No. _____

In The

Supreme Court of the United States

CURTIS JASON WENDT-WEST,

Petitioner,

v.

STATE OF HAWAI'I DEPARTMENT OF EDUCATION; and KATHLEEN DIMINO, Complex Area Superintendent, in her official capacity only,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CURTIS JASON WENDT-WEST
P.O. Box 4305
Palm Springs, CA 92263
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Pro Se Petitioner

QUESTIONS PRESENTED

1. Whether the States, in private suits involving Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., retain their Eleventh Amendment sovereign immunity in a federal court of another State or whether that immunity, in such cases, is congressionally abrogated "by appropriate legislation" through the enforcement powers of the Fourteenth Amendment.

2. Whether the lower courts, before dismissing Mr. Wendt-West, properly considered this Court's 1976 holding in *Fitzpatrick v. Bitzer* which affirmed the congressional abrogation of State sovereign immunity in private suits involving Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

3. Whether Mr. Wendt-West, a pro se litigant, should have been dismissed without prejudice, instead of with prejudice, and whether he should have been allowed an opportunity to amend his complaint to correct defective allegations of personal jurisdiction in the district court or on appeal after filing his motion seeking leave of court to amend pursuant to 28 U.S.C. § 1653.

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. Curtis Jason Wendt-West, Plaintiff and Petitioner;
2. State of Hawai'i Department of Education, Defendant and Respondent;
3. Kathleen Dimino, Complex Area Superintendent, in her official capacity only, Defendant and Respondent.

In a district court in California, Wendt-West pursued claims of unlawful discrimination and retaliation primarily under Title VII of the Civil Rights Act of 1964, as amended, but also Title IX of the Education Amendments Act of 1972, as amended, and other federal laws. The sole issues in this Court are for the claims against State of Hawai'i Department of Education and Kathleen Dimino, Complex Area Superintendent, in her official capacity only, involving the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, as amended.

RELATED PROCEEDINGS

Curtis Wendt-West v. State of Hawai'i Department of Education; and Kathleen Dimino, Complex Area Superintendent, in her official capacity only, No. 5:21-cv-01336-JWH-SPx (C.D. Cal. 2021).

Curtis Wendt-West v. State of Hawai'i Department of Education; and Kathleen Dimino, Complex Area Superintendent, in her official capacity only, No. 22-55091 (9th Circuit 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Curtis Jason Wendt-West respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit was issued on January 27, 2023. App. 1. The Ninth Circuit affirmed the dismissal order of the United States District Court for the Central District of California issued on December 27, 2021, document number 39 in the District Court's docketed matter number 5:21-cv-01336-JWH-SPx (C.D. Cal. 2021). App. 3. The United States Court of Appeals for the Ninth Circuit Order on the timely Petition for Rehearing, Rehearing En Banc, and Motion Seeking Leave of Court to Amend Complaint Pursuant to 28 U.S. Code § 1653 was issued on May 12, 2023. App. 11.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion affirming the decision of the United States District Court for the Central District of California on January 27, 2023, App. 1, and denied the Petitioner's Petition for Rehearing and Rehearing En Banc on May 12, 2023. *Id*. 11. The jurisdiction of this

Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 and the jurisdictional considerations under 42 U.S.C. § 2000e-5(f)(3). Also important are definitions in 42 U.S. Code § 2000e. Above all, the case poses fundamentally important questions regarding the balance between individual rights and States' rights within the context of constitutional guarantees under the Fourteenth Amendment and the Eleventh Amendment of the United States Constitution. However, another relevant federal statute to consider with this case is 28 U.S.C. § 1653 with provisions for amending pleadings, in the trial or appellate courts, to show jurisdiction and to correct defective allegations of jurisdiction.

42 U.S.C. § 2000e-2(a) EMPLOYER PRACTICES It shall be an unlawful employment practice for an employer—

1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin, or

2) to limit, segregate, or classify his employees or applicants for employment in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5(f) CIVIL ACTION BY COMMISSION, ATTORNEY GENERAL, OR PERSON AGGRIEVED; PRECONDITIONS; PROCEDURE, APPOINTMENT OF ATTORNEY; PAYMENT OF FEES, COSTS, OR SECURITY; INTERVENTION; STAY OF FEDERAL PROCEEDINGS; ACTION FOR APPROPRIATE TEMPORARY OR PRELIMINARY RELIEF PENDING FINAL DISPOSITION OF CHARGE; JURISDICTION AND VENUE OF UNITED STATES COURTS; DESIGNATION OF JUDGE TO HEAR AND DETERMINE CASE; ASSIGNMENT OF CASE FOR HEARING; EXPEDITION OF CASE; APPOINTMENT OF MASTER

3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in

> which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

42 U.S.C. § 2000e For the purposes of this subchapter—

a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not

> include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Fourteenth Amendment of the United States Constitution, Section 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Eleventh Amendment of the United States Constitution 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.

28 U.S. Code § 1653 Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

INTRODUCTION

This Court previously held in the class action suit *Fitzpatrick v. Bitzer*, 427 U.S. 445, at 445-446 (1976) (hereinafter *Fitzpatrick*) that:

> The Eleventh Amendment does not bar a backpay award to petitioners in No. 75-251, since that Amendment and the principle of state sovereignty that it embodies are limited by the enforcement provisions of § 5 of the Fourteenth Amendment, which grants Congress authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. Congress, in determining what legislation is appropriate for enforcing the Fourteenth Amendment, may, as it has done in Title VII, provide for suits against States that are constitutionally impermissible in other contexts.

The decision below implicates that, nearly 50 years after the *Fitzpatrick* holding, the lower courts have submerged in murky waters the legislative intent of the United States Congress to protect civil rights and the

American People from employment discrimination by State employers. Under *Fitzpatrick*, the congressional abrogation of Eleventh Amendment sovereign immunity used to be well settled in federal jurisprudence. A legal sea change occurred in 2019 due to a holding from this Court that, while notable, was not reconciled with or directed at *Fitzpatrick*.

Without a doubt, the fallout to that 2019 decision had rippling side effects. In this case, the district court was confused enough to disregard congressional intent and long standing precedent as held in *Fitzpatrick*. Importantly, this Court's reasoning in *Fitzpatrick*, and the congressional abrogation of state sovereign immunity it affirmed, is in danger of being displaced and remade non-legislatively to the detriment of public employees in our great nation. Worse still, those without the means or privileges to assert their rights or bring a case before the courts with counsel are most at risk. Fittingly, this case shines the light on a pro se litigant who filed a civil rights complaint against his former State employer, but was dismissed jurisdictionally in federal court. Due to a sovereign immunity defense, he was further locked out of amending his complaint to correct defective and inartful allegations of jurisdiction after his case was closed by order of the District Court. *Fitzpatrick*, though argued, was left unaddressed.

Clarity in this area of the law, as a constitutional matter, is paramount for everyday Americans and employees of state agencies, or those who may seek to become employed by an arm of a State; and it's critical for our 50 States to know, understand, and explicitly

follow the law. This Court should do now what it has not done in a substantial way since *Fitzpatrick*: grant review and resolve ambiguity between the principles of State sovereign immunity and the limits set upon them by federal civil rights employment law and the Fourteenth Amendment of the U.S. Constitution. In doing so, it should reverse the district court dismissal order, and the affirmation by the Ninth Circuit, to hold more in line with *Fitzpatrick* that nonconsenting States can still be brought into the courts of another state if Congress acted appropriately to authorize abrogation of state sovereign immunity under the enforcement powers of the Fourteenth Amendment to broadly guarantee civil rights protections. Accordingly, and in the interests of justice, this Court should order that Petitioner Wendt-West finally be afforded and permitted an opportunity to amend his complaint to correct defective allegations of personal jurisdiction.

STATEMENT OF THE CASE

The Ninth Circuit Court of Appeals erroneously affirmed dismissal of Petitioner Curtis Wendt-West's complaint after refusing to recognize that this Court decided long ago in *Fitzpatrick* that the States' Eleventh Amendment sovereign immunity is properly abrogated by congressional authority under the Fourteenth Amendment; and specifically in regards to unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"). This Court must grant the writ of

certiorari to correct the error of the Ninth Circuit, as well as that of the district court, and reconfirm the long standing Title VII principle, as put forth in *Fitzpatrick v. Bitzer*, 427 U.S. 445, at 456 (1976), that:

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections, by their own terms, embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Fundamental questions of sovereign immunity have been answered by this Court in decades past, and again in recent years. Holdings from the newer cases bringing the issue have provided insights into how the law should be followed. For instance, this Court held in 2019 that "States retain their sovereign immunity from private suits brought in courts of other States." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (hereinafter *Hyatt III*). Sure, not every sovereign immunity case has asked this Court to consider the principles of congressional abrogation under Section 5 of the Fourteenth Amendment, and *Hyatt III* didn't, but Petitioner Wendt-West's Title VII complaint does with *Fitzpatrick*.

In his case, the *Hyatt III* decision muddled the district court and the Ninth Circuit, which both became unsure of whether *Fitzpatrick* still applied or not. Indeed, the lower courts chose not to address the congressional abrogation of sovereign immunity under Title VII as argued by Wendt-West in his opposition to the dismissal motion and in his opening brief on appeal. In its decision, the district court stuck entirely to *Hyatt III* without considering *Fitzpatrick* and it directed the clerk to close his complaint, presumably with prejudice, holding that Wendt-West lacked personal jurisdiction and that defendants had sovereign immunity in California. In juxtaposition, the Ninth Circuit was silent on the matter of congressional abrogation under the Fourteenth Amendment and only focused on the insufficient allegations of jurisdiction in the pro se complaint.

Surprisingly, this Court spoke to the ongoing validity of *Fitzpatrick* last June through the 2022 case of *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455 (2022) (hereinafter *Torres*) affirming that:

> While courts generally may not hear private suits against nonconsenting States, see *Blatchford v. Native Village of Noatak*, 501 U. S. 775, 779, the States remain subject to suit in certain circumstances. States may consent to suit, see *Sossamon v. Texas*, 563 U. S. 277, 284; Congress may abrogate States' immunity under the Fourteenth Amendment, see *Fitzpatrick v. Bitzer*, 427 U. S. 445, 456.

Incidentally, this Court's decision in *Torres*, though coming after Petitioner Wendt-West filed his appeal in the Ninth Circuit, has indirectly given a response to the Title VII question he proffers. That intervening response seems to be, yes, *Fitzpatrick* still stands and nonconsenting States can face private suits in federal courts; but only in certain circumstances, such as if Congress abrogated States' immunity under the Fourteenth Amendment. Wendt-West argued as much in the lower courts and he believes the district and Ninth Circuit should have duly analyzed *Fitzpatrick*, considered it alongside *Hyatt III*, and responded fully to the issue.

Also at issue in this case is whether Wendt-West, as a pro se litigant, should have been able to amend his complaint to correct jurisdictional deficiencies in the district court prior to dismissal with prejudice; or on appeal after he filed a motion seeking leave of court pursuant to 28 U.S.C. § 1653. In the proposed amended complaint he included with his motion to the Ninth Circuit, and considering his case was dismissed in the pleading stage due, in part, to jurisdiction, Wendt-West attempted to show that he could cure the defective allegations of California jurisdiction sufficiently enough to save his complaint. With his motion and proposed amended complaint he hoped to overcome the deficiency that was his pro se pleading and to properly show allegations that his work at home in California was continuous and systematic for roughly one year, that it was pre approved and repeatedly consented to by the Respondents, and that California jurisdiction

and venue were both appropriate under 42 U.S.C. § 2000e5(f)(3) as the ongoing retaliation and constructive discharge was committed in California where he lived and worked.[1] Notably, his motion was denied by the Ninth Circuit with no words of explanation. App. 11-12.

Despite the fact he was not granted an opportunity to amend his complaint to correct defective allegations of jurisdiction in the district court or on appeal, and because *Hyatt III* is damming up his suit, overall, he brings claims for sex discrimination, retaliation, and constructive discharge. He asserts the unlawful employment actions were committed in California, were in violation of Title VII protections, and should be actionable due to the congressional abrogation of sovereign immunity and *Fitzpatrick*. He prays that this Honorable Court will review the decisions of the district court and the Ninth Circuit and, as warranted, correct errors to provide clarity for his sake, the sake of any other American who files a discrimination complaint federally protected under Title VII by the Fourteenth Amendment, and for all pro se litigants nationwide who have, will, or may blow the David and Goliath of whistles and file a lawsuit in district court alleging a State employer violated their civil rights.

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[1] 28 U.S.C. § 1653 Motion to Amend and Proposed Amended Complaint, *Curtis Wendt-West v. EDU-HI, et al.*, (9th Cir. 2023) (No. 22-55091).

A. Factual Background

Petitioner Wendt-West is a married gay man who was employed as a school counselor for his former employer, Respondents State of Hawai'i Department of Education ("Hawai'i State DOE"), and Kathleen Dimino, Complex Area Superintendent ("CAS Dimino"). App. 5. He first began working for the Hawai'i State DOE on July 31, 2017 and did so as a "10-month non-tenured employee on a limited term agreement." *Id*. at 5. In the district court, he inartfully alleged what he reasonably believed to be a hostile and discriminatory work environment dating back to October 17, 2019 when he first heard about the spreading of a false sexual rumor accusing him of "having an affair with a female colleague." *Id*. at 5-6. He further alleged that the Respondents "did not recognize" his employment separation notice on January 26, 2020 and continued his employment after he moved out of Hawaii. *Id*. at 5.

In his pro se complaint at the district court, Wendt-West alleged that his husband also worked at 'Iao Intermediate and on October 17, 2019 overheard their four supervisors laughingly spreading a false sexual rumor suggesting that "maybe Curtis is having an affair" with a female colleague. Verified Complaint of Plaintiff at 18:9-21:12, *Curtis Wendt- West v. HI-DOE, et al.*, (C.D. Cal. 2021) (No. 5:21-cv-01336-JWH-SPx). He asserted that on that "same night" he first opposed the discrimination "over email" to the school Principal. *Id*. at 21:13-21:19. He also alleged that by the "following morning" he had opposed the discrimination to his

"three Vice Principals" in person, "his union" through a school based representative, the "Hawai'i Civil Rights Commission" by fax, and by email to his "boss's supervisor" CAS Dimino. *Id*. at 21:20-23:4. Furthermore, in an "informal grievance meeting" with the school Principal later that day, Wendt-West again opposed the discrimination and gave notice that he intended to file a union grievance, that he had already initiated the pre-filing of a discrimination complaint through the Hawai'i Civil Rights Commission, and that he would go through with filing those formal complaints. *Id*. at 23:5-24:4.

His complaint further alleged that, on October 24, 2019, less than one week after the Hawai'i State DOE learned he opposed discrimination and promised to file formal discrimination complaints against his four supervisors for what he reasonably believed was sex based discrimination, CAS Dimino falsely "accused" Wendt-West of creating a "hostile working environment" as a pretext for terminating his employment; and keeping him under "investigation" for as long as possible to do so. *Id*. at 30:17-31:9, 42:15-42:27, and 147:12-148:15. He asserted that he was removed from his position at the school, "forced onto administrative leave and placed under investigation;" and that the Hawai'i State DOE refused, even during an EEOC investigation looking into his discrimination complaint, to "provide full specifics." *Id*. at 31:16-31:25 and 144:23-145:25. Though inartfully, his complaint alleged that CAS Dimino unilaterally extended his contract and paid administrative leave to keep him

hostage in "involuntary" employment until he quit, could be fired, or otherwise let go. *Id*. at 5:15-7:28. Mr. Wendt-West vehemently denies that he engaged in any misconduct and the Hawai'i State DOE's representation to the contrary is unjust enrichment at his expense and pretext for discrimination against him on the basis of his sexual orientation and for his protected activities opposing that discrimination.

He maintains that, after April 2020, CAS Dimino unilaterally extended his contract an additional year despite learning that he was living and would be working from his "new address back on the mainland" in California; and that, because there was "no talk of becoming tenured" she retaliated further by extending his employment's probationary period for one year. *Id*. at 123:13-125:25 and 134:3-137:12. Though inartful, he alleged in his complaint that these extreme adverse employment actions were taken against him by the Respondents because of his sexual orientation and his opposition to what he reasonably believed was unlawful discrimination, but also to chill his voice and to deter and dissuade others "from engaging in protected activity under Title VII" to oppose discrimination or file formal complaints of discrimination. *Id*. at 169:26-170:18. His complaint alleged the Hawai'i State DOE and CAS Dimino refused to accept his notice of unfair discharge and breach of contract on January 26, 2020 and kept him employed on paid administrative leave indefinitely; that is, until April 2021 after he lived and worked in California for roughly one year and when he changed the reason to constructive discharge because

"resignation seemed to be the only way" he could separate from the hostile working environment "without being further held in involuntary" employment. *Id*. at 171:22-172:12.

Significantly, and disturbingly so, within the iceberg of discrimination that is his complaint are allegations of titanic-sinking proportions. For instance, there is an allegation that, after Wendt-West and his husband opposed the discrimination and tried to make complaints as part of the early reporting process, he documented what he reasonably believed to be public corruption. Specifically, that discrimination complaints were minimized, rewritten, and "resynthesized" by the Hawai'i State DOE. *Id*. at 56:3-57:4 and 87:19-90:7. He alleged complaints were not heard in a "fair or impartial" manner and the State civil rights investigator and decision maker had a known dual-relationship. *Id*. at 77:1-79:5 and 100:8-100:18. He asserted that some complaints, such as "retaliation from CAS Dimino," were simply "not accepted" by the agencies of the State of Hawai'i while others were abruptly and unfairly ended during the "intake process." *Id*. at 86:12-86:17, 83:6-83:18, and 122:3-122:19. Mr. Wendt-West's complaint also alleged that on January 24, 2020 he recorded whispering on his computer during a pre-hearing conference which "involved collusion between state agencies." *Id*. at 198:8-198:24.

Consequently, he alleged that he provided notice to the Hawai'i State DOE and CAS Dimino on January 26, 2020 that, due to breach of contract, unfair discharge, and because he no longer believed the State of

Hawai'i would be fair or impartial in a complaint against the Hawai'i State DOE, he considered himself "Former 'Iao School Counselor." *Id*. at 101:16-105:24. He asserts that multiple State agencies in Hawai'i participated in this malicious and voice-chilling cover up, in a kafkaesque like manner, that conspired to deprive him of his civil rights, to shield the Hawai'i State DOE from liability, and to "deter" and dissuade others from protected activities. *Id*. at 169:26-170:18. Mr. Wendt-West still maintains that he has physical evidence showing that he caught one elected official, "Sylvia J. Luke," the former chairwoman of the Hawai'i House Finance Committee and current lieutenant governor of Hawai'i, interloping on a private phone call he had with a law firm from Honolulu as a "third, unwelcome party." *Id.* at 115:22-118:7.

Nevertheless, as an inartful pro se litigant he unsuccessfully alleged in the lower court proceedings that his employment, known by the Respondents to be in the State of California and at his home worksite from April 2020 to April 2021, ended in constructive discharge after he had been suspended on paid administrative leave and put under investigation, indefinitely, in retaliation for his protected activities to oppose and report discrimination directed at him by all four of his supervisors. His attempt was insufficient and his complaint was dismissed by the district court due to lack of personal jurisdiction in California; and it further closed the door on the case asserting that the Hawai'i State DOE had sovereign immunity in California.

B. Procedural Background

Mr. Wendt-West filed a pro se complaint of discrimination with the Los Angeles EEOC District Office "in August 2020." App. 6. The EEOC provided him his right to sue letter on May 21, 2021. *Id*. at 6.

He first filed this lawsuit pro se on August 9, 2021, alleging a variety of claims that the Respondents discriminated and retaliated against him because of his sex and sexual orientation in violation of Title VII and other federal laws. *Id*. at 4-6. In order to correct a technical deficiency on the pleading pages he filed a second complaint two days later on August 11, 2021. *Id*. at 4.

The district court, on December 27, 2021 granted the motion by Defendants and dismissed his complaint and all its claims concluding "that it lacks personal jurisdiction over the Defendants" and holding that "the underlying controversy, as alleged, did not take place in California, and it is not subject to California's regulation." *Id.* at 7-10. Although the district court did not explicitly say that Wendt-West was dismissed with prejudice, it also did not clearly state that the dismissal was without prejudice, and it did not provide him an opportunity to amend for corrections before directing the clerk to close the case in full. *Id*. at 3-10. Moreover, the district court held that "this Court may not exercise jurisdiction over a sovereign state government without that government's consent," *Id*. at 8-9.

Wendt-West timely appealed. Among the questions he asked the Ninth Circuit to review in his Opening Brief was whether the district court failed to

consider in its analysis the congressional abrogation of sovereign immunity under Title VII and whether he should have been afforded an opportunity to amend his pleadings prior to dismissal with prejudice to be more specific to Title VII. The Ninth Circuit affirmed on January 27, 2023 holding that:

> The district court properly dismissed Wendt-West's action for lack of personal jurisdiction because Wendt-West failed to allege facts sufficient to establish that defendants had such continuous and systematic contacts with California to establish general personal jurisdiction, or sufficient claim-related contacts with California to provide the court with specific personal jurisdiction over defendants.

Id. 1-2. Furthermore, the Ninth Circuit stated: "We do not consider matters not specifically and distinctly raised and argued in the opening brief or allegations raised for the first time on appeal." *Id*. at 2. Wendt-West filed a timely Petition for Rehearing and Rehearing En Banc. At the same time, he filed a Motion Seeking Leave of Court to Amend the Complaint Pursuant to 28 U.S.C. § 1653, which also included his Proposed Amended Complaint. He later amended the motion, as well. On May 12, 2023 the Ninth Circuit issued its order denying the Petition for Panel Rehearing and Rehearing En Banc; and also the Amended Motion Seeking Leave of Court to Amend the Complaint Pursuant to 28 U.S.C. § 1653. *Id*. at 11.

C. The District Court's Erroneous Decision Dismissing Mr. Wendt-West's Complaint

At the district court, this case squarely presents the question whether *Fitzpatrick* was correctly applied, or even applied at all, in a complaint the court acknowledged was for claims involving "Title VII." App. 4. In their sovereign immunity defense, the Respondents argued that *Hyatt III* precluded Petitioner Wendt-West from moving forward with his complaint in California on the grounds that the Hawai'i State DOE is an arm of the State with sovereign immunity and it does not give "consent to be sued outside of Hawai'i." App. 8-10. Wendt-West argued in his Response in Opposition to the dismissal motion that "Congress can abrogate state sovereign immunity in connection to its power to enforce the Fourteenth Amendment," and that he "believes that applies to Title VII and Title IX as federal laws designed to protect against discrimination in employment and in schools." Response in Opposition by Plaintiff at 35:22-36-5, *Curtis Wendt-West v. HI-DOE, et al.*, (C.D. Cal. 2021) (No. 5:21-cv-01336-JWH-SPx). Additionally, he argued that "California's Long Arm Statute is Enforceable Against A Sister-State in Federal Court Under Title VII And Title IX Claims Due to Congressional Abrogation of State Sovereign Immunity." *Id.* at 31:5-32:7.

Despite Wendt-West specifically raising *Fitzpatrick* and arguing for congressional abrogation in Title VII cases under the enforcement powers of the Fourteenth Amendment, the district court dismissed his complaint and all his claims due to his insufficient

jurisdictional pleading and it further closed the case citing *Hyatt* III, sovereign immunity, and lack of consent by a sister-state. App. 7-10. At no place in the district court order is there a mention of *Fitzpatrick* or the principles of congressional abrogation in Title VII cases. Nowhere in the order is *Fitzpatrick* reconciled with *Hyatt III*. Without a doubt, it is entirely unclear if this Court's holding in *Fitzpatrick* was examined or if congressional intent was taken into account.

That said, the district court also seemed to ignore other well established language from this Court used by Wendt-West in his Response in Opposition to argue for personal jurisdiction in California, specifically the "relates to" standard. Response in Opposition by Plaintiff at 32:8-34:24 and 36:6-37:12, *Curtis Wendt-West v. HI-DOE, et al.*, (C.D. Cal. 2021) (No. 5:21-cv-01336-JWH-SPx); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174 (1985) (hereinafter *Burger King*). The district court dismissal order states "that the underlying controversy, as alleged, did not take place in California, and it is not subject to California's regulation." App. 9. The language used by the district court strongly suggests its analysis was restricted to the "arises out of" standard and that it did not consider how the allegations about the discriminatory extension of the employment contract by the out-of-State employer was alleged to relate to California. Had the district court considered the "relates to" standard, it very well could have found reason to provide Wendt-West an opportunity to amend his complaint to be more specific to Title VII claims and jurisdiction.

Ultimately, had Title VII and *Fitzpatrick* been properly taken into consideration alongside *Hyatt III*, and had the district court not ignored the "relates to" standard for personal jurisdiction in *Burger King*, Wendt-West believes his case would not have been dismissed and further closed with prejudice. Indeed, a simple dismissal without prejudice would have been enough to allow him to amend his complaint to correct curable jurisdictional deficiencies; and it would have been a reasonable outcome to the dismissal motion given the pro se complaint was still in the pleading stage. Overall, and given that the district court did not articulate how *Fitzpatrick* was reconciled with *Hyatt III* or why it didn't apply, the district court should have been more lenient with Mr. Wendt-West instead of unduly burdening him, a pro se litigant, with outright dismissal.

D. The Ninth Circuit's Erroneous Refusal to Address the Questions Presented on Appeal

The same question of whether *Fitzpatrick* was appropriately considered, or considered at all, applies here as well. On appeal, the Ninth Circuit seemed to only answer one question asked by Wendt-West in regards to the sufficiency of his jurisdictional pleadings. App. 1-2. In his Opening Brief to the Ninth Circuit, Wendt-West asked other relevant questions, such as:

> Did the district court err when, in determining that it may not exercise jurisdiction over a sovereign state government without that government's consent and that California's

> long-arm statute therefore cannot authorize jurisdiction over a sister-state without that state's consent, it failed to consider Congressional Abrogation of State Sovereign Immunity under Federal Title VII and Title IX laws and the 14th Amendment?
>
> Did the district court abuse its discretion when, with no legal reasoning or consideration of the relevant factors, 1) it granted the motion to dismiss Mr. Wendt-West's claims under the banner of sovereign immunity without first providing Mr. Wendt-West an opportunity to amend his pleading, so as to be specific to only claims for relief under Federal Title VII and Title IX laws, and 2) was the dismissal undue considering Mr. Wendt-West made clear in his opposition that any claim for relief originally sought outside of Title VII or Title IX should instead be construed as retaliation under Title VII and Title IX?
>
> How far does the 14th Amendment go, in consideration with Title VII and Title IX, in protecting the rights of everyday Americans from the tyrannical overreach of state employers, like the Hawaii Department of Education, that retaliate against former employees knowing they reside in other states?[2]

Even the Respondents presented the issue to the Ninth Circuit for clarification and asked: "Did the District Court err by concluding that California's long-arm

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[2] Opening Br. of Plaintiff-Appellant at 7-8, *Curtis Wendt-West v. EDU-HI, et al.*, (9th Cir. 2023) (No. 22-55091).

statute cannot authorize a federal district court to exercise personal jurisdiction over a sovereign state government (department) defendant in a suit filed by a private individual in California without the defendant (sister-state's) consent?"[3] Notably, answers to the exceptionally important questions presented were not provided by the Ninth Circuit to the parties despite Wendt-West continuing his arguments against *Hyatt III* from the district court. To be sure, his appeal cited congressional abrogation affirmed in *Fitzpatrick* and further stated:

> Indeed, in this day and age there shouldn't have even been a question as to whether Congress can or did abrogate state sovereign immunity under Title VII or Title IX in connection to its power to enforce the Fourteenth Amendment. This is a well established matter that Congress has the power, authority, and duty to ensure states are not overstepping the constitutional rights of individual citizens and former employees.[4]

Wendt-West even sought to clarify a technical error in his complaint that jurisdiction, and not just venue, was brought under 42 U.S.C. § 2000e–5(f)(3). *Id*. at 5.

Pro se mistakes and inartful pleadings aside, Mr. Wendt-West believes he still deserved an answer to the

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[3] Defendant-Appellee's Answering Br. at 2, *Curtis Wendt-West v. EDU-HI, et al*., (9th Cir. 2023) (No. 22-55091) (May 18, 2022).

[4] Opening Br. of Plaintiff-Appellant at 47, *Curtis Wendt-West v. EDU-HI, et al.*, (9th Cir. 2023) (No. 22-55091).

questions that he distinctly raised and argued in the district court and to the Ninth Circuit. Confusion around *Hyatt III* and sovereign immunity or not, any answer would have been better than no answer at all. With no information it became even less clear what the law was or should be. Unquestionably, the Ninth Circuit's refusal to chime in on the matter as an authoritative voice was a missed opportunity to drive debate and legal jurisprudence on this issue forward, one way or another. Certainly, the Ninth Circuit could have sent the question back to the district court to make a firmer, more thoughtful holding on whether *Fitzpatrick* applied or not. It probably should have if it was unsure of how to answer considering an arm of one of the 50 States was also asking.

E. The Erroneous Refusal of the Lower Courts to Grant the Pro Se Litigant an Opportunity to Amend the Complaint to Correct Defective Allegations of Jurisdiction

Beyond the issue of congressional abrogation of state sovereign immunity under the Fourteenth Amendment is the common sense proposition that pro se litigants should be held to less stringent pleading standards and be afforded the opportunity to amend jurisdictional pleadings prior to dismissal with prejudice; and to be given a full and clear reason if the court does not grant leave to do so. It's indisputable that, as a pro se litigant, Petitioner Wendt-West is unskilled in legal practice and the complex art of litigating multistate jurisdiction in an employment discrimination

suit. Indeed, as an inartful pro se litigant he insufficiently alleged California jurisdiction.

Overall, his unskilled pleading could not convince the lower courts that he was forced onto paid administrative leave, indefinitely, even in California; and in retaliation for his protected activities to oppose and report discrimination directed at him by all four of his supervisors on October 17, 2019. He failed to adequately show that his employment was known by the Respondents to be in California and at his home worksite after April 2020. Undeniably, he struggled to properly assert his April 2021 "constructive discharge" in California and how it directly related to his retaliatory suspension on paid administrative leave after October 24, 2019.[5]

The worst mistake, perhaps, was making a technical error in his pleadings and arguing 42 U.S.C. § 2000e-5(f)(3) only for venue and leaving out jurisdiction to which it also applies; and then not catching it until appeal.[6] These inartful pleading deficiencies were fatal to his complaint, but he contends they were curable and that he should have been allowed to amend his complaint either in the district court or on appeal. Especially so after he filed a motion pursuant to 28 U.S.C.

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[5] Verified Complaint of Plaintiff at 171:5-172:21, *Curtis Wendt- West v. HI-DOE, et al.*, (C.D. Cal. 2021) (No. 5:21-cv-01336-JWH-SPx).

[6] Opening Br. of Plaintiff-Appellant at 5, *Curtis Wendt-West v. EDU-HI, et al.*, (9th Cir. 2023) (No. 22-55091).

§ 1653 while still on appeal.[7] Even more so when considering the affirming opinion on the dismissal order by the Ninth Circuit that zoned in on his insufficient allegations of jurisdiction and the left out the sovereign immunity piece that got his complaint closed with prejudice. App. 1-2.

Admittedly, the complaint was inartfully written and missing jurisdictional pieces. "Although it's preferable for a plaintiff to identify the statute authorizing jurisdiction in its complaint, a plaintiff alternatively may reference the applicable statute in its response to a defendant's motion to dismiss." *Johansson Corporation v. Bowness Const. Co.*, No. CIV. CCB-03-1750 (D. Md. Jan. 22, 2004). Wendt-West did just that, though. He filled the gaps with his Response in Opposition, which included not only mention of 42 U.S.C. § 2000e-5(f)(3), but also *Fitzpatrick*, the Fourteenth Amendment, and the congressional abrogation of sovereign immunity.

The district court and the Ninth Circuit overlooked those critical factors as well as common knowledge and standard procedures that, for pro se complaints, leave to amend should be granted "if it appears at all possible that the plaintiff can correct the defect."[8] Glaringly, this legal astigmatism persisted up

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[7] 28 U.S.C. § 1653 Motion to Amend and Proposed Amended Complaint, *Curtis Wendt-West v. EDU-HI, et al.*, (9th Cir. 2023) (No. 22-55091).

[8] *Lopez v. Smith*, 203 F.3d 1122, Majority Opinion at 1656, (9th Cir. 2000); *See Noll v. Carlson*, 809 F.2d 1446 (9th Cir. 1987).

to and after the denial of his Petition for Rehearing, which had more artfully stated his ongoing arguments regarding the "liberal construction of pro se pleadings."[9] The Ninth Circuit even overlooked that the United States Department of Justice has advocated for jurisdictionally dismissed private parties and their rights under U.S.C. § 1653.[10] All in all, the Ninth Circuit denied the motion filed pursuant to U.S.C. § 1653 and did not explain its reasoning, despite the liberal amendment rule permitting a party who has not sufficiently alleged jurisdiction to amend "even as late as on appeal."[11] As his case shows, clarity on pro se rules and procedures is necessary in order to preserve access to the judicial system for litigants who must navigate the judicial system on their own either for reasons of lack of financial resources to pay for legal representation or an inability to find counsel acting pro bono.

[9] Petition for Rehearing and Rehearing En Banc at 10-11, *Curtis Wendt-West v. EDU-HI, et al.*, (9th Cir. 2023) (No. 22-55091).

[10] Supplemental Br. for the United States as Amicus Curiae at 12-15, *Stevens v. Premier Cruises, Inc.*, No. 98-5913, 215 F.3d 1237 (Dec. 1999).

[11] *Dist. of Columbia v. Transamerica Ins. Co.*, 797 F.2d 1041, 1044 (D.C. Cir. 1986).

REASONS FOR GRANTING THE PETITION

I. This Case is an Ideal Vehicle to Resolve the Recurring and Nationally Important Questions Presented Which Have Wide Application Under Title VII

Nationally important questions about the extent of sovereign immunity are routinely brought before the courts and a number of cases behind them have been accepted by this Court in recent years. This is one such case and the reason for review is the law. Title VII and 42 U.S.C. § 2000e-5(f)(3), as written by Congress, are clear that actions may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed. Moreover, 42 U.S.C. § 2000e was amended in 1972 to include governments, governmental agencies, and political subdivisions within the definition of "person." Clearly, Congress intended that federal Title VII protections be extended to cover unlawful discrimination from State employers and it did not specify that, in cases against the States, jurisdiction was limited to the State where the employer was located.

Outside of Congress, this Court also affirmed these Title VII principles in *Fitzpatrick* holding that the Eleventh Amendment sovereign immunity of the States could be abrogated by Congress and the Fourteenth Amendment. Yes, *Fitzpatrick* was not literally about the relationship between the Fourteenth and Eleventh Amendments, but the language in the holding makes no distinction as to jurisdictional limits in Title VII cases against the State. Until 2019, and *Hyatt*

III, it's presumed that Title VII cases filed against State employers across State lines would not have had to prove their case against a wall of sovereign immunity, but rather personal jurisdiction and a showing that the actions arose in or were related to the State in which suit was filed. While still difficult, this approach was achievable for many litigants and allowed for cases to proceed on the merits.

Substantially, *Hyatt III* upset that delicate balance and literally changed the legal arena between the rights of States and private individuals; whether intentional or not. It did so, however, outside of the employment discrimination context and without consideration of Title VII or Section 5 of the Fourteenth Amendment. Legally speaking, the holding in *Hyatt III* created a hole; which in Hawai'i could be called a puka. Significantly, this gaping puka threatens the constitutional rights of every American protected from State employers by Title VII, especially those working remotely in another State. Indeed, Mr. Wendt-West's case illustrates this danger of working for a State employer, out-of-state; and he is not the only remote worker to have his case dismissed in the pleading stage due to sovereign immunity and because *Hyatt III* stepped over *Fitzpatrick*.[12] Left unchecked, employment discrimination by State employers will run rampant across the nation targeting sex, age, race, color, national origin, disability, genetic information, and religion. To avoid that, this Court must clarify the law and

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[12] *Milsap v. Kan. Dep't of Health & Env't*, No. 22-4050-JWB (D. Kan. Apr. 19, 2023).

finally reconcile the Eleventh Amendment with the Fourteenth Amendment in Title VII cases; and this case presents the ideal vehicle to do so given everything stated so far. Whether *Hyatt III* reigns, or *Fitzpatrick* stands, the public must know.

II. The Errors in this Case are Reversible

Mr. Wendt-West's case was dismissed jurisdictionally because of inartful pleading deficiencies that are curable. At the district court and in the Ninth Circuit, critical arguments were not addressed suggesting they were overlooked and not properly taken into account. This would be less apparent had the lower courts simply tried to explain their reasoning as to why congressional abrogation of sovereign immunity was inapplicable or if they had responded to this Court's holding in *Fitzpatrick*. Wendt-West does not dispute that he is an inartful, pro se litigant and has pleaded as such since filing suit. Insufficiently pleaded allegations of jurisdiction aside, it was the sovereign immunity defense that brought down his complaint. Had this been a case against a private employer, Mr. Wendt-West might have still been dismissed for pleading deficiencies, but as a pro se litigant in the Ninth Circuit he would have been afforded at least one opportunity to address the issue if it appeared "at all possible" that he could correct the defect.[13]

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[13] *Lopez v. Smith*, 203 F.3d 1122, Majority Opinion at 1656, (9th Cir. 2000); *See Noll v. Carlson*, 809 F.2d 1446 (9th Cir. 1987).

Without question, Wendt-West believes he was unduly dismissed by the district court. He continues to find affirmation that "dismissal on sovereign immunity grounds . . . must be without prejudice."[14] He even found that the motion to dismiss was arbitrarily decided and should not have moved forward because counsel failed to engage in any Conference of Counsel before filing the Motion, as required by L.R. 7-3. As the district court stated in another case, "This Court expects and requires strict compliance with the Local Rules . . . Accordingly, pursuant to L.R. 7-4, the Court declines to consider the Motion. The Court admonishes counsel henceforth to comply strictly with all Local Rules, including L.R. 7-3."[15]

At any rate, it must be said that, without *Hyatt III* and dismissal with prejudice blocking the way, Wendt-West could have amended his complaint at the district court; and he would have in order to be more specific to the statute and the facts alleging California jurisdiction under Title VII. He would not have had to appeal the dismissal to the Ninth Circuit or file a motion to amend jurisdictional pleading deficiencies while on appeal pursuant to U.S.C. § 1653. Unfortunately, it all comes back down to *Hyatt III* and the questions of whether congressional abrogation of sovereign immunity applies in Mr. Wendt-West's Title VII case and

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[14] *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1, Logan Cnty., Okla. v. City of Guthrie*, 654 F.3d 1058, 1069 n.9 (10th Cir. 2011).

[15] *Romero v. Tex. Roadhouse, Inc.*, EDCV 21-01610-JWH (SPx) (C.D. Cal. Nov. 8, 2021).

whether the lower courts properly considered this Court's holding in *Fitzpatrick*. If it does apply, and it wasn't considered, then, put simply, his case should be sent back down with an order that he be permitted to amend his jurisdictional pleadings under either the Federal Rules of Civil Procedure or U.S.C. § 1653.

In this case, justice can be pulled from the deep. It's not too late. The error is reversible by this Court and the complaint can be saved. It should be saved. This civil rights case against a State employer deserves to move forward on the merits to be heard fully and fairly. For Americans across the nation, hard won constitutional rights are at risk of being lost and silently discarded. Obviously, *Fitzpatrick* and *Hyatt III* must be properly reconciled in order to ensure the guarantees of the Constitution. Accordingly, the Eleventh Amendment and the Fourteenth Amendment are due a day of reckoning and this Court must rise to that challenge.

III. The Undue Dismissal of Pro Se Litigants in Civil Rights Cases Against State Employers is Dangerous to the General Public and Goes Against Basic Principles of Fairness

Nearly one-third of all complaints filed in federal court are filed by pro se litigants. *See, e.g.*, U.S. Courts, *U.S. District Courts—Civil Pro Se and Non-Pro Se Filings, by District, During the 12- Month Period Ending*

September 30, 2017, at 1.[16] The predominant reason these litigants proceed pro se is their inability to afford counsel. *See, e.g.*, Hon. Jed S. Rakoff, *Learned Hand Medal Speech* (May 2, 2018).[17] The majority of pro se plaintiffs bring claims seeking protection of basic rights, including constitutional and civil rights claims. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 Notre Dame J.L. Ethics & Pub. Pol'y 475, at 479-81 (2002); David Rauma & Charles P. Sutelan, *Analysis of Pro Se Case Filings in Ten U.S. District Courts Yields New Information*, 9 FJC Directions 5, at 5 (1996). As district court judges themselves have recognized, "federal programs to provide civil counsel are underfunded and severely restricted," resulting in "a crisis in unmet legal needs which disproportionately harms racial minorities, women, and those living in poverty." Colum. L. Sch. Hum. Rts. Clinic, *Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases—Response to the Fourth Periodic Report of the United States to the United Nations Human Rights Committee* at 1, (Aug. 2013).[18]

This problem is compounded in cases against governmental entities, such as the States, who are emboldened by sovereign immunity after *Hyatt III*.

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[16] http://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2017.pdf.

[17] fingfx.thomsonreuters.com/gfx/breakingviews/1/863/1123/Hon.%20Jed%20S.%20Rakoff%20speech.pdf.

[18] https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1045&context=human_rights_institute.

Despite Title VII protections, State employers can now freely discriminate outside their own State in hiring and employment. "Widespread harm is not difficult to imagine given that States operate numerous public universities across state lines."[19] This danger cannot be understated.

"For example, Washington, D.C. alone hosts satellite campuses and educational and outreach programs of public universities from dozens of States;" and the University of Hawai'i at Manoa is listed among them.[20] It is not a matter of if something discriminatory will happen out-of-state, but when, and others will find themselves in serious jeopardy. All things considered, Americans should not be left powerless given Congressional intent, Title VII, and the Fourteenth Amendment. Pro se allegations, some which are potentially dangerous to the public, should not be unduly dismissed and left on the table without word or reasoning as to *Fitzpatrick*. Americans deserve better than corrupt State employers who discriminate, retaliate, and weaponize paid administrative leave against employees who advocate for themselves and others. Truly, we must have clarity on the fundamental question of law between the proverbial king who could do no wrong and the Congress that said otherwise. With respect to basic principles of fairness, notions of justice for all, and our national story regarding civil rights abuses by

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[19] Brief of Alabama and 18 other States as Amici Curiae at 20-21, *Troy Univ., et al., v Farmer, Petition for Cert.*, (No. 22-787) (March 23, 2023).

[20] *Id.* at 21.

the States, Mr. Wendt-West humbly asks this Court to answer the questions presented. He prays this Court will look to history and act within reason to honor congressional intent and ensure equitable access to the judicial system for pro se litigants in cases against the States.

CONCLUSION

If *Hyatt III* has overturned *Fitzpatrick* then the intent of Congress as expressed through Title VII since 1972 was scaled back and State sovereign immunity was expanded. All without Congress too. Yet, it seems obvious that sovereign immunity defeats justice. As Justice Miller put it in 1882, in a famous opinion on sovereign immunity:

> Looking at the question upon principle, . . . we think . . . the defense [of sovereign immunity] cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. . . . No man in this country is so high that he is above the law.[21]

[21] *United States v. Lee*, 106 U.S. 196, 218–21 (1882); *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Even before that, in the 1803 case of *Marbury v. Madison*, Chief Justice Marshall declared: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[22] Over 60 years later, injustices around slavery proved the need for legal remedies against the States and those needs were met by Congress with the Civil War Amendments, which included the Fourteenth Amendment.

More recently, in 2013, Justice Ruth Bader Ginsburg wrote: "The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States."[23] Humbly, it must be noted that the power of enforcement by appropriate legislation reflected that those who framed the Civil War Amendments did not want to leave fundamental rights to this Court which shocked the nation in 1857 when it held that Black people could never be citizens and had no rights.

Certainly, as everyday Americans, we rely on both Congress and the courts to expound these legacies. Congress makes the law and has a duty to enforce it, but "It is emphatically the province and duty of the

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[22] *Marbury v. Madison*, 5 U.S. (1 Cranch), at 163 (1803).

[23] *Shelby County v. Holder*, 570 U.S. 529 (2013) (Ginsburg, J., dissenting).

judicial department to say what the law is."[24] Yet, after *Hyatt III*, the law around Title VII and state sovereign immunity is unclear. *Fitzpatrick* and the congressional intent that Title VII represents still stand, but in the lower courts both are being made to walk the legal plank in silent judgment. As things are, working Americans are being put at dangerous risk of drowning in State endorsed discrimination and retaliation that could jeopardize their livelihood and ability to pursue life, liberty, and happiness in any of the States. If *Fitzpatrick* gets lost in an ocean of consideration with nary a word, as it did in Wendt-West's case, State employers will have obtained a license to freely intrude on each other's territory to harass, attack, and discriminate against employees living and working in other States, even retired employees who relocated and receive benefits in another State. This would open a Pandora's Box of interstate discrimination and retaliation on a national scale that we have not witnessed since the days of Dred Scott and Jim Crow. Simply put, that would be unjust and un-American.

Petitioner Wendt-West and every worker in this country who should be protected against unlawful discrimination and retaliation by governmental employers, for reasons such as sex and sexual orientation, race, color, or religion, and no matter what State they live or work in, urgently need this Court's answer to the question of whether Title VII congressionally abrogates the States' Eleventh Amendment sovereign

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[24] *Marbury v. Madison*, 5 U.S. (1 Cranch), at 177 (1803).

immunity under the enforcement powers of the Fourteenth Amendment. Absent intervention by this Court, the *Hyatt III* decision will continue working to undermine the carefully-crafted safeguards that this Court protected in *Fitzpatrick* decades ago. Truth be told, ninety-nine percent of Americans cannot go unemployed for years to fight for their rights without counsel. Most would buckle under the pressure Wendt-West has stood against. In this sense, justice delayed really is justice denied. How many others must be made to suffer until we fill this legal puka identified by Wendt-West? With utmost respect, this Court must truly determine whether and to what extent the States' Eleventh Amendment sovereign immunity is substantively limited by the Fourteenth Amendment and the history it represents in safeguarding the American People from abuses by State governments.

Respectfully submitted,

CURTIS JASON WENDT-WEST
P.O. Box 4305
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Phone: (808) 757-5901

Pro Se Petitioner

Dated: August 8, 2023

APPENDIX TABLE OF CONTENTS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURTIS JASON WENDT-WEST, Plaintiff-Appellant, v. STATE OF HAWAI'I, DEPARTMENT OF EDUCATION; and KATHLEEN DIMINO, Complex Area Superintendent, in her official capacity only, Defendants-Appellees.	No. 22-55091 D.C. No. 5:21-cv-01336-JWH-SP MEMORANDUM* (Filed Jan. 27, 2023)

Appeal from the United States District Court
for the Central District of California
John W. Holcomb, District Judge, Presiding

Submitted January 18, 2023**

Before: GRABER, PAEZ, and NGUYEN, Circuit Judges.

Curtis Jason Wendt-West appeals pro se from the district court's judgment dismissing for lack of personal jurisdiction his action alleging federal and state law employment claims. We have jurisdiction under 28

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(2). *LNS Enters. LLC v. Cont'l Motors, Inc.*, 22 F.4th 852, 857 (9th Cir. 2022). We affirm.

The district court properly dismissed Wendt-West's action for lack of personal jurisdiction because Wendt-West failed to allege facts sufficient to establish that defendants had such continuous and systematic contacts with California to establish general personal jurisdiction, or sufficient claim-related contacts with California to provide the court with specific personal jurisdiction over defendants. *See id.* at 858-59 (discussing requirements for general and specific personal jurisdiction).

We do not consider matters not specifically and distinctly raised and argued in the opening brief or allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CURTIS JASON WENDT-WEST, Plaintiff, v. STATE OF HAWAI'I, DEPARTMENT OF EDUCATION; and KATHLEEN DIMINO, Complex Area Superintendent, in her official capacity only, Defendants.	Case No. 5:21-cv-01336-JWH-SPx **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO TRANSFER VENUE [ECF No. 27]** (Filed Dec. 27, 2021)

Before the Court is the motion of Defendants State of Hawai'i Department of Education ("HIDOE") and Kathleen Dimino, in her official capacity only, to dismiss for improper venue and lack of personal jurisdiction.[1] The Court finds this matter appropriate for resolution without a hearing. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support and in opposition,[2] the Court orders that the Motion is **GRANTED**, as set forth herein.

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[1] Defs.' Mot. to Dismiss, or in the Alternative, to Transfer Venue (the "Motion") [ECF No. 27].

[2] The Court considered the following papers: (1) Verified Compl. ECF No. 11] (the "Complaint") ; (2) the Motion (including its attachment; (3) Pl.'s Opp'n to the Motion the "Opposition") (including its attachment) [ECF No. 28]; and (4) Defs.' Reply in Supp. of the Motion (the "Reply") [ECF No. 36].

I. BACKGROUND

A. Procedural Background

Pro se Plaintiff Curtis Wendt-West filed his Verified Complaint commencing this action on August 9, 2021.[3] Wendt-West filed a second Verified Complaint two days later. Defendants filed the instant Motion on October 25; Wendt-West opposed on November 2; and Defendants replied on November 19.

B. Factual Background

Wendt-West asserts claims for (1) violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a); (2) violations of Title IX of the Education Amendments Act of 1972, as amended, 20 U.S.C. § 1681; violations of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101; (4) wrongful discharge in violation of public policy; (5) wrongful demotion in violation of public policy; (6) immediate payment of wages and waiting time penalties; (7) negligent supervision; (8) failure to prevent discrimination and harassment; (9) defamation; (10) breach of contract; (11) violations of the First Amendment of the U.S. Constitution; (12) violations of the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution; (13) involuntary servitude; (14) property damage; (15) intentional infliction of emotional distress; (16) retaliation against a whistleblower in violation of the False Claims Act, 31 U.S.C. § 3729; and (17)

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[3] Unless noted otherwise, all dates are in 2021.

conspiracy to deprive Wendt-West of his civil rights in violation of 18 U.S.C. § 241.[4] The following brief factual summary is based upon the allegations in the Complaint.

Wendt-West worked for the HIDOES as a school counsellor at 'Iao Intermediate School in Wailuku.[5] He worked as a 10-month non-tenured employee on a limited term appointment agreement.[6] Wendt-West commenced his employment on July 31, 2017, and he notified HIDOE of his intention to end his employment on January 26, 2020.[7]

Wendt-West left his job with HIDOE due to what he perceived to be a hostile and discriminatory work environment, as well as a breach of the Collective Bargaining Agreement covering his limited term appointment.[8] Wendt-West and his husband subsequently sold their home in Hawai'i and moved to the mainland in February 2020.[9] HIDOE did not recognize Wendt-West's employment separation and continued to list Wendt-West as its employee.[10]

Wendt-West's hostile work environment claims include several events, but they center around a 2019

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[4] Complaint ¶¶ 568-770

[5] *Id.* at ¶ 7.

[6] *Id.*

[7] *Id.* at ¶¶ 7 & 8.

[8] *Id.* at ¶ 10.

[9] *Id.* at ¶ 11.

[10] *Id.* at ¶¶ 12-19.

incident in which Wendt-West was accused of having an affair with a female colleague.[11] In August 2020, Wendt-West filed a complaint with the EEOC; he received a Right to Sue letter on May 21.[12]

II. LEGAL STANDARD

Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, a party may seek to dismiss an action for lack of personal jurisdiction. To defeat such a motion, the plaintiff must demonstrate that the exercise of personal jurisdiction is proper. *Menken v. Emm*, 503 F.3d 1050, 1056 (9th Cir. 2007). If the motion is based upon written materials, then "the plaintiff need only make a prima facie showing of jurisdictional facts." *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). Therefore, the court inquires into only whether the plaintiff's "pleadings and affidavits make a prima facie showing of personal jurisdiction." *Caruth v. Int'l Psychoanalytical Ass'n.*, 59 F.3d 126, 128 (9th Cir. 1995). Factual disputes are settled in the plaintiff's favor. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1554 (9th Cir. 2006). Although unrefuted assertions in the complaint must be taken as true, the plaintiff cannot "simply rest on the bare allegations of its complaint." *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977).

A party that seeks a court's exercise of personal jurisdiction over a nonresident must meet the

[11] *Id.* at ¶ 23.

[12] *Id.* at ¶ 17.

constitutional limits of due process and satisfy the long-arm statute of the forum state. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154–55 (9th Cir. 2006). California's long-arm statute is coextensive with constitutional due process. Cal. Civ. Proc. Code § 410.10. Thus, when determining personal jurisdiction, federal courts in California must ensure that exercising personal jurisdiction satisfies due process.

A federal court may exercise personal jurisdiction over a non-resident party when the non-resident party has "at least 'minimum contacts' with the relevant forum such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice." *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1110–11 (9th Cir. 2002) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 326 (1945)). A district court "may exercise either general or specific personal jurisdiction over non-resident defendants." *Fed. Deposit Ins. Corp. v. British-Am Ins. Co.*, 828 F.2d 1439, 1442 (9th Cir. 1987).

III. DISCUSSION

Defendants argue that the Court should dismiss Wendt-West's Complaint "for improper venue and lack of personal jurisdiction, as Defendants do not reside in the Central District of California, none of the events giving rise to Plaintiff's claims are alleged to have occurred in the Central District of California, and none of the property at issue is located in the Central

District of California."[13] In his Opposition, Wendt-West argues that venue is proper because many of the unlawful acts alleged in his Complaint took place while he was in California.[14] The Court concludes that it lacks personal jurisdiction over Defendants.

A court may exercise general jurisdiction over a foreign entity when its "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe*, 326 U.S. at 317). Here, Defendants are Hawai'i residents,[15] and they were served with process in Hawai'i, which (of course) is outside of the Central District of California.[16] Wendt-West does not attempt to argue in his Opposition that the Court has general jurisdiction over Defendants.[17] Accordingly, the Court finds that it lacks general jurisdiction over Defendants.

In the absence of general jurisdiction, a court may have still specific jurisdiction over a party. Whether a district court may exercise specific jurisdiction over a defendant "depends on an affiliatio[n] between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.*

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[13] Motion 1:6-10.

[14] Opposition 2:7-14.

[15] Verified Complaint ¶¶ 4 & 5.

[16] *See* Proofs of Service [ECF Nos. 14-21].

[17] *See generally* Opposition.

at 919 (internal quotations and citations omitted) (alteration in original). Here, Defendants lack the sort of affiliation with California that would justify the Court's exercise of specific jurisdiction. Wendt-West does not allege that Defendants maintain offices or own property in California, nor does he allege that he was required to perform any contractual duty in California.[18]

Wendt-West argues that Defendants retaliated against him in the Central District of California,[19] but that argument fails. Wendt-West asserts that HIDOE transmitted harassing letters to him at his home in California,[20] but those letters were sent to his former address in Hawai'i and then forwarded to his new address in California.[21] The Court finds that the underlying controversy, as alleged, did not take place in California, and it is not subject to California's regulation.

In any event, this Court may not exercise jurisdiction over a sovereign state government without that government's consent. *Franchise Tax Bd. Of California v. Hyatt*, 139 S. Ct. 1485, 1492 (2019) ("States retain their sovereign immunity from private suits brought in the courts of other states."). California's long-arm statute therefore cannot authorize jurisdiction over a sister-state without that state's consent. Defendants

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[18] *See generally* Verified Complaint.

[19] *See*, *e.g.*, Opposition 16:16-24:15.

[20] *Id.*

[21] Verified Complaint ¶ 425.

are a state agency and a state employee who is sued in her official capacity. In their Amended Answer, Defendants do not give their consent to be sued outside of Hawai'i.[22]

Accordingly, the Court **GRANTS** the Motion. The Verified Complaint is **DISMISSED** for lack of personal jurisdiction.

IV. CONCLUSION

For the foregoing reasons, the Court hereby **ORDERS** as follows:

1. The Motion is **GRANTED.**
2. The Verified Complaint is **DISMISSED.**
3. The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED.

Dated: December 27, 2021 /s/ John W. Holcomb
John W. Holcomb
UNITED STATES
DISTRICT JUDGE

[22] Defs.' Am. Answer to the Complaint (the "Amended Answer") [ECF N. 26].

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURTIS JASON WENDT-WEST, Plaintiff-Appellant, v. STATE OF HAWAI'I, DEPARTMENT OF EDUCATION; and KATHLEEN DIMINO, Complex Area Superintendent, in her official capacity only, Defendants-Appellees.	No. 22-55091 D.C. No. 5:21-cv-01336-JWH-SP Central District of California, Riverside ORDER (Filed May 12, 2023)

Before: GRABER, PAEZ, and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Wendt-West's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 19) are denied.

Wendt-West's opposed motion to file an amended complaint (Docket Entry Nos. 20 and 21) is denied.

No further filings will be entertained in this closed case.