

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 29 2024

FOR THE NINTH CIRCUIT

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

MICHAEL SMITH,

No. 23-55030

Plaintiff-Appellant,

D.C. No. 3:22-cv-00798-DMS-BGS

v.

MEMORANDUM*

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of California
Dana M. Sabraw, District Judge, Presiding

Submitted March 26, 2024**

Before: TASHIMA, SILVERMAN, and KOH, Circuit Judges.

Michael Smith appeals pro se from the district court's judgment dismissing his action brought under Federal Rule of Civil Procedure 60(d)(3) seeking to collaterally attack his criminal conviction entered in the Eastern District of Kentucky. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse

* 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). Smith's request for oral argument, set forth in the reply brief, is denied.

of discretion. *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003). We may affirm on any basis supported by the record. *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008). We affirm.

Dismissal of Smith’s action against the United States was proper because Smith failed to allege facts sufficient to show an explicit waiver of sovereign immunity. *See Elias v. Connett*, 908 F.2d 521, 527 (9th Cir. 1990) (“Absent its consent to suit, an action against the United States must be dismissed.”); *Cominotto v. United States*, 802 F.2d 1127, 1129 (9th Cir. 1986) (“Waiver of immunity must be demonstrated by the party suing the United States.”), *abrogated on other grounds by Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

AFFIRMED.