the State Bar—favors the conclusion that the State Bar is an arm of the state and entitled to its immunity.

ii. Control

The second factor of control considers, first, "how the directors and officers" of the entity "are appointed." *P.R. Ports Auth.*, 531 F.3d at 877 (citing *Hess*, 513 U.S. at 44). Again, this factor cuts in favor of immunity. The California Supreme Court, the state legislature, and the governor appoint the State Bar's Board of Trustees. Cal. Bus. & Prof. Code §§ 6010, 6013.1, 6013.3, 6013.5. Officials within the three branches of the state government also appoint the Committee of Bar Examiners, a body that oversees the bar exam and admission. *Id.* §§ 6046, 6046.5; Cal. R. Ct. 9.4. Thus, the power to appoint the State Bar's governing structure is housed wholly within the state government.

Beyond appointment, the California Supreme Court exercises significant control over the State Bar's functioning. The California Supreme Court has "inherent jurisdiction over the practice of law" in the state, so the State Bar "acts under the authority and at the direction of the Supreme Court." Cal. R. Ct. 9.3. Admission rules adopted by the State Bar are subject to California Supreme Court review and approval, *id.* at 9.5, and the State Bar must report to the California Supreme Court on each administration of

the bar exam, *id.* at 9.6(c). Relatedly, the State Bar's admission and disciplinary decisions are subject to California Supreme Court review. Cal. Bus. & Prof. Code §§ 6066, 6082; Cal. R. Ct. 9.13. The California Supreme Court has explained that "in matters of discipline and disbarment, the State Bar is but an arm of th[e] court," which "retains its power to control any such disciplinary proceeding at any step," *In re Att'y Discipline Sys.*, 967 P.2d at 59 (citation omitted), including by, for example, imposing procedural standards on such proceedings, *Emslie v. State Bar of Cal.*, 520 P.2d 991, 999 (Cal. 1974).

Presented with a comparably close relationship between the Arizona Supreme Court and the Arizona State Bar, the Supreme Court concluded that the Arizona State Bar's actions were state action and therefore exempt from antitrust law. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977). The Supreme Court reasoned that where the Arizona State Bar's role was "completely defined" by the Arizona Supreme Court, and it acted "as the agent of the court under its continuous supervision," claims arising from that role were "against the State. The Arizona Supreme Court [was] the real party in interest." *Id.* Likewise, the California Supreme Court's significant degree of control over the State Bar strongly suggests that the State Bar is an arm of the judicial branch of California.

The dissent recognizes that the State Bar is subject to the Supreme Court's "supervision." However, it contends that "supervision is not control" because the Supreme Court of California "does not veto the decisions of the State Bar" but "merely chooses whether to adopt the State Bar's recommendations as to admission and discipline." This is a distinction without a difference, as the Supreme Court of California need not have the power to veto the decisions of

the State Bar when it has total control over which of those decisions will be adopted in the first place.

The California state legislature also controls the State Bar's ability to raise revenue. Though the legislature has authorized the State Bar to raise its own funds, which are "paid into the treasury of the State Bar," *id.* § 6063, the legislature sets an annual cap on the amount the State Bar can charge in licensee fees, *id.* § 6140, and requires the State Bar to submit an annual budget for the legislature's review and approval in conjunction with any bill that would authorize the State Bar to collect such fees, *id.* § 6140.1. The legislature's power over the State Bar's fundraising ability and annual budget further illustrates the state's control over the State Bar.

Thus, the second factor of control also favors the State Bar's immunity.

iii. Treasury

Finally, we consider the State Bar's financial relationship to California and its overall effects on California's treasury. *P.R. Ports Auth.*, 531 F.3d at 878 (citing *Hess*, 513 U.S. at 43–44). "In analyzing this third factor . . . the relevant issue is a [s]tate's overall responsibility for funding the entity or paying the entity's debts or judgments, *not* whether the [s]tate would be responsible to pay a judgment *in the particular case at issue*." *Id.* (emphasis in original) (citations omitted).

There is no dispute that California law makes the State Bar responsible for its own debts and liabilities, so California would not be liable for a judgment against the State Bar. Cal. Bus. & Prof. Code § 6008.1. The State Bar, however, posits that, because "[a]ll property of the State Bar . . . [is] held for

essential public and governmental purposes in the judicial branch of government," *id.* § 6008, the State Bar's funds *are* state funds. The State Bar also points to the control the California state legislature exercises over its ability to raise revenue. *See supra* p. 29. These aspects of the State Bar's financial administration do not prove that California is responsible for funding the State Bar or paying its debts or judgments. But they are indicia of California's intent with respect to the State Bar and control over it, and they undermine Kohn's portrait of the State Bar as a financially self-sustaining, independent entity.

The State Bar also relies on cases where we considered whether the State, even if not directly liable for a judgment against an entity under state law, would be the "real, substantial party in interest," *Regents*, 519 U.S. at 429 (citation omitted), because the entity performed essential governmental functions that the state could not do without. For example, in *Alaska Cargo Transport, Inc. v. Alaska R.R. Corp.*, 5 F.3d 378 (9th Cir. 1993), Alaska would not have been liable for a judgment against a state-created railroad. *Id.* at 380–81. But the railroad was "a unique and essential fixture in the lives of thousands of widely dispersed Alaskans" and "perform[ed] a vital governmental function." *Id.* Therefore, we concluded that, in the face of a large judgment, the railroad "would be compelled to turn to legislative appropriation in order to remain in business, and the legislature would have to respond favorably so that the 'essential' transportation function would continue to be performed . . . ." *Id.* at 381 (citation omitted).

Similarly, in *Aguon v. Commonwealth Ports Auth.*, 316 F.3d 899 (9th Cir. 2003), we determined that the Commonwealth Ports Authority of the Northern Mariana Islands, a public corporation created to operate and manage

the Northern Mariana Islands' ports, "perform[ed] a central governmental function," so that if it "were to be faced with a large money judgment which it could not pay, the Commonwealth would be compelled to protect its island economy by responding with an appropriation to provide the citizens of the Commonwealth with essential seaport and airport services." *Id.* at 902–03.

The State Bar presses a similar argument. As a surrogate for the California Supreme Court, the State Bar performs "a vital governmental function" in the regulation of lawyers. *Alaska Cargo Transp., Inc.*, 5 F.3d at 381. Therefore, a "structure of compulsion" might force California "into the role of real, substantial party in interest" if the State Bar were unable to satisfy a money judgment against it to ensure that the State Bar could continue to serve this role. *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1185 (9th Cir. 2003).

This factor presents a closer call. The State Bar's functions are "essential to the primary governmental function of administering justice . . . ." *Goldfarb*, 421 U.S. at 792. However, we also have said that "in the absence of a showing that money used to pay a judgment will necessarily be replaced with state funds, 'we adhere to our basic proposition that the fact that the state may ultimately *volunteer* to pay the judgment . . . is immaterial . . . .'" *Beentjes*, 397 F.3d at 781 (quoting *Holz*, 347 F.3d at 1185).

Either way, despite Kohn's arguments to the contrary, this third factor is not dispositive. *See supra* pp. 13–14. Given that the intent and control factors strongly favor the conclusion that California "structured" the State Bar to "enjoy the special constitutional protection of the [s]tate[] [itself]," the third factor, placed in its proper context, cannot

overcome the first two. *Hess*, 513 U.S. at 43–44 (citation omitted). We see no reason to disturb our nearly forty-year-old determination that the California State Bar is an arm of the state and entitled to immunity in federal court.

***

This conclusion puts us in good company. In the years since we last considered the State Bar's immunity in *Lupert* and *Hirsh*, all the other federal circuits to have considered the question have agreed: State bars are arms of the state and enjoy sovereign immunity under the Eleventh Amendment.[11]

The one circuit court decision that bucks this trend is our own. In *Crowe v. Or. State Bar*, 989 F.3d 714 (9th Cir. 2021) (per curiam), we applied the *Mitchell* factors to conclude that the Oregon State Bar is not an arm of the state. *Id.* at 731–33. Although there may be some differences between the California and Oregon State Bars, whether the Oregon State

[11] *See, e.g.*, *T.W. v. N.Y. State Bd. of L. Exam'rs*, 996 F.3d 87, 92 (2d Cir. 2021) ("The Board of Law Examiners, as an 'arm[]' of the State of New York, 'share[s] in [its] immunity . . . .'" (first and second alterations in original) (citation omitted)); *Nichols v. Ala. State Bar*, 815 F.3d 726, 732 (11th Cir. 2016) (per curiam) (holding Alabama State Bar immune given that its powers were "public in nature and would otherwise be exercised by the Alabama Supreme Court"); *Dubuc v. Mich. Bd. of L. Exam'rs*, 342 F.3d 610, 612, 615 (6th Cir. 2003) (holding Michigan Board and Bar immune in the absence of evidence as to whether Michigan would be responsible for judgment against the Bar because "the Board and the Bar are merely extensions of the Michigan Supreme Court"); *Thiel v. State Bar of Wis.*, 94 F.3d 399, 405 (7th Cir. 1996) ("The State Bar is immune from suit under the Eleventh Amendment."), *overruled on other grounds by Kingstad v. State Bar of Wis.*, 622 F.3d 708, 718 (7th Cir. 2010); *Green v. State Bar of Tex.*, 27 F.3d 1083, 1087–88 (5th Cir. 1994) (dismissing § 1983 claims against Texas State Bar committee as barred by the Eleventh Amendment).

Bar would be an arm of the state under the three-factor test we now employ, rather than the *Mitchell* factors, is not before us today. Any future case brought against the Oregon State Bar will need to be analyzed under the new test we articulate in this decision.

III. CONCLUSION

In sum, we update our arm of the state jurisprudence to better reflect the Supreme Court's latest guidance and affirm our precedent that the California State Bar is entitled to immunity from suit in federal court. We remand to the original three-judge panel for consideration of the remaining issues consistent with this opinion.

AFFIRMED IN PART and REMANDED to the three-judge panel.

MENDOZA, Circuit Judge, concurring in part:

I agree with the majority that the factors set out in *Mitchell v. Los Angeles Community College District* are out of step with the Supreme Court's jurisprudence. I also agree that, in this case, the California Bar is an arm of the state for sovereign immunity purposes. I write separately for two reasons. *First*, I probe the panel's adoption of the D.C. Circuit's sovereign immunity test and its reading of *Hess v. Port Authority Trans-Hudson Corp*. The D.C. Circuit's three-factor test makes good legal and practical sense. But that circuit's approach to weighing the sovereign immunity factors hews far more closely to Justice O'Connor's dissenting opinion in *Hess* than Justice Ginsburg's majority. I do not read our majority opinion as adopting that aspect of the D.C. Circuit's reasoning, and I

caution against doing so. *Second*, I disagree with the majority's wholesale embrace of the D.C. Circuit's entity-based approach to sovereign immunity. This case was a close call, and I urge my colleagues to be wary of deeming certain state instrumentalities—which often perform functions unrelated to the express delegation of state power—categorically immune from every federal suit. Doing so lacks good cause in either precedent or fact.

I

The scope of state sovereign immunity extends more broadly than the Eleventh Amendment's text. *See Alden v. Maine*, 527 U.S. 706, 713 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991))). The Eleventh Amendment, passed by Congress in 1794 and ratified by the states in 1795, accomplishes more than nullifying *Chisholm v. Georgia* to protect states' purses and restricting the Article III diversity jurisdiction of the federal courts. *See Seminole Tribe*, 517 U.S. at 54, 68 (citing *Chisholm v. Georgia*, 2 U.S. 419 (1793)). Its "object and purpose" is "to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers*, 123 U.S. 443, 505 (1887); *see also Alden*, 527 U.S. at 715. The Eleventh Amendment thus confirms the centuries-old presupposition that "each State is a sovereign entity in our federal system," *Seminole Tribe*, 517 U.S. at 54 (citing *Hans v. Louisiana*, 134 U.S. 1, 10 (1890)), and that "courts may not ordinarily hear a suit brought by any person against a nonconsenting state," *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. --, 142 S. Ct. 2455, 2461–62 (2022). At its core, Eleventh Amendment

immunity is rooted in the "respect owed [the states] as members of the federation." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The Eleventh Amendment sometimes extends sovereign immunity to state instrumentalities that operate as arms of the state, barring valid abrogation or waiver. *See P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 144 ("Absent waiver, neither a State nor agencies acting under its control may 'be subject to suit in federal court.'"); *Alden*, 527 U.S. at 756. The Supreme Court, however, has offered limited guidance as to when respect for a state's dignity compels us to immunize a state instrumentality. Treasury concerns have consistently and historically spurred the extension of sovereign immunity to state-created entities. *See, e.g.*, *Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 401 (1979) ("[S]ome agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability[.]"); *see also Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."). The legal "structure" of the entity affects any sovereign immunity analysis, as well. *Lake Country Ests.*, 440 U.S. at 401; *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (considering the "nature of the entity created by state law" in determining whether the entity was an arm of the state). The Court has also directed us to examine various factors, including whether the entity receives guidance and extensive funds from the state, the entity's ability to raise revenue, whether the state appoints its board, the function of the entity, and the entity's power to issue bonds or levy taxes. *Mt. Healthy*, 429 U.S. at 280; *Lake Country Ests.*, 440 U.S.

at 400–02. But these cases do not lay out a concrete arm-of-the state test for the extension of Eleventh Amendment sovereign immunity.

A

Hess v. Port Authority Trans-Hudson Corp. is a notable exception. 513 U.S. 31 (1994). In *Hess*, the Court addressed whether the Eleventh Amendment immunized a bistate Port Authority, charged with coordinating transport through a port on the New York-New Jersey border, from a personal injury suit brought by railroad workers under federal law. *Id.* at 32. It answered "no." *Id.* at 32–33. Guided by *Lake Country Estates*' examination of a bistate entity, the *Hess* Court first focused on the entity's "structure," examining various "indicators" of immunity, including: (1) the entity's "function"; (2) the nature of the entity's governing body; (3) the entity's implementing legislation; and (4) whether the states have "financial responsibility" for the entity, including "legal liability." *Id.* at 43–46. Unlike the bistate entity in *Lake Country Estates*, where the factors disfavored sovereign immunity, the *Hess* Court concluded that those factors "point[ed] in different directions" for the Port Authority's immunity from suit. *Id.* at 47. The Court thus needed a tiebreaker.

So it invoked the Eleventh Amendment's "twin reasons for being" to guide its analysis: "solvency" and "dignity." *Hess*, 513 U.S. at 47, 52. Those twin reasons, however, have a critical factor in common: the practical and legal effect of a judgment on a state's treasury, which trumped concerns over "control" of the entity. *See id.* at 51; *id.* at 48 ("[T]he impetus for the Eleventh Amendment[is] the prevention of federal-court judgments that must be paid out of a State's treasury."). Indeed, the *Hess* Court explicitly declined to

"render[] control dispositive," reasoning that control was a "perilous," "uncertain," and "unreliable" indicator of a state's intention to make an agency immune. *Id.* at 47–48 (citations omitted). By contrast, addressing whether a judgment against the entity would put the state's purse on the line was certain; and the *Hess* Court thus affirmed that treasury concerns are "the most salient factor in Eleventh Amendment determinations." *Id.* at 48. Or, as Justice O'Connor's dissent succinctly puts it: "for determining arm-of-the-state status, we may now substitute a single overriding criterion, vulnerability of the state treasury." *Id.* at 55 (O'Connor, J., dissenting). After all, "[t]he Court dismisses consideration of control altogether." *Id.* at 62 (O'Connor, J., dissenting).

B

Three years later, the Court issued its decision in *Regents of the University of California v. Doe*. 519 U.S. 425 (1997). Like *Hess*, the Court in *Regents* addressed when to apply Eleventh Amendment immunity to a state instrumentality, zeroing in on "the relationship between the State and the entity in question." *Id.* at 429. To determine whether this relationship gives rise to immunity, the *Regents* Court examined (1) "the essential nature and effect of the proceeding"; (2) "the nature of the entity created by state law"; and, as in *Lake Country Estates* and *Hess*, (3) "whether a money judgment against a state instrumentality or official would be enforceable against the State . . . ." *Id.* at 429–30 (citing, among other cases, *Hess*, 513 U.S. 30; *Mt. Healthy*, 429 U.S. at 274; *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dep't of Treasury of State of Ind.*, 323 U.S. 459 (1945)). And the *Regents* Court reaffirmed the "considerable importance" of that last consideration. 519 U.S. at 430.

II

Despite the Court's guidance in *Regents* and *Hess*, the circuit courts have struggled to translate that precedent into a workable, arm-of-the-state standard for Eleventh Amendment sovereign immunity. Most have revised or expanded upon existing, factor-based tests to assess whether subjecting a state agency to suit in federal court would infringe on the "dignity," "solvency," and "respect" concerns underpinning the Eleventh Amendment. Some follow *Hess* quite faithfully. They examine the sovereign nature of the entity using factor-based tests; if those factors point in different directions, they determine whether "solvency" and dignity" concerns compel an answer, while recognizing that a judgment's impact on the state's treasury is the most important factor. *See, e.g.*, *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61 (1st Cir. 2003). Other circuits employ balancing tests—or in the Second Circuit's case, nesting, factor-based, balancing tests—to assess whether the Eleventh Amendment shields a state instrumentality from suit. *See, e.g.*, *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 135–36 (2d Cir. 2015) (citing *Clissuras v. City Univ. of N.Y.*, 359 F.3d 79 (2d Cir. 2004) and *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289 (2d Cir. 1996)); *Sw. Bell Tel. Co. v. City of El Paso*, 243 F.3d 936, 938 (5th Cir. 2001). Some abandon a test altogether, *see Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 769–81 (7th Cir. 2005), or, following *Regents*' lead, focus primarily on the relationship between the entity and the state, *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 974 (10th Cir. 1997).

Our decision in *Mitchell*, which preceded *Regents* and *Hess*, was just such a factor-based test—an imperfect

vehicle, perhaps, but one that we repeatedly defended as compatible with Supreme Court precedent. *See, e.g.*, *Ray v. Cnty. of L.A.*, 935 F.3d 703, 711 (9th Cir. 2019); *see also Crowe v. Or. State Bar*, 989 F.3d 714, 731 (9th Cir. 2021), *cert denied* 142 S. Ct. 79 (Mem). Today, we reverse course and align ourselves with the D.C. Circuit's approach in *Puerto Rico Ports Authority v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008). That decision directs courts to examine: "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." *Id.* at 873. I concur in that choice—the D.C. Circuit's test is a fair one. But I caution us from taking the D.C. Circuit's decision too far by adopting (1) its approach to weighing the sovereign immunity factors, which curiously departs from *Hess*'s majority in favor of its dissent; or (2) its entity-based approach to sovereign immunity.

A

The Eleventh Amendment's "twin reasons for being"—"state dignity" and "solvency"—ought to be afforded equal weight in our sovereign immunity analysis. *See Hess*, 513 U.S. at 47, 52; *see also Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (affording equal weight to treasury and dignity considerations). I like the majority's analytical framework for these concerns, which neatly parses the "intent" and "control" factors as advancing the state's dignity interest, while the "treasury" factor protects the states' financial solvency. But I am concerned by the equal weight that the D.C. Circuit and, by implication, the majority, appear to give the intent, control, and treasury factors, respectively. I read the D.C. Circuit's decision as putting its thumb on the scale for "state dignity" (which, adding together its attendant

factors, would get approximately two-thirds of the immunity vote), veering quite far from *Hess* and *Regents*. In my view, control and intent should count for half the vote, and the treasury factor should be weighed equally against them. To be consistent with the Court's guidance, I urge my colleagues not to read our decision today as de-emphasizing solvency concerns in favor of those that implicate dignity.

In my and most circuit courts' view, Supreme Court precedent is clear: whether the state legally or practically pays a money damages judgment against the entity is central to the sovereign immunity analysis. *See supra* Section I; *see also Fresenius Med. Care*, 322 F.3d at 66, 68; *Leitner*, 779 F.3d at 134 ("The first factor, 'the vulnerability of the State's purse,' is 'the most salient factor in Eleventh Amendment determinations.'" (quoting *Hess*, 513 U.S. at 47–48)); *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 261 (4th Cir. 2005) ("[T]he most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded." (citation omitted)); *Sw. Bell Tele. Co.*, 243 F.3d at 938 ("[C]ourts must review . . . whether a money judgment against the instrumentality would be enforceable against the state."); *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 443 (6th Cir. 2020) (reciting that the "state's potential legal liability for a judgment against the defendant 'is the foremost factor' to consider in our sovereign immunity analysis"); *Takle*, 402 F.3d at 769 (noting that an entity would be immune if it "were financed by the state . . . so that any judgment against it would be paid out of state funds"); *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006) (noting that courts assess autonomy and control and, "more importantly, whether a money judgment against the agency will be paid with state funds"); *Duke*, 127

F.3d at 975 ("The Supreme Court has indicated more recently that 'the vulnerability of the State's purse [i]s the most salient factor in Eleventh Amendment determinations.'") quoting *Hess*, 513 U.S. at 48)) (alteration in *Duke*). We said the same two years ago. *See Crowe*, 989 F.3d at 731. And while solvency is not the sole concern that we address when considering an entity's sovereign immunity, *see Seminole Tribe*, 517 U.S. at 58 (considering what protections a state is owed by the Eleventh Amendment, and not who is entitled to share that protection), that does not mean it is lesser than its twin.

To read otherwise, as the D.C. Circuit does, draws far closer to *Hess*'s dissent than its majority. In dismissing a party's outsized reliance on treasury considerations, the D.C. Circuit reasoned that predominantly focusing on a state's financial liability in the lawsuit "would inappropriately convert a *sufficient* condition for sovereign immunity into the single *necessary* condition for arm-of-the-state status." *P.R. Ports Auth.*, 531 F.3d at 879 (emphasis in original). Citing *Hess*, the D.C. Circuit further stated: "That is not the law[.]" *Id.* at 879. But under a plain reading of *Hess*'s majority, that *was* the law; it was Justice O'Connor's *dissent* that sought to limit such an approach. *Hess*, 513 U.S. at 59 (O'Connor, J., dissenting). Criticizing the majority's "conclusion that the vulnerability of the state treasury is determinative," she wrote that its treasury-focused analysis "takes a *sufficient* condition for Eleventh Amendment immunity, and erroneously transforms it into a *necessary* condition." *Id.* at 59 (emphasis in original). Like the D.C. Circuit in *Puerto Rico Ports Authority*, Justice O'Connor's dissent in *Hess* thus championed state "control" as either co-extensive with, or more important than, "treasury" concerns when assessing sovereign immunity. *Compare Hess*, 513

U.S. at 61 (O'Connor, J. dissenting) (reasoning that "control can exist even where the State assumes no liability for the entity's debts") *with P.R. Ports Auth.*, 531 F.3d at 879 (rejecting the argument "that there is no sovereign immunity if the State is not obligated to pay a judgment in a particular case").

But the Supreme Court has expressly declined to embrace Justice O'Connor's attempts in *Hess* to "look beyond the potential impact of an adverse judgment on the state treasury, and examine the extent to which the elected state government exercises 'real, immediate control and oversight' over the [entity.]" *Regents*, 519 U.S. at 431–32 (quoting *Hess*, 513 U.S. at 62 (O'Connor, J., dissenting)). And the Court reaffirmed the critical role played by the treasury consideration to Eleventh Amendment immunity for state instrumentalities. *Id.* at 431. It might be true that an equally weighted, intent-control-treasury test would avoid *Hess*'s "counterproductive" and "objectionable" aspects, including its "nearly exclusive focus on the vulnerability of the state's treasury." Héctor G. Bladuell, *Twins or Triplets?: Protecting the Eleventh Amendment through a Three-Prong Arm-of-the-State Test*, 105 Mich. L. Rev. 837, 842 (2007) (proposing, in large part, the test adopted by the D.C. Circuit the following year). But I agree with the First Circuit—"*Hess* binds us," *Fresenius Med. Care*, 322 F.3d at 67–68, and we can neither sidestep it nor recharacterize it.

Thankfully, our decision today does not reach this issue and the D.C. Circuit's decision does not foreclose our approach to weighing these factors. Here, the first two factors weigh strongly in favor of immunity, and the third factor, though "mixed," indicates a significant financial relationship between the State Bar and California. So we

need not and, as I read the majority, do not determine the exact weight that we should ascribe to each factor. To remain consistent with *Hess* and *Regents*, I encourage us not to neglect solvency for dignity by indexing too heavily on control and intent.

B

Unlike the majority, I hesitate to embrace the D.C. Circuit's conclusion that "once an entity is determined to be an arm of the State under the three-factor test, that conclusion applies unless and until there are relevant changes in the state law governing the entity." *P.R. Ports Auth.*, 531 F.3d at 873. In my view, we need not reach this issue today, given that it was neither briefed nor argued. And while this categorical approach to sovereign immunity may make our job easier as judges, it lacks consistent support in our precedent or practice and would lead to anomalous results.

The majority is right that our *Mitchell*-based precedent on the question of "entity versus activity" immunity is mixed. *Compare Durning v. Citibank, N.A.*, 950 F.2d 1419, 1426 (9th Cir. 1991), *with Ray*, 935 F.3d at 710. In 1995, however, we held that state entities that function in various capacities are "not entitled to Eleventh Amendment immunity" with respect to every function; instead, the indicia of sovereign immunity "must be examined closely to ascertain that the [entity] is indeed functioning as an arm of the state." *Doe v. Lawrence Livermore Nat'l Lab'y*, 65 F.3d 771, 775 (9th Cir. 1995), *rev'd sub nom. on other grounds by Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997). When the Supreme Court reversed our decision in *Doe*, it declined to disturb that holding. *See Regents*, 519 U.S. at 425 n.2. This might well be because the "function" of an

entity, including the function that "g[ives] rise to the specific controversy at issue in [the] litigation," sheds significant light on the sovereign immunity analysis. *See Lake Country Ests.*, 440 U.S. at 402; *Hess*, 513 U.S. at 43–46; *c.f.*, *N. Ins. Co. of N.Y. v. Chatham Cnty., GA.*, 547 U.S. 189, 197 (2006) (phrasing the relevant immunity question as whether "the County . . . was acting as an arm of the State . . . in operating the drawbridge"); *Regents*, 519 U.S. at 431–32 (leaving open whether it is appropriate to consider, for sovereign immunity purposes, "the character of the function that gave rise to the litigation"). *See also Walker v. Jefferson Cnty. Bd. of Educ.*, 771 F.3d 748, 757 (11th Cir. 2014) (tethering the sovereign immunity analysis to "the particular function in which the [entity] was engaged when taking the actions out of which liability is asserted to arise") (alteration in original). After all, contrary to our reasoning in *Durning*, sovereign immunity is not always absolute; it is subject to waiver and valid abrogation. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618, 620 (2002). And while a state's immunity may well be absolute as a first-stage inquiry, I do not see why a state instrumentality's immunity necessarily follows suit.

Preserving a function-based approach instead of the D.C. Circuit's entity-based approach serves the Eleventh Amendment's twin purposes. *See Seminole Tribe*, 517 U.S. at 58 (noting that the Eleventh Amendment prevents "federal-court judgments that must be paid out of a State's treasury" and "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties'") (cleaned up). *First*, the function-based approach narrows our focus to the entity's conduct in the dispute at hand, avoiding an overbroad view of sovereign immunity. An arm of the state is not the state,

and its dignity interest is relevant insofar as it functions as an arm of the state. After all, it is the entity's conduct, and not merely its legal status, that brings it to court, thus raising Eleventh Amendment concerns in the first place. *See Lake Country Ests.*, 440 U.S. at 402; *c.f.*, *ex parte Ayers*, 123 U.S. at 505; *Regents*, 519 U.S. at 429 (assessing the "nature and effect of the proceeding" to determine the relationship between the state instrumentality and the state). Indeed, our very framing of the question—"whether a state instrumentality *may* invoke the State's immunity"—reinforces this view. *See Regents*, 519 U.S. at 429 (emphasis added). I see nothing in our or the Supreme Court's Eleventh Amendment jurisprudence that would require us to declare a state instrumentality, like a state, sovereignly immune in perpetuity.

Second, a function-based approach avoids a far-ranging inquiry into potentially irrelevant aspects of an entity's legal structure, which might be leveraged to immunize that entity for conduct otherwise divorced from or beyond the state's mandate. State instrumentalities are, increasingly, sprawling institutions with generalized state mandates, attending to a myriad of far narrower state, local, and even private interests. And it is not hard to imagine a scenario in which a state instrumentality is deemed immune as an "arm of the state" in one case, despite administering to a host of local and private interests not at issue in that litigation. Our new entity-based approach would broadly immunize that entity's conduct and any future conduct, categorically granting or denying immunity regardless of that instrumentality's activity. Indeed, the entity-based approach could, ostensibly, immunize a state instrumentality even when it acts contrary to or in excess of the direction and authority it received from the state. On balance, a function-based

approach thus avoids over-and under-categorizations of sovereign immunity, aligning our doctrine with *Hess*'s and *Regents*' goals.

These theoretical concerns have practical implications. Take, for example, public universities, which have long been afforded sovereign immunity under the Eleventh Amendment. *See, e.g.*, *Lapides*, 535 U.S. at 617 (assuming the university system's immunity for purposes of examining waiver); *Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032, 1035 (9th Cir. 1999) ("[T]he University performs the central governmental function of providing opportunities for 'deserving and qualified citizens to realize their aspirations for higher education' . . . . [It] is an arm of the State of Oregon for Eleventh Amendment immunity purposes.") (internal citation omitted). Yet this immunity, construed at the entity level, protects universities from a variety of suits seemingly divorced from their state mandate to provide higher education, such as federal patent prosecution. Indeed, state universities successfully invoke sovereign immunity to block collaborative research partners from challenging the inventorship of patents arising out of that research, *see Xechem Int'l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 382 F.3d 1324 (Fed. Cir. 2004); dictate venue for their own patent enforcement lawsuits, *see Tegic Commc'ns Corp. v. Bd. of Regents of Univ. of Tex. Sys.*, 458 F.3d 1335 (Fed. Cir. 2006); and avoid being compelled to join a patent infringement lawsuit brought by an exclusive licensee of the university's patent, *see Gensetix, Inc. v. Bd. of Regents of Univ. of Tex. Sys.*, 966 F.3d 1316 (Fed. Cir. 2020). Their private counterparts have no such privilege. *Accord* Christopher M. Holman, *State Universities Push the Limits of Eleventh Amendment Sovereign Immunity at the Federal Circuit*, 39 Biotech. L. Rep. 347, 360 (2020) ("[State

universities] exploit the patent system as a sword, while largely insulating themselves from liability or judicial intervention through the shield of Eleventh Amendment state sovereign immunity.") (citing *Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334, 1340 (Fed. Cir. 2006)).

Or consider the challenge posed by county sheriffs' departments. They are often structured as quasi-local and quasi-state entities, following mandates issued by both governments. Yet, when they are categorically deemed arms of the state, plaintiffs are "unable to sue" over "entirely locally dictated policies." *See* Kelsey Joyce Dayton, *Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine*, 86 U. Chi. L.R. 1604, 1650 (2019) (citing *Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996)). Adopting an explicit, entity-based approach to sovereign immunity only magnifies these concerns because it permits a state instrumentality to avoid federal lawsuits in perpetuity—regardless of the roles it chooses to play or the actions it chooses to take.

Today's case illustrates the value of a function-based approach that accounts for the conduct at issue in the dispute. Consistent with the D.C. Circuit's test, both the majority and the dissent address the "intent" factor by devoting considerable attention to the "functions" performed by the State Bar. The dissent, relying on *Keller v. State Bar of California*, 496 U.S. 1 (1990) and *Crowe*, 989 F.3d at 732, construes "function" broadly, and it discusses the State Bar's largely "advisory" role, which points away from immunity. By contrast, the majority focuses on the State Bar's role in licensing and regulating lawyers, including its "core functions of admission and discipline of attorneys." In finding the State Bar immune, the majority draws particular

attention to the State Bar's job of "examin[ing] candidates' qualifications for admission and administer[ing] the bar exam." In my view, the majority's approach is more persuasive because it examines the State Bar's function *as it relates to* the conduct at issue here—namely, the State Bar's allegedly discriminatory administration of the bar exam. An entity-based approach, by contrast, provides little means of resolving the sovereignty dispute teed up by the majority and dissent over the State Bar's broad function. In essence, it leaves parties to dredge up aspects of that entity's legal status to make their case for or against immunity, without reference to the challenged conduct at hand.

It seems logical to me that consideration of the function-at-issue must remain relevant to the sovereign immunity analysis. Nor does it seem particularly unworkable. We managed to successfully grapple with "the function at issue" analysis for many years—even finding it consistent with Supreme Court precedent. *See Ray*, 935 F.3d at 710 (reasoning that the "function at issue" test "fits with the Court's statement in *Chatham*"); *see also Streit v. Cnty. of L.A.*, 236 F.3d 552, 567 (9th Cir. 2001). So I would not abandon it now.

* * *

In sum, I do not see our decision today as a Trojan horse, carrying *Hess*'s dissent in its stomach. It is, instead, a faithful translation of the Supreme Court's arm-of-the-state precedent, and a long overdue update to our sovereign immunity case law. Although I depart from the majority's reasoning with respect to entity-based immunity, so long as we continue to appropriately weigh the sovereign immunity factors, I am pleased to concur in the outcome.

BUMATAY, Circuit Judge, joined by SUNG, Circuit Judge, concurring in part and dissenting in part:

Our court rightly abandons the multi-factor test from *Mitchell v. Los Angeles Community College District*, 861 F.2d 198 (9th Cir. 1988), in favor of the D.C. Circuit's more streamlined approach articulated in *Puerto Rico Ports Authority v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008). Looking at intent, control, and overall effects on a State's treasury to determine whether an entity is an "arm of the State" more closely aligns with Supreme Court precedent. Those factors better illuminate the "twin" aims of Eleventh Amendment sovereign immunity—State dignity and State solvency. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994). So I agree with the majority's retirement of the *Mitchell* test.

But I part ways with the majority's application of this new approach to the facts before us. In my view, each of its factors cuts against finding sovereign immunity for the State Bar of California. First, California has made evident its intent to treat the State Bar more like an independent state-created entity, such as a municipality, rather than an "arm of the State." Second, California has relinquished nearly all direct and immediate control over the Bar. And finally, California is not on the hook for the Bar's funding or its debts. With these considerations in mind, we should have recognized that the State Bar is not entitled to the sovereign immunity reserved only for the State and its instrumentalities.

For these reasons, I join Parts I, II.A, and II.B of the majority's opinion and respectfully dissent from the rest.

I.

The Eleventh Amendment provides that "[t]he 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. The Supreme Court has long held that actions "'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (quoting U.S. Const. amend. XI). The Constitution extends this grant of immunity to state agencies and instrumentalities to preserve the States' dignity and financial solvency—"the Eleventh Amendment's twin reasons for being." *Hess*, 513 U.S. at 47.

We, along with several other federal courts, have long struggled to formulate a consistent test for determining whether a state-created entity should be afforded sovereign immunity. But as the majority explains, today we adopt the D.C. Circuit's approach, which follows the Supreme Court's guidance in this difficult area of law. *See* Maj. Op. 18–19. That approach requires us to look at (1) whether the State has expressed its *intent* to treat the entity like an arm of the State, (2) whether the State exercises significant *control* over the entity, and (3) whether private suits against the entity would impact the State's *treasury*. *P.R. Ports Auth.*, 531 F.3d at 873.

The question here is whether the State Bar of California enjoys the State of California's sovereign immunity. Following our newly adopted analysis, I would hold that it does not.

A.

Start with intent. We must look first at how state law characterizes the "nature of the entity" and whether the State treats the entity "more like a county or a city than . . . like an arm of the State." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). That involves determining whether the entity is a legal entity that exists "separate" from the State. *Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 401 (1979). From there, we can assess whether the State intended for the entity to enjoy sovereign immunity. Here, California law classifies the State Bar much like a municipality, the Bar operates unlike a state agency, and even the California Supreme Court has disclaimed the State Bar's role in state governance. This factor thus cuts against immunity here.

State Bar as a Municipality-like Public Corporation

California law treats the State Bar the same way as it treats independent municipalities. California's Constitution establishes the State Bar as a "public corporation." Cal. Const. art. VI, § 9. That term has been used in California to describe municipalities and the like for nearly a century and a half. *See, e.g.*, *Ex parte Wall*, 48 Cal. 279, 311 (1874) (classifying "subordinate local governments," like "counties, towns and cities," as "local public corporations"), *overruled on other grounds by Ex parte Beck*, 162 Cal. 701 (1912); *Martin v. Aston,* 60 Cal. 63, 67 (1882) (observing that the California Constitution prohibits imposing "taxes upon counties, cities, towns, or other public or municipal corporations"); *In re Werner*, 129 Cal. 567, 572 (1900) (observing that "[a]ll municipal corporations are public corporations" and that "public corporation" and "municipal corporation," while technically distinct, are often considered

"synonymous"). The U.S. Supreme Court has had a similar understanding of the term. *See, e.g.*, *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 668–69 (1819) (opinion of Story, J.) (stating that public corporations "exist for public political purposes only, such as towns, cities, parishes and counties").

And historically, "neither public corporations nor political subdivisions [were] clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty." *Hopkins v. Clemson Agric. Coll. of S.C.*, 221 U.S. 636, 645 (1911); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (observing that even though counties are "integral to the State," they are still unprotected by sovereign immunity); *Mt. Healthy*, 429 U.S. at 280 (stating sovereign immunity does not extend to "municipal corporation[s] or political subdivision[s]"). So classification as a "public corporation" cuts strongly against sovereign immunity.

Here, the State Bar was established as a "public corporation" in 1927—not to imbue it with State authority but to recognize its importance to the public interest. *See State Bar of Cal. v. Superior Ct. of L.A. Cnty.*, 207 Cal. 323, 328 (1929).[1] Back then, a superior court judge challenged the State Bar's classification as a "public corporation." *Id.* at 328–30. Given "its membership," "its function," and "its independence of public regulation and control," amici for the judge argued that it should be considered a "private

[1] When the California Legislature created the State Bar, state law defined "public corporation" as "one formed or organized for the government of a portion of the State"—i.e., a local government. *Keller v. State Bar*, 47 Cal. 3d 1152, 1162 (1989) (emphasis added) (quoting Cal. Civ. Code § 284 (repealed)), *rev'd* 496 U.S. 1 (1990).

corporation." *Id*. at 329. The Supreme Court of California rejected that view. While California's highest court recognized that the "profession and practice of the law" involves "in a limited sense a matter of private choice and concern," it is also "essentially and more largely a matter of public interest and concern." *Id*. at 330. That's because of the "integral and indispensable" role attorneys serve in "our system of administering justice." *Id*. Thus, the profession and practice of law "is not such a matter of purely private concern," *id.* at 332, but its relation to the administration of civil and criminal law make it the "proper subject of legislative regulation and control," *id*. at 331. So from the beginning, the State Bar was not conceived of as an "arm of the State," but an entity subject to special legislative oversight given its unique public-interest role. Certainly, nothing in the State Bar's classification as a "public corporation" grants it *more* immunities or privileges than municipalities, which have no sovereign immunity.

And the same understanding of the State Bar's classification as a "public corporation" exists today. The State Bar is statutorily established as a "public corporation" in the Business and Professions Code—not the *Government* Code. *See* Cal. Bus. & Prof. Code § 6001. Although "public corporation" isn't defined in the Business and Professions Code, it is elsewhere in California law:

- The Government Code defines "public corporation" as "any county, city and county, city, town, municipal corporation, district of any kind or class, authority, redevelopment agency or political subdivision of this state." Cal. Gov. Code § 67510 (as codified in the

San Francisco Bay Area Transportation Terminal Authority Act).

- That definition was carried over to the Financial Code. *See* Cal. Fin. Code § 22050(f) ("This division does not apply to any public corporation as defined in [§] 67510 of the Government Code[.]").

- The Government Code defines "local agency" to include municipalities and other "public corporation[s]." *See, e.g.*, Cal. Gov. Code §§ 53069, 53200(a), 53215, 53227.2(a), 53460(a), 53820, 53850(a), 54307.

- Definitions of "political subdivision" often equate "public corporation[s]" with municipalities. *See, e.g.*, Cal. Pub. Util. Code § 21010 ("'Political subdivision' means any county, city, city and county, public corporation, district or other political entity or public corporation of this State.").

- As do definitions of "[l]ocal public entity," which "includes [any] county, city district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State." Cal. Gov. Code § 940.4; *id.* § 970(c) (similar); *see also id.* § 5600 (defining "[p]ublic body" as "any county, city and

county, city, public district, public authority or other public corporation").

- And the Labor Code distinguishes the "State" from "public corporations" for employment purposes. *See* Cal. Lab. Code § 3300 (separating "Employer" into distinct categories of "(a) [t]he State and every State agency" and "(b) [e]ach county, city, district, and all public and quasi public corporations"); *see also id.* § 9006 (same).

To be sure, California law also defines "public corporation" to include the State in some limited circumstances. *See, e.g.*, Cal. Gov. Code § 6300(b) (defining "Public Corporation" to include "the state" and "municipalit[ies]" for foreign trade zones); Cal. Pub. Cont. Code § 21561 (for the Metropolitan Water District, "public corporation" includes both the "United States," "any other state," or any state "subdivision"); Cal. Gov. Code § 12100.50(b)(1) (for the California Foreign Investment Program, the term means "the state" or "any corporate municipal instrumentality"). But notice that these definitions are significant outliers and are limited to only those distinct areas of the law. And invariably these definitions include municipalities, which no one believes are entitled to sovereign immunity. So these outliers have no relevance for our sovereign immunity inquiry.

Thus, under California law, the State Bar's classification as a "public corporation" only signifies that it should be treated like a municipality—not an arm of the State. So it's a red herring to rely on assumptions about the term "public

corporation" to find immunity here. We've not made these assumptions about public corporations before. *See Crowe v. Or. State Bar*, 989 F.3d 714, 720, 733 (9th Cir. 2021) (acknowledging the Oregon State Bar's status as a "public corporation" but ruling that it was not entitled to immunity).

The Supreme Court of California once relied on the State Bar's superficial classification as a "public corporation" to consider it a "governmental agency"—only to be unanimously reversed by the U.S. Supreme Court. *See Keller v. State Bar*, 47 Cal. 3d at 1162–63. In that case, members of the State Bar sued the Bar for forcing them to pay dues to advance political ideas the members disagreed with, in violation of their First and Fourteenth Amendment right to free speech. *Keller v. State Bar of Cal.*, 496 U.S. 1, 4 (1990). The California high court reasoned that the Bar's status as a public corporation made it a state agency, and thus the Bar could use dues for any purpose within the scope of its authority. *Id.* at 6–7. But the U.S. Supreme Court rejected that reasoning. It noted that the State Bar "is a good deal different from most other entities that would be regarded in common parlance as 'governmental agencies.'" *Id.* at 11. That's because "[t]he State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession"—the Supreme Court of California. *Id.* at 13. Indeed, while the State Bar performs "important and valuable services" for the California's court system, the Bar itself plays only an "advisory" role. *Id.* at 11. The Supreme Court thus overruled the California court's ruling that the State Bar was a government entity. We should not make the same mistake. *See Crowe*, 989 F.3d at 732 (holding that *Keller*'s "analysis is pertinent and analogous to the

[sovereign] immunity question"). While the State Bar may have separated its associational and administrative functions since then, the administrative half of the Bar remains a largely autonomous and advisory public corporation. So none of the changes identified by the majority undermine the thrust of the Supreme Court's holding—the Bar's mere advisory role means that it should not be treated as a government entity.

State Bar's Statutory Functions

Beyond California's express designation of the State Bar as something like a political subdivision not entitled to sovereign immunity, the State Bar does not function like a state agency. By statute, it's treated as distinct from state agencies. The California Legislature expressly withheld "the exercise of powers of state bodies or state agencies" from the Bar. Cal. Bus. & Prof. Code § 6001 ("No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies . . . shall be applicable to the State Bar, unless the Legislature expressly so declares.").

On the other hand, California law imbues the Bar with other powers typically indicative of its *separate* corporate status. For example, the Bar can issue bonds in its own name, Cal. Bus. & Prof. Code § 6001(b), which "strongly suggests that it has a legal independence from the state for Eleventh Amendment purposes." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1428 (9th Cir. 1991); *see also Mt. Healthy*, 429 U.S. at 280 (noting that a school board's authority to issue bonds made it more like a county or city and thus not entitled to sovereign immunity).

California law also gives the State Bar the power to sue and be sued, which again is "strongly suggestive of . . .

autonomy and independence" from the State. *Durning*, 950 F.2d at 1427 n.4. In *Durning*, our court held that the Wyoming Community Development Authority did not enjoy sovereign immunity in part because the Wyoming Legislature "unequivocally grant[ed] the Authority the power to '[s]ue and be sued' in its own right." *Id.* at 1427 (quoting Wyo. Stat. § 9–7–105(a)(i) (1977)). We face the same circumstances here. The California Legislature unmistakably gave the State Bar the power to "sue and be sued." Cal. Bus. & Prof. Code § 6001. The majority attempts to wave away this point by relying on *Durning*'s caveat that "[a] mere statutory grant of the power to sue or be sued . . . is not enough to waive immunity from suits brought in federal court if it may fairly be construed as limited to a waiver of immunity in the state's own courts." Maj. Op. 25 (quoting *Durning*, 950 F.2d at 1427 n.4). But the language in § 6001 is virtually identical to the language the *Durning* court said weighed *against* immunity. *Compare* Cal. Bus. & Prof. Code § 6001 ("The State Bar . . . may sue and be sued."), *with* Wyo. Stat. § 9–7–105(a)(i) (1977) (stating that the authority may "[s]ue and be sued"). What's more, the California Attorney General is statutorily responsible for representing all state agencies in California—with few exceptions—but is not so obligated with respect to the State Bar. *See* Cal. Gov. Code § 12512 ("The Attorney General shall . . . prosecute or defend all causes to which the state . . . is a party[.]"). That suggests that the State Bar's ability to "sue and be sued" *is* another designation of its independent legal status.

Of course, California law subjects the State Bar to some of the same government-only laws as state agencies. For instance, the State Bar must comply with California public-records and open-meetings laws. Cal. Bus. & Prof. Code

§ 6001. But this alone does not swing this factor decisively toward finding immunity, especially when the Bar's "separate corporate status is clearly established." *Durning*, 950 F.2d at 1427. The Oregon State Bar was also subject to Oregon's public records law, and yet there we found no immunity for the Oregon State Bar. *Crowe*, 989 F.3d at 730. Determining California's intent for its State Bar requires a holistic approach—not one that turns on incidental similarities between corporations and state agencies.

State Bar as an Administrative Assistant

Likewise, the Supreme Court of California has disclaimed the State Bar's role as a government decisionmaker. The California Supreme Court has said that the "State Bar is not in the same class as state administrative agencies placed within the executive branch." *In re Rose*, 22 Cal. 4th 430, 439 (2000) (simplified). That's because the "State Bar Court *exercises no judicial power*." *Id*. at 436 (emphasis added). Rather, the State Bar "makes recommendations" to the California Supreme Court, "which then undertakes an independent determination of the law and the facts, exercises its inherent jurisdiction over attorney discipline, and enters the first and only disciplinary order." *Id*. So even though the California court has described the State Bar as its "administrative arm," *id.* at 438 (simplified), and "a constitutional entity within the judicial article of the California Constitution," *Obrien v. Jones*, 23 Cal. 4th 40, 48 (2000), this isn't dispositive of the State's intent. Indeed, the California Supreme Court made these observations in the context of establishing that the State Bar is merely an "administrative assistant" with *no* independent decisionmaking authority. *In re Rose*, 22 Cal. 4th at 438. And it reaffirmed that the State Bar lacked the "powers to regulate and control the attorney admission and disciplinary

system"—powers that are part of the inherent judicial authority of the California Supreme Court. *Obrien*, 23 Cal. 4th at 48. So given this context, these superficial descriptions of the State Bar reveal little about the State's intent.

* * *

Taken together, the State Bar's classification as a municipality-like public corporation, the State Bar's statutory functions separate from the State and its agencies, and the California Supreme Court's descriptions of the Bar as merely advisory all weigh strongly against immunity.

B.

Next, we look at the amount of control California exercises over the State Bar. Admittedly, this factor is a closer call. But ultimately, this factor also cuts against immunity.

While somewhat opaque, control can be assessed based on whether the State may "appoint and . . . remove" the entity's officers, whether the State may "veto [the entity's] actions," and whether "the State['s] legislature[] can determine the projects the [entity] undertakes." *Hess*, 513 U.S. at 47. But, as the Court warned, "[g]auging actual control . . . can be a perilous inquiry, an uncertain and unreliable exercise." *Id.* (simplified). And, of course, "ultimate control of every state-created entity resides with the State" given the State's power to "destroy or reshape any unit it creates." *Id.* So "ultimate control" is not dispositive. After all, "[p]olitical subdivisions exist solely at the whim and behest of their State . . . yet cities and counties do not enjoy Eleventh Amendment immunity." *Id.* (simplified).

So we're not looking for just any kind of control; we're looking for the kind that demonstrates that "the State 'clearly structured the entity to share its sovereignty.'" *P.R. Ports Auth.*, 531 F.3d at 874 (simplified). It "should turn on real, immediate control and oversight, rather than on the potentiality of a State taking action to seize the reins." *Hess*, 513 U.S. at 62 (O'Connor, J., dissenting). Indeed, in *Hess*, even with the States' power to appoint and remove officers, the States' veto power, and the States' determination of the entity's projects, that level of control *wasn't* enough to establish sovereign immunity. *Id.* at 48–53 (majority opinion).

Here, the State Bar's Board of Trustees is appointed by all three branches of California's government—the Supreme Court of California, the State Legislature, and the Governor. *See* Cal. Bus. & Prof. Code §§ 6010, 6013.1, 6013.3, 6013.5. But that appointment power *alone* doesn't demonstrate control sufficient to find immunity. In fact, the Court has explicitly rejected such a myopic view of control. *See Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) ("While the Governor appoints four of the board's five members . . . the city of St. Louis is responsible for the board's financial liabilities . . . and the board is not subject to the State's direction or control in any other respect. It is therefore not an 'arm of the State' for Eleventh Amendment purposes." (simplified)).

Looking beyond appointment power, California has far less control over the Bar's Board. For instance, unlike the officers in *Puerto Rico Ports Authority* or in *Hess*, the Board's members and officers are not removable at will. So once they've appointed members to the Board, California's state officials lose the power to "directly supervise and control [the Bar's] ongoing operations" by way of removal.

P.R. Ports Auth., 531 F.3d at 877. And unlike in *Puerto Rico Ports Authority*, no government official serves in the Bar's leadership. In fact, the Board consists of only attorneys and members of the public—not judges—which strongly suggests the California Legislature intended the Bar to be advisory. *See* Cal. Bus. & Prof. Code §§ 6013.1, 6013.3, 6013.5. Even if government officials were on the Board, this fact on its own is not enough to establish control. *Durning*, 950 F.2d at 1427 (acknowledging that the governor and state treasurer serve on the entity's board but still denying immunity). Thus, once the Board's members and officers take their positions, California lacks direct control over the Bar's day-to-day affairs.

True, the Board is under the *supervision* of the Supreme Court of California. But supervision is not control. For instance, unlike the States in *Hess*, the Supreme Court of California does not veto the decisions of the State Bar. *See Hess*, 513 U.S. at 37; *see also Lake Country Ests.*, 440 U.S. at 402 (noting that the State's lack of veto power over the entity made the entity more like a municipality). Rather, the California court merely chooses whether to adopt the State Bar's recommendations as to admission and discipline. So although the Bar reports to California's highest court, the court does not exercise direct control over how the Bar operates or what recommendations it may ultimately make. Such an advisory role cuts against immunity here. As in Oregon, the State Bar is "not the typical government official or agency, but rather a professional association that provides recommendations to the ultimate regulator of the legal profession." *Crowe*, 989 F.3d at 732 (simplified).

Nor does the State Legislature's *regulation* of the State Bar change the calculus. It should be of no surprise that the State has the authority to *regulate* the State Bar. As Justice

O'Connor observed, "[v]irtually every enterprise, municipal or private, flourishes in some sense at the behest of the State." *Id*. at 62 (O'Connor, J., dissenting). So the mere fact that the State Bar is subject to California legislation does not automatically make it an instrumentality of the State. Far from it. Indeed, the indirect nature of legislative action over the State Bar underscores how little control the State has over the Bar. Unlike with state agencies, the California Legislature does not appropriate State Bar funds. At most, the California Legislature can cap the amount the State Bar collects in licensing fees. *See* Maj. Op. 29 (citing Cal. Bus. & Prof. Code § 6140). The State Bar's counsel conceded at argument that the Legislature might *negotiate* with the State Bar through fee caps and other legislative measures to *encourage* the Bar to spend its money in a certain manner. For instance, if the State Bar wished to sell one of its buildings, the California Legislature could express its disapproval and threaten to cap licensing fees, but it couldn't outright veto the sale. This is not the same kind of "legal control" we would expect to see the State exert over a state agency or other instrumentality. *Cf. P.R. Ports Auth.*, 531 F.3d at 878 (explaining that the Governor's authority to direct the entity to demolish infrastructure illustrates that the entity "operates subject to the control of the Governor"). Instead, it is the State attempting to prod an independent institution into choosing an action under threat of legislative retaliation. This is not the "real" and "immediate" control required to show, "not just on paper, but also in its operation," that the State and the State Bar are effectively the same. *Id.*

The Bar is thus not subject to a level of State control that would cloak it in sovereign immunity.

C.

Finally, we analyze the Bar's impact on the State's treasury. Here, we ask whether the entity "generates its own revenues" and whether the State bears legal liability for the entity's debts. *Hess*, 513 U.S. at 45, 52. This factor cuts decisively against immunity.

It is inescapable that this suit—or any other—against the State Bar would not impact the State's treasury. As the majority admits, "California law makes the State Bar responsible for its own debts and liabilities." Maj. Op. 29 (citing Cal. Bus. & Prof. Code § 6008.1). And the State Bar is tasked with raising its own funding. That the California Legislature may impose a cap on Bar dues does not alter the State Bar's financial independence from the State. Simply put, the State is not responsible for the Bar's funding, debts, or liabilities. If Kohn were to ultimately prevail here, neither California nor its citizens would bear the costs of any judgment. Thus, this factor lands squarely against immunity.

The impact on the State's treasury is a big deal even if it's not dispositive. While the Eleventh Amendment may have "twin reasons for being," *Hess*, 513 U.S. at 47, the State's solvency was the "impetus for the Eleventh Amendment," *id.* at 48. That did not change after *Hess*. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court merely observed that the "[t]he Eleventh Amendment does not exist *solely* in order to prevent federal-court judgments that must be paid out of a State's treasury." *Id.* at 58 (emphasis added) (simplified). That means we must respect the State's sovereign immunity even in cases of "prospective injunctive relief"—when money judgments against the States are not at issue. *Id.* But in the context of

a suit for damages, as here, the Court has never brushed off or minimized the importance of the treasury factor in the sovereign immunity analysis.

With this framing, we should readily acknowledge the treasury factor's import—not downplay it—in assessing whether the Bar is an arm of the State. Given that intent and control *together* represent one half of sovereign immunity's purpose—the State's dignity interest—the overall effects on the State's treasury make up the other half. *See P.R. Ports Auth.*, 531 F.3d at 874. So while perhaps not dispositive, the treasury factor must at least be treated as equally important to the intent and control factors *when combined*. Whenever intent and control *together* cut only weakly in favor of immunity, the twin concern for treasury should win the day. Here, the answer should have been even more obvious because *all* the factors point the same way: no immunity.

II.

California law lays out a structure for the State Bar like an independent municipality. By creating that structure, California has shown an intent not to clothe the State Bar with the immunity that California enjoys. More than that, California has treated the State Bar as a separate entity by allowing it to operate without significant control or direction. And finally, the State Bar's liabilities are independent of the State. Each of these factors strongly points to concluding no immunity for the State Bar.

Unfortunately, our court failed to recognize the clear signs that California has laid out before us and thus the majority mistakenly affords the State Bar total immunity from suit. I would have paid due respect to the sovereign's wishes.

I respectfully dissent.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BENJAMIN KOHN,

Plaintiff,

v.

STATE BAR OF CALIFORNIA, et al.,

Defendants.

Case No. 20-cv-04827-PJH

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 34

Before the court is defendants the State Bar of California ("State Bar") and the California Committee of Bar Examiners' (the "Committee" and, together with the State Bar, "defendants") motion to dismiss. The matter is fully briefed and suitable for resolution without oral argument. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court GRANTS the motion, for the following reasons.

BACKGROUND

On July 18, 2020, plaintiff Benjamin Kohn ("plaintiff") filed a complaint alleging seven violations of the Americans with Disabilities Act ("ADA") and seven corresponding violations of California's Unruh Act, Cal. Civ. Code § 51(f). Dkt. 1. The same day, plaintiff filed a motion for preliminary injunction, (Dkt. 2), which the court denied on August 13, 2020, (Dkt. 26), finding that plaintiff's motion was not ripe for adjudication. Plaintiff then filed a first amended complaint ("FAC") that brings the following fifteen claims: (1) violation of ADA related to the February 2019 Bar Exam; (2) violation of the ADA for deliberate indifference related to the February 2019 Bar Exam; (3) violation of

the ADA related to the February 2020 Bar Exam; (4) violation of the ADA related to the October 2020 Bar Exam; (5)–(7) violations of the ADA and California Government Code §§ 11135 et seq. & 12944 et seq. for deliberate indifference for each of plaintiff's past three exams; (8)–(14) violations of the Unruh Act, Cal. Civ. Code § 51(f) for each ADA violation; (15) violation of the ADA for failure to provide reasonable accommodations for the October 2020 Exam and defendants' deliberate indifference. Dkt. 32.

Plaintiff is a law school graduate who registered to take the October 2020 sitting of the California Bar Examination. FAC at 9–10.[1] Plaintiff suffers from and has been diagnosed with several physical and psychological conditions including autism and neurological/attention disorders, digestive system conditions (gastroparesis, postoperative dysphagia, pelvic floor dyssynergia, and irritable bowel syndrome with chronic constipation), and visual impairments (keratoconus, dry eye syndrome, uncorrectable astigmatism, floaters). Id. ¶ 2. Because of his conditions, plaintiff has been granted several accommodations on past exams administered at various levels and by various institutions. Id. ¶ 3.

Plaintiff has previously taken the California Bar Exam in July 2018, February 2019, and February 2020 and for each exam he was granted some testing accommodations but denied others. Id. ¶¶ 5–6. Examples of denied accommodations included: 150% extra time on the written portion of the exam, a cap of no more testing time per day than non-disabled test takers, ergonomic/physical equipment supplied in the exam room, specialized disability proctors, and 30 minutes of break time per 90 minutes of testing. Id. ¶ 6. Plaintiff alleges that his physicians have opined that plaintiff should receive testing accommodations similar to those previously requested and denied. Id. ¶¶ 7–17. Accordingly, plaintiff alleges that he is "disabled" and "significantly impaired in a major life

[1] Several allegations in the FAC do not reference numbered paragraphs, in violation of Federal Rule of Civil Procedure 10(b). Further, new allegations in the FAC duplicate the numbered paragraphs from the original complaint. To avoid confusion, the court refers to the allegations without numbered paragraphs and the new allegations by citing the electronically stamped ECF page numbers at the top of each page.

function." Id. ¶ 18.

On March 19, 2020, plaintiff submitted a petition for testing accommodations for the October 2020 exam. Id. ¶ 19. In his petition, plaintiff sought all accommodations that defendants previously granted on his prior attempts at the California Bar Exam, as well as accommodations that were previously denied. Id. ¶ 25. On June 4, 2020, plaintiff supplemented his petition with additional expert opinions. Id. ¶ 19. Plaintiff alleges that he was prejudiced by defendants' delays in deciding his accommodations for the October exam and, with regard to the COVID-19 pandemic, the Committee discriminated against disabled test takers by failing to offer them the opportunity to take the exam online. Id. ¶ 26.

On August 27, 2020, the Committee issued a final administrative decision to plaintiff notifying him that, in addition to affirming his previously granted requests, it granted his request for increased time on written portions of the exam and no more testing time per day than non-disabled students with a corresponding increase in the number of days to take the exam. Id. at 2. The Committee denied the remainder of plaintiff's requests for administration of the exam over weekend days only, testing in a private room, pre-scheduled breaks to be taken instead at plaintiff's discretion, a complete ergonomic workstation provided by the Committee, a hotel room for plaintiff provided by the Committee, and assignment to an experienced proctor. Id.

On August 31, 2020, plaintiff filed a renewed motion for preliminary injunction, (Dkt. 29), which the court denied on September 25, 2020, (Dkt. 36). Defendants now move to dismiss the FAC in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

DISCUSSION

A. Legal Standard

1. Rule 12(b)(1)

A federal court may dismiss an action under Federal Rule of Civil Procedure 12(b)(1) for lack of federal subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Because

"[a] federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears," the burden to prove its existence "rests on the party asserting federal subject matter jurisdiction." Pac. Bell Internet Servs. v. Recording Indus. Ass'n of Am., Inc., 2003 WL 22862662, at *3 (N.D. Cal. Nov. 26, 2003) (quoting Gen. Atomic Co. v. United Nuclear Corp., 655 F.2d 968, 969 (9th Cir. 1981); and citing Cal. ex rel. Younger v. Andrus, 608 F.2d 1247, 1249 (9th Cir. 1979)). A jurisdictional challenge may be facial or factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)). When the attack is facial, the court determines whether the allegations contained in the complaint are sufficient on their face to invoke federal jurisdiction. Id. Where the attack is factual, however, "the court need not presume the truthfulness of the plaintiff's allegations." Id.

When resolving a factual dispute about its federal subject matter jurisdiction, a court may review extrinsic evidence beyond the complaint without converting a motion to dismiss into one for summary judgment. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (holding that a court "may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction"); see also Land v. Dollar, 330 U.S. 731, 735 n.4 (1947) ("[W]hen a question of the District Court's jurisdiction is raised . . . the court may inquire by affidavits or otherwise, into the facts as they exist."). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." Safe Air for Everyone, 373 F.3d at 1039.

2. Rule 12(b)(6)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock Inc., 349 F.3d 1191, 1199–1200 (9th Cir. 2003). Under Federal Rule of Civil Procedure 8, which requires that a complaint include a "short and plain statement of the claim showing that the pleader is

entitled to relief," Fed. R. Civ. P. 8(a)(2), a complaint may be dismissed under Rule 12(b)(6) if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013).

While the court is to accept as true all the factual allegations in the complaint, legally conclusory statements, not supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009). The complaint must proffer sufficient facts to state a claim for relief that is plausible on its face. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 558–59 (2007).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Where dismissal is warranted, it is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005).

B. Analysis

1. Claims for Injunctive and Declaratory Relief

Plaintiff's fourth claim alleges a violation of the ADA for the Committee's failure to provide a timely decision for the October 2020 Bar Exam. FAC at 27. In his prayer for relief, plaintiff requests injunctive relief in the form of a court order directing defendants to grant his petition and declaratory relief granting him all accommodations received for the February 2020 Bar Exam plus additional requests.[2] Id. at 28.

In their reply brief, defendants raise the contention that because plaintiff took the

[2] The FAC also requests the court issue a preliminary injunction granting plaintiff disability accommodations. FAC at 4. The court denied both plaintiff's initial motion for preliminary injunction, (Dkt. 26), and his renewed preliminary injunction, (Dkt. 36), and any remaining claim for injunctive relief is moot.

October 2020 Bar Examination, his claims for injunctive and declaratory relief are now moot and should be dismissed for lack of jurisdiction. Reply at 1. Defendants submit a declaration confirming that plaintiff took and completed the exam. Dkt. 38-1.

Defendants present this issue for the first time in their reply brief. As a general rule, courts do not consider arguments raised for the first time on reply. See, e.g., Bazuaye v. I.N.S., 79 F.3d 118, 120 (9th Cir. 1996) ("Issues raised for the first time in the reply brief are waived."); Dytch v. Yoon, 2011 WL 839421, at *3 (N.D. Cal. Mar. 7, 2011) ("Defendant's argument . . . was raised for the first time in her reply brief. As a result, it is improper for the Court to consider it."). "However, courts have an 'independent obligation' to police their own subject matter jurisdiction, including the parties' standing." Animal Legal Def. Fund v. U.S. Dep't of Agric., 935 F.3d 858, 866 (9th Cir. 2019) (quoting Summers v. Earth Island Inst., 555 U.S. 488, 499 (2009)); and citing Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999)).

Here, despite defendants' failure to address mootness in their opening brief, the court has an independent obligation to consider whether plaintiff's prospective injunctive and declaratory relief claims are moot. "No justiciable controversy is presented where the question sought to be adjudicated has been mooted by developments subsequent to filing of the complaint." M.M. v. Lafayette Sch. Dist., 767 F.3d 842, 857 (9th Cir. 2014) (citing Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992)). In this case, defendants have administered the October 2020 Bar Exam and any request for declaratory or injunctive relief pertaining to that Exam is necessarily moot.

For the foregoing reasons, to the extent plaintiff's fourth claim pleads a claim for relief based on prospective declaratory or injunctive relief pertaining to the October 2020 Bar Exam, defendants' motion to dismiss is GRANTED and plaintiff's fourth claim is DISMISSED WITH PREJUDICE.

2. First through Seventh & Fifteenth Claims: ADA

Plaintiff's first through seventh and fifteenth claims allege violations of the ADA

based on both his past Bar Exams and October 2020 Bar Exam. FAC at 4, 25–27.[3]

Defendants argue that plaintiff's ADA claims fail because the State Bar is immune from claims for damages under Title II of the ADA, plaintiff has failed to sufficiently plead intentional conduct necessary for damages under the ADA, plaintiff has failed to plead a cognizable ADA violation for procedural claims, and plaintiff has failed to plead that the significant accommodations he has already been granted are not reasonable under the ADA. Mtn. at 11–12.

Defendants' first argument is dispositive. The Eleventh Amendment provides: "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. Accordingly, no state or its agencies may be sued in federal court without consent. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). This immunity extends to defendants, which are state agencies. Hirsh v. Justices of Supreme Ct. of State of Cal., 67 F.3d 708, 715 (9th Cir. 1995) (per curiam) ("The Eleventh Amendment's grant of sovereign immunity bars monetary relief from state agencies such as California's Bar Association and Bar Court." (citations omitted)).

In some instances, however, "Congress may, through its enforcement powers under § 5 of the 14th Amendment, abrogate Eleventh Amendment immunity." Vartanian v. State Bar of Cal., 2018 WL 2724343, at *4 (N.D. Cal. June 6, 2018) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)). There are two predicate questions necessary to determine whether Congress abrogated Eleventh Amendment immunity: "first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional

[3] The FAC adds a section entitled "New Requests for Relief" that includes a new claim for compensatory damages, punitive damages, interest, attorney's fees, and costs based on the denial of reasonable accommodations requested for the October 2020 Bar Exam and defendants' deliberate indifference in denying those requests. FAC at 4. The court construes this as plaintiff's fifteenth claim for violation of the ADA.

authority." Kimel, 528 U.S. at 73.

The first question is easily met; "it is undisputed that Congress unequivocally expressed its intent to abrogate Eleventh Amendment immunity in enacting the ADA." Vartanian, 2018 WL 2724343, at *4; see 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."). The Supreme Court has held that the second question requires an inquiry into the facts alleged in each case.

In Tennessee v. Lane, 541 U.S. 509, 518 (2004), the Court examined whether Title II of the ADA validly abrogates state sovereign immunity. In support of its holding, the court noted that Title II prohibits not only "irrational disability discrimination" in violation of the Equal Protection Clause, but also "a variety of other basic constitutional guarantees" protected by the Fourteenth Amendment. Id. at 522–23. The Court ultimately held that Congress validly abrogated Eleventh Amendment immunity in "the class of cases implicating the fundamental right of access to the courts." Id. at 533–34. The Court left open whether other violations of the Fourteenth Amendment could establish whether Congress validly abrogated state sovereign immunity.

In United States v. Georgia, the Court confirmed that section 5 of the Fourteenth Amendment "authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights." 546 U.S. 151, 158 (2006) (quoting Lane, 541 U.S. at 559–60 (Scalia, J., dissenting); and citing Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)). Thus, "insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." Id. at 159. To determine whether Congress validly abrogated state sovereign immunity, Georgia requires courts to examine: "(1) which aspects of [defendants'] alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's

purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." Georgia, 546 U.S. at 159. In the wake of Georgia and Lane, courts have engaged in a case-by-case analysis to determine whether a fundamental right is at issue and whether Title II validly abrogates state sovereign immunity. See, e.g., Viriyapanthu v. California, 2018 WL 6136148, at *3–4 (C.D. Cal. Oct. 26, 2018); Vartanian, 2018 WL 2724343, at *4–5; see also Phiffer v. Columbia River Corr. Inst., 384 F.3d 791, 793 (9th Cir. 2004) (O'Scannlain, J., concurring) (noting that Lane requires "nuanced, case-by-case analysis").

Here, defendants argue the FAC fails to allege conduct that violates the Fourteenth Amendment to the Constitution. Mtn. at 13. According to defendants, the Supreme Court has held that disability is not a suspect classification under the Equal Protection clause, (id. at 13–14 (citing City of Cleburne v. Cleburne Living Cent., 473 U.S. 432, 439 (1985))), nor is there a fundamental right to practice law, (id. at 14 (citing Giannini v. Real, 911 F.2d 354, 358 (9th Cir. 1990))). Defendants assert that because plaintiff has failed to state a Title II claim arising from a violation of constitutional rights, his claim does not fall in the category of claims for which Congress validly abrogated California's sovereign immunity. Id.

In response, plaintiff argues that United States v. Georgia and Tennessee v. Lane did not reach whether Congress had authority to abrogate state sovereign immunity in cases without a constitutional violation. Opp. at 7. Plaintiff cites Bartlett v. New York State Board of Law Examiners, 156 F.3d 321 (2d Cir. 1998), as a case where the Second Circuit awarded compensatory damages under the ADA to a visually disabled applicant to the New York state bar. Opp. at 8. Plaintiff then cites Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 74 (1992), for the proposition that intentional violations of Title VI and thus the ADA and Rehabilitation Act can sustain an award of monetary damages. Opp. at 8.

To determine whether Congress validly abrogated defendants' sovereign immunity in this case, the court applies the three-factor test articulated in Georgia. "Neither Lane

nor Georgia require that a constitutional violation be separately enunciated, just that the "Title II claims [be] evidently based, at least in large part, on conduct that independently violate[s] the constitution." Barrilleaux v. Mendocino Cty., 61 F. Supp. 3d 906, 913 (N.D. Cal. 2014) (alterations in original) (quoting Georgia, 546 U.S. at 157).

With regard to the first prong, plaintiff alleges that the misconduct that violated Title II included excessively burdensome procedures to seek testing accommodations, delay in responding to his accommodation requests, and deliberate indifference by failing to provide reasonable accommodations for all of his prior sittings of the California Bar Exam. See FAC 25–27. To meet the second prong, the court examines whether this purported misconduct states a claim for violation of the Fourteenth Amendment.

Plaintiff's Title II theory is that he did not receive sufficient accommodations to take the California Bar and practice law in California. Yet, plaintiff does not have a fundamental right to take the California Bar Exam or to practice law. As stated in Giannini v. Real, 911 F.2d at 358, "[t]here is no fundamental right to practice law or to take the bar examination." Id. (citing Lupert v. Cal. St. Bar, 761 F.2d 1325, 1327 n.2 (9th Cir. 1985)). The Giannini court then applied a rational basis standard of review and held that "allowing California to set its own bar examination standards is rationally related to the legitimate government need to ensure the quality of attorneys within the state." 911 F.2d at 358; see also Lupert, 761 F.3d at 1328 ("State and federal courts generally have subjected state bar admission restrictions to mere rational basis analysis." (citations omitted)).

Plaintiff has failed to present any facts demonstrating that the procedures and accommodations provided by the State Bar fail rational basis review. See Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) ("[T]he burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." (internal quotations and citations omitted)). Indeed, the FAC demonstrates that defendants repeatedly gave plaintiff testing accommodations and responded to his accommodation petitions. See FAC ¶¶ 41–52. Together, Giannini and

Lupert foreclose the type of predicate constitutional violation necessary to abrogate state sovereign immunity and the FAC confirms that defendants meet the requirements of rational basis review.

In his opposition, plaintiff identifies two possible constitutional violations: violation of his procedural due process rights and an Equal Protection violation based on COVID-19 testing procedures. With regard to the former, he argues that, because Congress created statutory rights through the ADA, those rights are protected by the process required by Mathews v. Eldridge, 424 U.S. 319 (1976). Opp. at 10. Plaintiff contends that defendants' process is fundamentally flawed in various ways, including their failure to give written findings or feedback, their extremely short appeals process, and their failure to disclose medical evidence for their decision. Id.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews, 424 U.S. at 332. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Id. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). To state a procedural due process claim, plaintiff must allege facts showing a deprivation of a constitutionally protected liberty or property interest, and a denial of adequate procedural protections. Pinnacle Armor, Inc. v. United States, 648 F.3d 708, 716 (9th Cir. 2011); Kildare v. Saenz, 325 F.3d 1078, 1085 (9th Cir. 2003).

Here, plaintiff's procedural due process theory fails for two reasons. First, he has not identified a protected liberty or property interest. While plaintiff refers to "disability rights" in his opposition, it is unclear what specific interest is claimed. As discussed, plaintiff does not have a fundamental right to take the bar exam or practice as an attorney.

Second, even if the court were to assume that plaintiff had a protected liberty or property interest, defendants have provided both an opportunity to submit his accommodation petition, see Cal. State Bar Rules 4.80–4.92, and to appeal any adverse

determination, see Cal. State Bar Rule 4.90, Cal. Rule of Court 9.13(d). Moreover, the FAC alleges that for each of his prior bar examinations defendants considered plaintiff's petitions and permitted him to appeal unfavorable determinations. See FAC ¶¶ 41–52. With regard to the October 2020 Bar Exam, defendants permitted plaintiff to file a petition and, despite a delay caused by plaintiff's supplemental filing, issued a final ruling on August 27, 2020 that granted several of his accommodations. Id. at 2. Thus, plaintiff has not stated a claim for violation of a procedural due process right. See also Giannini, 911 F.2d at 357 (finding no procedural due process claim where petitioner had opportunity to present claim to California Supreme Court and in fact petitioned the court).

Next, plaintiff alleges that the Committee discriminated against applicants with disabilities because it provided non-disabled individuals with the opportunity to take the October 2020 Bar Exam online but required disabled persons to test in person at test centers to receive their accommodations. FAC ¶ 26. Plaintiff picks up this argument in his opposition, contending that defendants have denied accessible locations for the October 2020 Bar Exam and have therefore deprived disabled applicants a chance at admission to the state bar. Opp. at 17.

Disabled people do not constitute a suspect class, but the Equal Protection Clause "prohibits irrational and invidious discrimination against them." Dare v. California, 191 F.3d 1167, 1174 (9th Cir. 1999) (citing Cleburne Living Ctr., 473 U.S. at 439, 446). Accordingly, defendants' COVID-19 related policies need only meet rational basis review. See Lupert, 761 F.3d at 1328. As the district court in Gordon v. State Bar of California, 2020 WL 5816580, at *7 (N.D. Cal. Sept. 30, 2020), recently determined, the State Bar's remote testing policy does not facially discriminate against disabled individuals. Further, the State Bar's policy does not disproportionately burden disabled test takers. As the court explained, most in-person test takers for the October 2020 Bar Exam are not disabled and of the "657 test takers with disability-related accommodations, the State Bar approved 462 (or 70 percent) for remote testing." Id. Finally, the court determined that remote-testing conditions for some test takers do not deny disabled test takers with equal

and meaningful access to the Bar Exam. Rather, the State Bar's testing conditions and protocols apply to all test takers and do not violate the ADA. Id. at *7–8. This reasoning is persuasive and demonstrates why plaintiff in this case fails to state an Equal Protection claim (much less a Title II claim) for the same conduct.

Finally, plaintiff's reliance on Bartlett v. New York State Board of Law Examiners, 156 F.3d at 331, is misplaced for several reasons. First, the opinion is out-of-circuit and was vacated by the Supreme Court, though on other grounds. See N.Y. State Bd. of Law Examiners v. Bartlett, 527 U.S. 1031 (1999). Second, the opinion predates both Lane and Georgia and does not incorporate the case-by-case analysis required by those controlling opinions. Indeed, the district court in that case determined that the ADA abrogated state sovereign immunity based solely on title 42 U.S.C. § 12202 and did not determine whether Congress validly abrogated state sovereign immunity with regard to the specific claim at issue. See Bartlett v. N.Y. State Bd. of Law Examiners, 970 F. Supp. 1094, 1131 (S.D.N.Y. 1997). Third, while the Second Circuit affirmed a compensatory damage award for violation of Title II, it relied on Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 74 (1992), for the proposition that Title VI and the Rehabilitation Act supported an award of monetary damages. Bartlett, 156 F.3d at 331. However, the court cited no case for the proposition that an intentional violation of the ADA, as opposed to Title VI and the Rehabilitation Act, supports monetary damages. See id. Without such controlling authority, Bartlett's reasoning is unpersuasive.

In sum, the FAC does not allege that defendants' misconduct violated the Fourteenth Amendment to the Constitution. Further, plaintiff has cited no authority demonstrating that, insofar as such misconduct violated only Title II, that Congress's purported abrogation of sovereign immunity is nevertheless valid. Without such binding authority, the court cannot find that Congress validly abrogated sovereign immunity. Therefore, defendants are immune from suit for damages under Title II of the ADA. Despite an opportunity to amend his complaint and after two motions for preliminary injunction, plaintiff has failed to identify further facts that would state a claim. Further

amendment would therefore be futile. For the foregoing reasons, defendants' motion to dismiss is GRANTED and plaintiff's first through seventh and fifteenth claims are DISMISSED WITH PREJUDICE.

3. Fifth through Seventh Claims: California Government Code

Plaintiff's fifth through seventh claims also allege that defendants acted with deliberate indifference in violation of California Government Code § 11135 et seq. and § 12944 et seq. FAC at 27. Defendants argue that the State Bar Act, Cal. Bus. & Prof. Code § 6001, exempts the State Bar from the requirements of Division 3 of Title 2 of the California Government Code, which includes the two statutes cited by plaintiff. Mtn. at 23. Plaintiff does not address this argument in his opposition.

California Business and Professions Code § 6001 states in relevant part:

> No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in Division 3 (commencing with Section 11000) . . . of Title 2 of the Government Code, shall be applicable to the State Bar, unless the Legislature expressly so declares.

Cal. Bus. & Prof. Code 6001. Both sections 11135 and 12944 are located in Division 3 of Title 2 of the Government Code and do not apply to defendants.[4] The court agrees with defendants; plaintiff cannot state a claim for violation of sections 11135 and 12944 of the Government Code against the State Bar.

For the foregoing reasons, defendants' motion to dismiss is GRANTED and plaintiff's fifth through seventh claims for violation of the California Government Code are DISMISSED WITH PREJUDICE.

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[4] Nor has the Legislature expressly declared these sections are applicable to the State Bar. By way of comparison, section 11135(a) explicitly states that "[n]otwithstanding Section 11000, this section applies to the California State University," Cal. Gov. Code § 11135(a), which in turn otherwise exempts the California State University from the definition of "state agency," § 11000(a). Because no similar language applies to the State Bar, the Legislature has not expressly declared the section to be applicable. Similarly, section 12944 provides no explicit application to the State Bar. See Cal. Gov. Code § 12944.

4. Eighth through Fourteenth Claims: California Unruh Act

Plaintiff's eighth through fourteenth claims are for violations of the Unruh Act, Cal. Civ. Code § 51(f). FAC at 27. Plaintiff alleges that each predicate violation of the ADA is also a violation of the Unruh Act. Id.

Defendants contend that plaintiff's Unruh Act claims fail because plaintiff has failed to plead compliance with the California Government Claims Act and the State Bar is not subject to claims attempting to incorporate alleged Title II ADA violations into the Unruh Act. Mtn. at 24. In response, plaintiff argues that he has meet the administrative notice requirements of the California Government Claims Act. Opp. at 20–22.

California Civil Code § 51(f) provides: "A violation of the right of any individual under the [ADA] shall also constitute a violation of this section." A brief review of the FAC confirms that plaintiff's Unruh Act claims are coextensive with his ADA claims. Because plaintiff fails to state a claim for violation of the ADA, it follows that he cannot state a claim for violation of section 51(f). Plaintiff's claim also fails because the Unruh Act only applies to "business establishments," Cal. Civ. Code § 51(b), and California courts have held that government entities are not "business establishments" and not subject to the Unruh Act, see, e.g., Harrison v. Rancho Mirage, 243 Cal. App. 4th 162, 175 (Ct. App. 2015).

Accordingly, defendants' motion to dismiss plaintiff's eighth through fourteenth claims for violation of the Unruh Act is GRANTED and the claims are DISMISSED WITH PREJUDICE.

5. Rehabilitation Act Claim

The introduction to the FAC references violations of the Rehabilitation Act, 29 U.S.C. § 794, and alleges that defendants are governmental agencies that benefit from federal funding. FAC at 1–2, 10. However, plaintiff does not plead a particular cause of action for violation of the Rehabilitation Act.

Nonetheless, defendants argue that plaintiff cannot state a claim for violation of the Rehabilitation Act because the State Bar does not in fact receive any federal funds.

Mtn. at 22 (citing Dkt. 34-1). Plaintiff contends that the State Bar benefits from federal funding in a variety of ways because it is an arm of the State. Opp. at 18. According to plaintiff, as long as the State of California receives federal funding, then any instrumentality of the State indirectly receives federal funding.

Section 504 of the Rehabilitation Act states that: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his 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). The term "program or activity" includes "a department, agency, special purpose district, or other instrumentality of a State." § 794(b)(1)(A). To state a § 504 claim, plaintiff must show that "(1) he is an individual with a disability; (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance." Updike v. Multnomah Cty., 870 F.3d 939, 949 (9th Cir. 2017) (citation omitted).

While plaintiff alleges defendants receive federal funding, defendants have controverted these allegations with a declaration and evidence that demonstrates that the State Bar does not receive federal financial assistance. See Dkt. 34-1. Plaintiff has not produced any evidence that might rebut defendants' declaration. Instead, he argues that because the State Bar is an instrumentality of the State of California and the State receives federal funds, the State Bar must also receive federal funds.

This contention is incorrect. A plain reading of section 504 demonstrates that Congress did not intend the Rehabilitation Act to apply to every instrumentality of a State. Congress defined "program or activity" with reference to individual departments, agencies, or other instrumentalities. See § 794(b)(1)(A). The Rehabilitation Act only applies to a subset of those individual agencies or instrumentalities that receive federal financial assistance. § 794(a). This implies there is a subset of agencies or instrumentalities that could demonstrate they do not receive federal funding.

The Ninth Circuit has also addressed this issue. "Congress limited the scope of § 504 to those who actually 'receive' federal financial assistance because it sought to impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds." U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986), superseded by statute on other grounds by Air Carrier Access Act of 1986, Pub. L. No. 99-435. "Consequently, while those who affirmatively choose to receive federal aid may be held liable under the [Rehabilitation Act], liability will 'not extend as far as those who benefit from it,' because application of § 504 to all who benefit economically from federal assistance would yield almost 'limitless coverage.'" Castle v. Eurofresh, Inc., 731 F.3d 901, 908–09 (9th Cir. 2013) (quoting Paralyzed Veterans, 477 U.S. at 607–08). In other words, plaintiff must demonstrate that the State Bar affirmatively and directly receives federal funds and cannot rely solely on the fact that the State Bar is an instrumentality of the State of California.

Defendants have established that the State Bar does not receive federal financial assistance and is therefore not subject to the Rehabilitation Act. Plaintiff has not rebutted this evidence. For the reasons stated, defendants' motion to dismiss any purported Rehabilitation Act claim is GRANTED and the claim is DISMISSED WITH PREJUDICE.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is GRANTED and plaintiff's First Amended Complaint is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: October 27, 2020

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BENJAMIN KOHN,

Plaintiff,

v.

STATE BAR OF CALIFORNIA, et al.,

Defendants.

Case No. 20-cv-04827-PJH

JUDGMENT

The issues having been duly heard and the court having granted defendants' motion to dismiss the first amended complaint with prejudice,

it is Ordered and Adjudged

that plaintiff take nothing, and that the action is dismissed with prejudice.

IT IS SO ORDERED.

Dated: October 27, 2020

/s/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON
United States District Judge

United States District Court
Northern District of California

FILED

DEC 21 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN KOHN,

Plaintiff-Appellant,

v.

STATE BAR OF CALIFORNIA; CALIFORNIA COMMITTEE OF BAR EXAMINERS, and Their Agents in Their Official Capacity,

Defendants-Appellees,

PEYMAN ROSHAN,

Intervenor-Pending.

No. 20-17316

D.C. No. 4:20-cv-04827-PJH
Northern District of California, Oakland

ORDER

Before: MURGUIA, Chief Judge, and RAWLINSON, IKUTA, OWENS, BRESS, FORREST, BUMATAY, SUNG, SANCHEZ, H.A. THOMAS and MENDOZA, Circuit Judges.

The Motion for Leave to Intervene and for Extension of Time to File a Motion for Rehearing, filed December 20, 2023, is DENIED.

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

PROOF OF SERVICE

I, Chantel L. Febus, do swear that on this date, March 5, 2024, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by delivery to a third-party commercial carrier for delivery within 3 calendar days and where able, have served a separate additional copy by electronic service. I have served the Supreme Court of the United States via Federal Express, priority overnight.

The names and addresses of those served are as follows:

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Rita Kathryn Himes
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Counsel for Respondents

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 5, 2024.

By: *__/s/ Chantel L. Febus__*

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