OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 84-351

TITLE ATASCADERO STATE HOSPITAL AND CALIFORNIA DEPARTMENT OF MENTAL HEALTH, Petitioners V. DOUGLAS JAMES SCANLON

PLACE Washington, D. C.

DATE March 25, 1985

PAGES 1 - 33

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IN THE SUPREME COURT OF THE UNITED STATES

- -x

ATASCADERO STATE HOSPITAL :

AND CALIFORNIA DEPARTMENT :

OF MENTAL HEALTH, :

Petitioners, : No. 84-351

v.

DOUGIAS JAMES SCANLON :

- -x

Washington, D.C.

Monday, March 25, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:56 o'clock p.m.

APPEARANCES:

JAMES E. RYAN, ESQ., Deputy Attorney General of California, Los Angeles, California, on behalf of the petitioners.

MARILYN HOLLE, ESQ., Los Angeles, California; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next this morning in Atascadero State Hospital and California Department of Mental Health against Scanlon.

Mr. Ryan, I think you may proceed now whenever you are ready.

ORAL ARGUMENT OF JAMES E. RYAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. RYAN: Mr. Chief Justice, and may it please the Court, this case comes here on a petition by state defendants for writ of certiorari to the Ninth Circuit Court of Appeals.

It is our position that that court was in error when it held that the doctrine of sovereign immunity as embodied in the Eleventh Amendment to the United States Constitution did not constitute a bar to the federal court civil action that was commenced by respondent in this case.

Central to the Ninth Circuit's decision were its findings on two points, first, that the Rehabilitation Act of 1973 constituted an effective abrogation of state's immunity under that Act, and secondly, that by the receipt of federal funds these state defendants impliedly consented to that claimed abrogation.

We submit that had the court below applied the settled sovereign immunity doctrine under the precedence of this Court it could not have reached the conclusions that it did. We ask nothing more in this case than that those settled principles and precedents be applied today.

The guarantee of sovereign immunity, simply stated, is this, that no state may be sued in federal court without consent given. In the final analysis, when one reviews the decisions of this Court in the Eleventh Amendment area, it is the search for consent that marks the Court's decisions.

As with any guarantee or privilege under the Constitution, this Court has stated repeatedly that a waiver will not be found absent the clearest of circumstances.

In the context of the Eleventh Amendment, it has been the rule since at least 1908 in the Murray versus Wilson Distilling Company case that a waiver of sovereign immunity will not be found absent express language or overwhelming implication from the text as will leave no reasonable construction otherwise.

This clear statement or clear language rule, bred no controversy, nor even invited the attention of this Court until there began to emerge the concept that

in lieu of express words, a waiver or consent could be found on the basis of state conduct. Recognition of this doctrine was first articulated in the Hardin case.

But a recognition of consent by conduct did not dispense with the requirement that express language be present. Rather, the implied waiver doctrine simply represented a shift as to where that express language must be found.

Thus in the implied waiver case of Employees versus Missouri Department of Health, this Court stated that the express language found in that case must show that Congress had considered and explicitly determined to sweep away the immunity of the states from suit in federal court.

That is not to suggest, though, that the concept or the requirement of express language found its genesis in the Employees case. As I have mentioned, as to any constitutional waiver or privilege, as to any constitutional guarantee or privilege, it has always been the rule that express language must be found.

The only distinction to be made at this point is that in express waiver cases, this Court will look to the express language on the state side and in implied waiver cases this Court will look for the express language on the Congressional side.

QUESTION: Mr. Ryan, I suppose you would concede, however, that a plaintiff in the circumstances of this case could nevertheless seek an injunction against the state asking for an order that the physician be given --

MR. RYAN: In federal court, Your Honor? No. I think it is clear under --

QUESTION: You think not under Ex Parte Young?

MR. RYAN: If the plaintiff in this case had sued an official, that issue would have been raised.

QUESTION: But no officials were named here.

MR. RYAN: No officials were named in this case, but as to naming a state agency itself --

QUESTION: If officials had been named, and injunctive relief sought, you would agree the suit could have proceeded in federal court?

MR. RYAN: Under the common understanding of the rules pertaining to Ex Parte Young at that time. Yes, Your Honor.

QUESTION: And maybe attorneys' fees obtained if successful?

MR. RYAN: Yes, Your Honor. Whether we are dealing with an express waiver case, therefore, or an implied waiver, it has always been the rule that the

Court look to and require express language.

It is therefore not accurate for amici to suggest in this case that the application of a clear statement rule represents some form of impermissible retroactive application of a statutory construction principle.

This clear statement requirement also obtains even where Congress is exercising its plenary powers under the Fourteenth Amendment.

While consent to abrogation under those circumstances is presumed by virtue of the state's ratification of the Fourteenth Amendment, nonetheless this Court has still required that the language which is to be deemed sufficient for abrogation be explicit.

Thus we find in the Fitzpatrick case which was invclving a Fourteenth Amendment enactment, Title 7, this Court found that the requisite clear expression of an intent to sweep away the immunity of the states was present in the Title 7 statutes.

Consequently, whether we are dealing here with a Fourteenth Amendment exercise or a spending clause exercise, we still will have to find the explicit language in the statute under the Rehabilitation Act.

Applying this clear statement rule to the statutory language at issue here under the

Rehabilitation Act, we submit that it is manifest that Congress has not evidenced in any clear language any expression that it has considered and firmly decided to sweep away the immunity of the states.

The Ninth Circuit found that Congress had authorized suit against a general class of defendants which literally included states. To start with, we feel it is clear that there is no inclusion of the states under the Act expressly. The plain reading of the statutory language in this case demonstrates that Congress has made no expression on the requisite intent that this Court has required.

When it came to expressing that states would be excluded as recipients under the Act, Congress left that to the executive branch, which did so by regulation. When it came to expressing that private actions were authorized under the Rehabilitation Act, Congress did not express that. It left that declaration to the judicial branch.

Certainly if Congress has not provided for an express remedy under the Act, it cannot be claimed that it has swept away state's immunity to federal suits under the very same language. Two or three circuits have reached this conclusion. And the federal government has concurred in its amicus brief filed in

this case.

Respondent, however, urges that the enactment involved here was a Fourteenth Amendment exercise, and as such we must look beyond the statutory language employed by Congress and pursue a search through the relevant legislative histories and materials, legislative history and materials not just of the Rehabilitation Act, but of Title 6, upon which portions of the Rehabilitation Act are modeled.

While we do not agree that this is a Fourteenth Amendment enactment, nor do we agree that even if it were, a search beyond the statutory language is allowed in view of this Court's precedents. In any event, it is to avail to the respondent in this case by conducting such an examination of the record.

QUESTION: Counsel, you mentioned the position of the Solicitor General. It hasn't always been consistent, has it?

MR. RYAN: No, it has not.

QUESTION: In this case.

MR. RYAN: It has not.

QUESTION: So he was against you earlier.

MR. RYAN: He certainly was.

QUESTION: You didn't mention that.

QUESTION: Mr. Ryan, would the plaintiff here

have been able to file suit in the California state courts under Section 504 for damages?

MR. RYAN: Very definitely.

QUESTION: Is that because the state has generally waived its sovereign immunity to actions like this in the state court?

MR. RYAN: The state has generally waived its immunity for suit in states under this type statute, but not -- that is not to say, of course, that the state has waived its immunity under the Eleventh Amendment for suits in federal court.

QUESTION: So your position is the Eleventh Amendment protection is really broader than the protection under the sovereign immunity doctrine.

MR. RYAN: Our position is that under established law as handed down by this Court, that waivers under state law pertaining to suits brought in state courts do not constitute a waiver of the Eleventh Amendment immunity from suit in federal court.

QUESTION: Have we ever so held?

MR. RYAN: Yes, you have -- yes, this Court has, Your Honor, in several cases.

QUESTION: Where that particular point was at issue?

MR. RYAN: Where similar statutes --

QUESTION: I mean where you had an acknowledgement by the state that there had been a waiver of any sovereign immunity defense, nevertheless assertion of the Eleventh Amendment.

MR. RYAN: Well, the position of the defendants in this case is not that there has been a broad waiver of sovereign immunity, only that there has been a waiver in state courts, and this Court has seen this very same argumet made in a number of cases right through Pennhurst II.

In fact, the statute that was raised in Pennhurst II and reviewed by this Court was almost identical to the constitutional provision which respondent relies on in this case, and in Pennhurst II and in Patsy and Employees, this Court rejected the same argument on each occasion.

QUESTION: Your provision says, "Suits may be brought against a state in such manner and in such courts as shall be directed by law." That does not include federal courts, the way you read it?

MR. RYAN: That's correct. It does not include actions in federal court. And, I might add, it has never been so held, and in fact, in the only case which I am aware of that has reviewed that constitutional provision, it is a District Court case,

but it did uphold the very argument that I am making today.

In any event, when respondent has conducted his presumably thorough review of the legislative histories and materials underlying both this Act and Title 6, we find that only two intents may be gleaned from that review: first, that it was the intent or understanding of Congress that states would be generally covered by the Rehabilitation Act of 1973; and second, that Congress anticipated or expected that some form of redress would be available to persons who were victims of violations of Section 504, whether that form of enforcement would be through administrative remedy or private action.

Neither of these understandings on Congress's part, however, serves to answer the essential inquiry, and the very reason why respondent embarked on his review of the legislative history, neither of these understandings show an intent by Congress or an expression by Congress that it had considered and firmly decided to sweep away the immunity of the states, notwithstanding the Eleventh Amendment.

We have seen more than one statement of this clear statement rule, and we submit that it is the test which must be applied in this case. For instance, in

the Employees case, the clear statement rule was framed in these terms: "Congress must by clear language express its intent to bring states to heel in the sense of lifting their immunity from suit in federal court."

In Quern, it was stated by this Court that "Congress must by clear language indicate on its face an intent to sweep away the immunity of the states," and most recently in Pennhurst II this Court restated the rule and embraced it in the following terms: "Congress must by unequivocal expression of intent express that intent to overturn the constitutional immunity of the several states."

We submit that the very lengths to which respondent has gone to supply this Court with the requisite clear language expression by Congress and the very fact this case is here bespeaks the lack of clarity with respect to Congress's intent to abrogate sovereign immunity under this Act.

If Congress intends that violations of Section 504 be redressed against states in federal court suits, it knows how to correct that problem. It can correct that problem. We have given examples in our opening brief to which respondent has not replied of instances where Congress has clearly expressed its intent that it was sweeping away the sovereign immunity of the states.

Title 7 is just one example of how that kind of abrogation can be done and will satisfy the precedents of this Court.

Respondent and amici, however, have suggested that this clear language or clear statement rule be abolished. Such a suggestion ignores the strong policy and practical considerations underlying such a rule.

First off, the clear language or clear statement rule provides notice, notice to all involved, notice to the states that the sovereign immunity is being attempted to be abrogated, notice to the beneficiaries, if there be any, of an act as to what their available remedies are, and not least importantly, notice to this Court that an abrogation has in fact been attempted.

The alternative for not having a clear statement rule leaves this Court in the position of having to deduce from inference as to what Congress's intent was with respect to state sovereign immunity. This is a role which amici have suggested this Court should not perform.

At the same time, the lack of a clear statement rule requires by nature that states become surveyors of the Congressional Record and scattered bits of legislative history both under the subject Act and of

any other Act that that statute may incorporate.

In order to determine in the first instance, before the conduct which is going to attach to that abrogation, whether in fact there is a condition of abrogation at all, we submit that a clear statement rule makes good sense and should be maintained in this case.

For the first time in this case respondent has suggested that the state has waived its sovereign immunity under state law and therefore its sovereign immunity under the Eleventh Amendment.

We have addressed those items in our reply brief, but I would only add that identical arguments have been made before this Court on several occasions, in the Murray case, in the Petty case, in the Florida Department of Health case, and as I mentioned earlier, in the Pennhurst II case.

In each of those instances, a similar argument was rejected.

In conclusion, the recent Pennhurst decision emphasized the importance of a hearing to the fundamental principles of sovereign immunity as exemplified by the Eleventh Amendment to the United States Constitution and to the requirement of unequivocal expression of Congressional intent before this Court would declare that sovereign immunity had

been abrogated.

In this case and under this Act, whether you look to the statutory history, statutory language, or the legislative history behind that Act, one finds no evidence of Congressional intent to sweep away the state's immunity under this Act. Consequently, we would request respectfully that the Ninth Circuit decision in this case be reversed.

CHIEF JUSTICE BURGER: Ms. Holle.

ORAL ARGUMENT OF MARILYN HOLLE, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. HOLLE: Mr. Chief Justice, and may it please the Court, before I respond to the points raised by Mr. Ryan, I would like to summarize our position in this case. Section 504 represents a major political victory for handicapped persons, really a political victory akin to that won by blacks in the Civil Rights Acts of 1964 and 1968.

The language of 504 is elegant and majestic in its sweep. The language of 504 imposes substantial obligations on state programs receiving aid. The language of 504 also confers important rights on handicapped persons, including the right to go to court to enforce the promise of 504.

The state does not disagree with any of that.

What the state is trying to do in this case is do an end run around the clear will of Congress by interposing the Eleventh Amendment bar.

We believe there are three reasons for upholding the decision of the court below. First, the first reason, when Congress drafted and enacted 504, it intended to create a federal civil right, enforceable in federal court against any and all recipients, including the states.

Indeed, a review of the legislative history indicates that states were a primary target of the 504 legislation. When Congress went back to 504 in 1978, Congress went back to enhance and extend 504, and to underscore its broad remedial purposes.

The second reason, under California state law, California has waived its immunity to suit in federal court under the federal civil rights claim. Beyond that, under both federal and state law, California has consented to suit.

That consent follows from receipt of federal financial assistance knowing of the substantive obligations imposed, receipt of federal financial assistance knowing it means liability to suit, and receipt of federal financial assistance knowing that when the state denies a job to someone because of his or

her handicap, 504 rights are involved.

QUESTION: Ms. Holle, have you said all you are going to say about your argument that the state statute waives immunity both in federal courts as well as state courts?

MS. HOLLE: No, I have not. If I may --

QUESTION: You are going to get to that later?

MS. HOLLE: Yes, I am, Your Honor.

The third reason is that where federal rights are concerned, there is no Eleventh Amendment bar to suit, particularly with respect to a federally created civil right. There is no need to employ the Ex Parte Young fiction. And maybe in terms of the points raised by Mr. Ryan I should address first the states issue at the suggestion of Justice Rehnquist.

This Court had occasion to look very carefully at California sovereign immunity doctrines in a case which came to it under the full faith and credit clause. That was Nevada v. Hall. In that case there were some members of this Court who did not like the fact that California imposed its policy of no sovereign immunity on a sister state.

I think by looking at that case as well as cases developed in California, I think it will be clear

that California has waived sovereign immunity. I think the California constitutional provision and the California statute should be looked at in the light suggested by Justice Stevens in his footnote in Patsy.

QUESTION: Have you read our Great Northern Insurance Company versus Read case?

MS. HOLLE: Yes, I have, and indeed in that case this Court recognized that somehow California was different when it analyzed the outcome and the reasons for the outcome in Smith v. Reeves, and it really contrasted California with other states. It approved of the outcome, because what was involved was a state taxing statute, sort of a subject which has been traditionally left to the states.

Indeed, I mean, it is dealing with something which is within the traditional sovereign immunity interests of a state, that is, to define when and where and how state-created rights can be enforced, as was done in Pennhurst, or rights bottomed on state-created rights, as was the result of Hans.

QUESTION: What do you think it depends on, Ms. Holle, the intent of the legislature passing the --

MS. HOLLE: I think if you look at Muskopf --

QUESTION: I mean, I was asking what you think it depends on.

MS. HOLLE: I think it depends on whether or not the legislature has affirmatively imposed a limitation so as to bar discriminatees from suit in federal court under 504 or any other civil rights statute.

QUESTION: So it is not a question of whether they intended the waiver to extend to federal court as well as to state court?

MS. HOLLE: I think a fair reading of Muskopf would indicate that in California sovereign immunity concepts have been swept away.

QUESTION: But what is the test for purposes of applying the Eleventh Amendment?

MS. HOLLE: The test would be whether or not with respect to a federally created right there is any bar that you can find that the legislature has affirmatively imposed.

QUESTION: So if a legislature simply passes a statute, perhaps like the statute in Great Northern, saying the state waives its immunity to sue, period, that would be enough in your --

MS. HOLLE: Well, in California the structure is a little different.

QUESTION: But I --

MS. HOLLE: Yes.

QUESTION: Would you answer my question?

MS. HOLLE: Yes. Yes.

QUESTION: Now, did the court below deal with that question?

MS. HOLLE: No, the court below dealt with federal law questions, and indeed we don't think you reach state law questions unless you rule against us on the federal law, and therefore have to look at that as an alternative reason.

QUESTION: Well, suppose we disagree with you on the federal law issue. What do we do with this state law waiver question?

MS. HOLLE: I think maybe you follow what you did in Rogers v. Mills. Send it back for certification. But I don't think because of the nature of the statute involved here you need to do that. Maybe -- I would like to go to --

QUESTION: Was waiver argued at all in the lower courts?

MS. HOLLE: Waiver was argued under the Parden standard, and if you look at Parden, this Court relied on the reasoning of a California state court.

QUESTION: That wasn't a state law question.

MS. HOLLE: No, but this Court relied on the reasoning in Parden versus California for its outcome.

I would like to respond to Mr. Ryan's contention that before a state may be brought to federal court by a citizen to vindicate a federally created right, the statute creating that federal civil right must contain magic words under the state proposed express language rule.

We contend that that is an extreme rule, and it confers on the Eleventh Amendent protections given to no other rule. Such a rule would direct this Court -- would direct courts to reach results which would be contrary to the will and intent of Congress, reach results which would frustrate the very purposes for which a statute was enacted, would direct this -- would direct courts to ignore legislative history.

And the reason we are in this situation is really the failed logic of Hans. First you have Hans. Then to limit Hans you have the notion, the fiction developed in Ex Parte Young. Then you need more, so abrogation, waiver, and consent doctrines are developed.

Indeed, with the complexity of these doctrines, you have a situation which is confusing, Byzantine in structure, and one in which actually this Court would give license to a state who is in federal court on a federal cause of action to lay back until a merits decision was reached, and then to leap out and

shout sovereign immunity to avoid the result.

In response to this, the state and indeed the United States is proposing the clear statement rule, but that rule, as Senator Cranston and the other Congresspeople have indicated, really, I think, raises separation of powers problems.

By issuing a prescriptive rule, this Court, I believe, would trench on the Article I rights of the coordinate branch. What we really ask is that this Court give effect to Congress's intent and not require Congress to jump through several hoops before this Court believes Congress meant what it said.

A point raised by both Mr. Ryan and in the United States' brief is the need for magic words relating to damages. I think that this Court's review of damages, that is, appropriate remedy for at least intentional employment discrimination was covered in Conrail and is applicable here.

I think to find that Congress intended to withhold from a federal court a remedy so conditional as back pay, traditionally included within equitable remedies, would be anomalous.

Indeed, this Congress when it enhanced and extended 504 in 1978, had before it cases which had awarded damages, Southeastern Community College, you

know, Duran versus City of Tampa, Drennon, and the damage issued was raised also in the court below in Southeastern Community College versus Davis.

The state also says, well, what are you really arguing about? You can go to state court. Isn't that enough? Under the facts in our case, it really wasn't enough. First, we are dealing with a federal civil right, and we wanted to go where you traditionally go to vindicate a federal civil right.

We also went to federal court because of what we perceive as the exigencies in our own case. We believed that coming to federal court after attempting to resolve this problem through complaints with HEW, we would have a good chance at a remedy within a year.

When you look at the facts as set out in the complaint, this is somebody who worked for free for Atascadero State Hospital as a student volunteer. A paid nine-month, half-time student assistanceship program came open. Because he had been doing a good job, he was offered that job. But because that then involved the personnel bureaucracy, he was knocked out.

The consequences was not just him not getting that money. The consequences was that he didn't get his bachelor's degree, because he needed that internship to complete six clinical field requirements for his degree

in recreation assistance.

But beyond the facts in our individual case, there is a logical inconsistency in the position urged by Mr. Ryan. California does provide a remedy for 504 claims, but it is a remedy provided at the whim of the state, at the grace of the state.

The state tomorrow could close its doors to 504 victims. And this Court has dealt with state constitutions which enshrine late nineteenth century notions of sovereign immunity.

Do people in, say, Alabama, whose constitution this Court considered in Parden and again in Alabama v. Pugh, have no remedy? Did Congress intend that there be different results depending on the particular state the person found himself or her to be in?

Or is the state really arguing a more extreme position, that when Congress enacted 504, it abrogated state sovereign immunity in their own courts, and indeed perhaps compelled state courts to keep their doors open for victims of 504 discrimination at the hands of the state.

I would submit that the position we put forward is certainly the more reasonable one, namely, that Congress intended a federal court remedy against any and all receipients as well as a state court remedy

where the state permitted it.

I might -- sort of missed that when I was contrasting why we wanted to go to federal court, is that at the time, then, and now, it takes four years to get to trial in state court, and we felt we could resolve our problem in a year in federal court.

One point that Mr. Ryan made was that states are not named under the Civil Rights Act. We contend they are named, and that they are the largest component probably of the class defined as recipients of federal financial assistance. It is an unambiguous definition, a definition that was borrowed and established from that from Title 6 by Gore's Mother and perhaps from 504's twin, Title 9.

In looking at the enactment of 504, you have to remember that 504 was not enacted in a vacuum. It was enacted against a backdrop of 1982 Title 6 and indeed Title 9. What Congress was doing was borrowing a model that worked. It was not amending the Fair Labor Standards Act, which is a statute replete with minutiae.

It was not amending the Social Security Act, again a problem of a statute which under each title has just an incredible amount of detail and minutiea.

It was creating a right, a statute like that of Title 6, like that of Title 9, a statute, a federal

civil right which would not be frozen in time, but which would be a illumned and informed by history, experience, and developing case law, as is the case under 1982 vis-a-vis Sullivan versus Little Hunting Park, as was the case under Title 7 in Griggs versus Duke Power. We are talking about a very different animal.

The purpose really is to look at what Congress intended, and the background of what Congress intended is informed by the legal standards when 504 was drafted in 1972. The standard there was Parden, and under Parden we meet the test.

The Parden test is met because the states are clearly within the scope of the class covered. The Parden standard is met because the state in accepting federal financial assistance made itself subject to 504, including the liability to suit.

Remember, Parden was the first case in this Court dealing with whether or not a citizen could go to federal court to vindicate a federally created right under federal law.

The Murray rule was a rule articulated to preserve and protect legitimate state sovereign immunity interests, legitimate interests in defining when and where suits against it could be brought which were state-created rights.

The 1974 Congress which clarified and expanded the definition of the protected class underscored the intention that all recipients were to be subject to suit.

In 1978, Cranston, in the legislative history involving states, Cranston indicated that attorney fees were to be awarded whether the states were named or whether states' officials were named, again an indication that Congress knew states were being sued.

Indeed, I think some of the legislative history involving statements by Bayh lists state suits, such as Campmire. Indeed, the state was sued in -- it was a state instrmentality in Southeastern Community College v. Davis, in which, in fact, the Eleventh Amendment issue was flagged at the Court of Appeal level so did not come ignored to this Court.

On the second ground, I think I have pretty well covered it, except I really want to note here that the position of the state is one representing the interests of part of the state, that is, a particular department in the executive branch of the state.

The position of the state here is really analogous to the position of the state in Brown v. Pitchess, where the state attorney general argued to our state supreme court that state courts should be closed

to 1983 claims, which our state supreme court rejected unanimously, and analogous also to the position of the attorney general in Williams v. Horvath, where the attorney general argued that state government tort immunity conditions precedent to suit should be engrafted on 1983. That also was rejected unanimously.

On waiver, I ask you to read the state decision of Maurice v. Calfiornia, the very same case whose reasoning this Court relied on in Parden. I think you will agree with the conclusions reached by Mr. Scanlon's attorneys.

On the final issue, which is whether or not the logic of Hans, if not the result of Hans, should be overruled, I call your attention to the list of authorities appended to our brief, which really calls into question the presumptions of the Hans Court, and I do sc without necessarily challenging the result of Hans.

Principles of comity indeed, principles articulated in Professor Fields' article noted in the brief of the ACLU provide the means by which the legitimate state interests through comity, et cetera, can be protected, while recognizing that there were two amendments proferred to Congress following Chisolm, one, the one that won, which limited the diversity

jurisdiction of the citizen diversity clause, you know, where the defendant was a state, and one which would do, which would have the result that this Court indicated in Hans was the result of the eleventh amendment.

The broader amendment lost and I think should be -- I should think that the logic of Hans should be relooked at again by this Court.

QUESTION: You asked us to look particularly at the Maurice case in California.

MS. HOLLE: Yes.

QUESTION: Is that not an appellate court decision?

MS. HOLLE: But that case was approved specifically in the first -- the state court in Nevada v. Hall decision, and it is for that reason that I call it to your attention.

QUESTION: It was approved by the California Supreme Court in Nevada against Hall?

MS. HOLLE: By the California Supreme Court in the first Nevada v. Hall decision.

In conclusion, 504 was a fairly won political victory. It gave important rights to handicapped persons to enable them to participate and contribute in the mainstream of society. 504 gave handicapped persons the right to enforce its promise in federal court

against all recipients, including the state.

We ask that this Court do no more than give effect to what Congress intended when Congress extended to disabled persons the rights previously given to other disenfranchised groups.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Ryan?

ORAL ARGUMENT OF JAMES E. RYAN, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. RYAN: A few points, if I may.

Respondent's arguments with respect to California's waiver of immunity to be sued in its own courts would turn the rule that this Court has enunciated in so many occasions when the same arguments were made literally on its head.

Respondent would have the legislature state explicitly that it was reserving federal court jurisdiction in order for the state to continue to maintain its federal court immunity.

This is not the rule that was expressed in the Pennhurst II case under a similar statute wherein the Court stated that only where there is a clear declaration of the state's intent to submit its fiscal problems to other courts will a waiver be deemed by

virtue of a state statute or other provision.

A state's waiver of immunity in its own courts has never been held to be sufficient to constitute a waiver of the Eleventh Amendment, and of course would go completely contrary to the express waiver requirements.

Respondent mentioned that the rule that should be applied was that which guided the Court in the Parden case, but as this Court itself noted subsequent to the Parden case, that case stands as unique and on the outer limits of implied waiver cases.

And in fact under almost virtually the same facts this Court in the Employees versus Missouri case came to just the contrary conclusion, wherein it was not locked into prior precedents in which it had held that states were included within all-inclusive language employed by Congress in the context of railroad legislation.

Finally, respondent in answer to a question made note of the fact that it takes four years to get to trial in the California state courts. While that may be the case under some circumstances, I am not sure. It only takes 20 days plus five days for mailing to obtain a preliminary injunction.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 2:43 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-351 - ATASCADERO STATE HOSPITAL AND CALIFORNIA DEPARTMENT OF MENTAL HEAL
Petitioners V. DOUGLAS JAMES SCANLON

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)