

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA A. PUGLIESE,
Plaintiff-Appellant,

UNITED STATES,
Intervenor,

v.

JACK DILLENBERG, in his individual capacity and official capacity as Director of the Arizona Department of Health Services, husband; WAYNE LEBLANCE, in his official capacity as Assistant Chief of the Arizona Department of Health Services Office of Human Rights, husband; ARIZONA, STATE OF,
Defendants-Appellees.

No. 01-16544
D.C. No.
CV-95-00928-MHM
OPINION

Appeal from the United States District Court
for the District of Arizona
Mary H. Murguia, District Judge, Presiding

Submitted September 11, 2003*
Pasadena, California

Filed October 7, 2003

Before: Andrew J. Kleinfeld, Kim McLane Wardlaw, and
William A. Fletcher, Circuit Judges.

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

Per Curiam Opinion
Concurrence by Judge Kleinfeld

COUNSEL

Trisha Kirtley, Esq., Phoenix, Arizona, for the plaintiff-appellant.

Lisa Kay Hudson, Office of the Attorney General, Liability Management Section, Phoenix, Arizona, for the defendants-appellees.

OPINION

PER CURIAM:

The State of Arizona validly waived its sovereign immunity under the Eleventh Amendment to claims brought pursuant to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, et seq., when it accepted federal Rehabilitation Act funds. See *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1185-86 (9th Cir. 2003); *Lovell v. Chandler*, 303 F.3d 1039, 1050-51 (9th Cir. 2002); *Douglas v. Cal. Dept. of Youth Auth.*, 271 F.3d 812, 819-21 (9th Cir. 2001), *rehearing en banc denied* at 285 F.3d 1226 (9th Cir. 2002). The district court's decision to the contrary, see *Pugliese v. Ariz. Dept. of Health and Human Servs.*, 147 F. Supp.2d 985, 989-91 (D. Ariz. 2001), which was rendered prior to the decisions cited above, is therefore REVERSED. We REMAND for further proceedings consistent with this opinion.

KLEINFELD, J, concurring:

I continue to adhere to the view I took in our dissent from our court's orders denying rehearing en banc in *Douglas v. California Department of Youth Authority*, 285 F.3d 1226 (2002), and *Hason v. Medical Board of California*, 294 F.3d 1166 (2002). In my opinion, a state cannot knowingly and voluntarily waive a right that Congress has said it does not have. When the state acted under the constraint of the federal statute, the Supreme Court decision¹ holding that Congress acted unconstitutionally had not come down. In *Hason*, the Supreme Court granted certiorari to review our court's position and dismissed certiorari only because the State of Cali-

¹*Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

fornia decided that it did not wish to contest liability.² The Court may again decide to consider the matter. As a panel, though, we have no such authority, so I concur in the per curiam opinion.

²*Medical Bd. of California v. Hason*, 537 U.S. 1028 (2002) (granting certiorari, in part), *cert. dismissed*, 123 S.Ct. 1779 (2003).