No. 82-738

DR. ETHEL MIGRA

v.

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION

CERT TO CA6 (Edwards, Kennedy, Celebrezze) (by order)

Scheduled for Argument: Tuesday, October 11, 1983

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Bartlett, October 6, 1983

SUMMARY

Petr in this case is a former employee of the resp school board. After a dispute over whether the school board would renew petr's contract, petr filed suit in state court against the school board and several of its members. In essence, she alleged breach of contract and a variety of state law torts. The state court determined that resp had breached its contract with petr. At petr's request the state court dismissed without prejudice the various common law tort claims. Petr then filed a §1983 suit in federal court, alleging a variety of constitutional violations as well as several state law claims. The DC dismissed petr's suit, finding that it is barred under Ohio law by res judicata. The CA6 affirmed.

I recommend that you affirm the CA6. It seems to be settled law that 28 U.S.C. §1738 requires a federal court to give a state court judgment the same preclusive effect that it would have in other state courts. The DC determined that under Ohio law, petr's suit in state court would have barred a later suit in a state court. Accordingly, the DC found petr's suit in federal court barred by res judicata.

In Allen v. McCurry, 449 U.S. 90 (1980), you argued in dissent that §1983 implicitly negated in certain circumstances the preclusive effect of state court judgments. You argued that a §1983 litigant should always have the opportunity to litigate his claim in federal court if he so desires. Where §1738 would otherwise operate to foreclose this opportunity, you argued that §1983 implicitly modified the scope of §1738.

In my view, the argument of your dissent in Allen is not applicable to the facts of this case. In this case, petr had the opportunity to bring her entire cause of action in federal court. She chose not to do so. The policies behind §1983 do not require that a plaintiff be able to bring state and federal claims that are part of a single cause of action in separate proceedings, one in federal court and one in state court. Accordingly, there is no reason that §1738 does not give full preclusive effect to the state court judgment in this case.

I FACTS AND DECISIONS BELOW

Petitioner Dr. Migra was employed beginning in August, 1976, by the Warren City School District Board of Education. Until the events that precipitated this lawsuit, she was employed on a yearly basis as supervisor of elementary education for the school district. On April 17, 1979, the members of the Board adopted a unanimous resolution to renew the employment of Dr. Migra for the ensuing school year 1979-1980. She accepted the offer on April 23. The following day, on April 24, 1979, the Board held a special meeting at which it voted three to one to rescind its resolution of April 17.

As a result of the termination of her employment, petr brought suit in state court against the Board and its members who voted to terminate her employment. The complaint asserted, in essence, two causes of action: 1) breach of the employment contract by the Board; and 2) wrongful interference with petr's contract of employment by individual members of the Board. At trial, the state court sua sponte "reserved and continued" petr's claim against the individual Board members. The court adjudged only the contract termination issue. The court concluded that petr had duly accepted the April 17 resolution to continue her employment, that the acceptance constituted a binding contract between the petr and the Board, and that the Board had unlawfully terminated the contract. On July 9, 1980, the state court dismissed the tort claim against the individual respondents without prejudice at petr's request.

On July 10, 1980, petr filed this §1983 suit in federal

district court (N.D. Ohio, Manos) against the school board and its individual members. The suit contains both state and federal claims. Her state claim contends that several members of the Board defamed her by spreading malicious rumors about her. Her federal claim alleges violations of her First, Fifth and Fourteenth Amendment rights. In essence, petr alleges that resps punished the exercise of her free speech and advocacy of desegregation, and falsely and maliciously stigmatized her resulting in the deprivation without due process of her liberty interest in reputation and property interest in continued state employment, without due process. In addition, although she was not tenured, she claims that she had a legitimate expectation of continued employment which created a property interest in her job beyond the 1979-1980 school year. She seeks damages and injunctive relief. Resps moved for summary judgment on the basis of res judicata and the statute of limitations. The DC granted the motion. The court found that all of petr's federal claims could have been fully litigated as part of the cause of action brought in state court, and that this suit was therefore barred by res judicata. The state law claims the court found were barred by the statute of limitations. With respect to the claim for continued employment beyond the 1979-1980 school year, the court dismissed for failure to state a claim on which relief could be granted. The CA6, in a one-page order, affirmed the judgment below, and later denied rehearing and rehearing en banc.

II. Contentions.

A. Petitioner.

The principal issue in this case is whether the traditional doctrine of res judicata bars the petr from instituting a civil rights action in federal court pursuant to 42 U.S.C. §§1983, 1985, by reason of a former action between the same parties in the state court which adjudicated only statutory and common law issues. Petr's claim in the federal court was separate from the one brought in the state court case. The principle that governs the case, therefore, is the one enunciated by this Court in Mercoid Corporation v. Mid-Continent Co., 320 U.S. 661, 671 (1944).

> "The case is governed by the principle that where the second cause of action between the parties is upon a different claim the prior judgment is res judicata not as to issues which might have been tendered 'but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'" (citations ommitted).

Mercoid was just a logical application of the rule set forth in the leading American case on res judicata, Cromwell v. County of Sac, 94 U.S. 351 (1876):

> "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." 94 U.S. 353.

Applying these cases to the instant dispute, it is clear that the only claim or demand that petr is precluded from bringing in this suit is the claim or demand on which the state court rendered its judgment.

Allen v. McCurry, 449 U.S. 90 (1980), does not imply to the

contrary. Allen states merely that Section 1983 does not present a categorical bar to the application of res judicata and collateral estoppel concepts.[1] Nothing in Allen requires a departure from the fundamental precept of res judicata--that it applies only to a subsequent suit involving the same cause of action as the prior suit. Where there has not been a judicial determination by the state court on the merits of the specific claims in the federal complaint, a plaintiff's action will not be barred by res judicata. This rule was reiterated by Justice Blackmun in Kremer v. Chemical Construction Corp. 102 S.Ct. 1883, 1887 (1982):

> "It is a basic principle of the preclusion doctrine, that a decision in one judicial proceeding cannot bar a subsequent suit raising issues that were not relevant to the first decision."

Kremer also makes clear that the Full Faith and Credit Act, 28 U.S.C. §1738, requires the federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the state from which the judgments emerged. Id. at 94. Ohio law, however, adheres to the traditional doctrine of res judicata expressed by this Court in

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[1]The terminology of preclusion doctrine creates some ambiguity. Collateral estoppel, referred to more precisely as "issue preclusion" concerns whether an issue that has been litigated can be relitigated in a subsequent action. Res judicata, also known as "claim preclusion," is a broader concept that bars subsequent litigation of all claims arising out of a single cause of action. The confusion in the terminology is created because res judicata is also sometimes used to refer to preclusion doctrine generally, which includes both issue and claim preclusion.

Cromwell and Mercoid. These rules are expressed clearly in Norwood v. McDonald, 142 Ohio St. 299 (1943), and Whitehead v. General Tel. Co., 20 Ohio St. 2d 108 (1969). Because petr's claim in state court involved only issues of state statutory and common law, whereas the claim in this suit involves federal constitutional claims, the federal and state claims constituted separate causes of action. The prior state proceeding does not act as a bar to this suit.

The district court in this case also erroneously concluded that the appropriate statute of limitations was the one year statute of limitations that applies in Ohio to causes of action for slander. In the instant case, the constitutional claim is properly described as alleging a conspiracy to accomplish an unlawful goal in violation of petr's civil rights. Although such deprivation resulted from the injury to petr's reputation caused by resp's statements, it is the element of conspiracy rather than the element of slander that should determine the applicable statute of limitations. In Ohio, although the statute of limitations for a slander action is one year, the statute of limitations for conspiracy to slander is four years. Accordingly, the DC was wrong to hold that the case was barred by the statute of limitations.

The lower court decisions[2] in this case also contravene the

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[2]The decision before this Court is, of course, the decision of the CA6. Because that opinion affirmed the DC by order, my discussion will refer to the DC opinion.

intent and purpose of §1983 because they deny a federal forum to a litigant with meritorious and unlitigated federal claims. The legislative history of the Act evidences a specific congressional intent to protect a citizen's civil rights even where alternative remedies exist. The Act was not designed to promote federalism, judicial recourse, comity or to reduce the federal caseload; it was designed to protect individual rights. As noted by Justice Douglas:

> "The choice made in the Civil Rights Acts of 1870 and 1871 to utilize the federal courts to insure the equal rights of the people was a deliberate one, reflecting a belief that some state courts, which were charged with original jurisdiction in the normal federal-question case, might not be hospitable to claims of deprivation of civil rights. Whether or not that premise is true today, the fact remains that there has been no alteration of the Congressional intent to make the federal courts the primary protector of the legal rights secured by the Fourteenth and Fifteenth Amendments and the Civil Rights Acts." Harrison v. NAACP, 360 U.S. 167, 181 (1959).

In the instant case, the litigation of the federal claims in the district court would not be duplicative of the state court effort because the issues in the two cases are totally different. Moreover, federal jurisdiction over the claim in this case would not violate comity because no state court decision would be superseded. Application of preclusion to this type of case could actually increase the work of the federal courts, because a plaintiff who wants a federal forum for his federal claims will be forced to bring all state claims into federal court as well.

The lower courts in this case seemed to justify denial of federal jurisdiction on the ground that petr could have brought both her federal and state claims in state court. In the field

of civil rights, however, Congress has ensured that a plaintiff be given the right to elect the forum in which he prefers to litigate his claim. It is not petr's position that §1983 deprives state courts of jurisdiction over constitutional issues. Petr contends simply that to make a federal forum unavailable to the petr, as was done in this case, violates the intent of Congress.

Finally, petr's claim for job tenure beyond the end of her 1979-1980 contract should not have been dismissed for failure to state a claim. Although petr does not formally have a tenured job with the Board, she intends to show that the circumstances of her job situation had created a legitimate claim to job tenure. Perry v. Sinderman, 408 U.S. 593, 602 (1972).

B. Respondent.

The Full Faith and Credit Act requires federal courts to give to state court judgments the same preclusive effect that state courts themselves would give to such judgments. Allen, supra; Kremer, supra. The principles of res judicata in Ohio law preclude second actions between the same parties or their privies arising out of the same transaction, occurrence, or series of transactions and occurrences. Because both petr's federal and state law claims arose out of a single occurrence, Ohio law required petr to litigate both the federal and state claim in the same proceeding. The lower courts therefore correctly determined that the instant suit is barred by res judicata.

The argument of petr to the contrary is based on the erroneous assumption that under Ohio law, petr had more than one

cause of action upon which she was entitled to bring suit. Although it is true that in earlier times Ohio applied res judicata and collateral estoppel in a very narrow manner, Ohio law more recently has adopted considerably broader rules. Most importantly, petr has ignored the opinion of the Supreme Court of Ohio in Johnson's Island, Inc. v. Board of Township Trustees, 69 Ohio St. 2d. 241, 431 N.E. 672 (1982). That opinion is merely the most recent of a long line of Ohio cases in which broader notions of res judicata and collateral estoppel have been incorporated into Ohio law. See e.g., Sharp v. Shelby Mutual Insurance Co., 15 Ohio St. 2d 134 (1968); Henderson v. Ryan, 13 Ohio St. 2d 31 (1968); Rush v. Maple Heights, 167 Ohio St. 2d 221 (1958).

Johnson's Island involved a zoning dispute between a homeowners' association and a neighboring landowner, Johnson's Island, Inc.. The specific dispute related to the operation by the corporation of a limestone quarry on the island. The operation of the quarry required blasting and other heavy industrial activities. The local homeowners' association sought and obtained a permanent injunction from the Common Pleas Court of Ottawa County prohibiting Johnson's Island, Inc. from conducting any quarrying on the island. In that action, the corporation did not challenge the constitutionality of the zoning ordinance. In a later action, the corporation brought suit against the Town Trustees, challenging the constitutionality of the zoning regulation as applied to the quarry. The trial court granted summary judgment against the corporation on res judicata

grounds even though the defendant in the second action was not the homeowner's association, and the constitutional issue had not been decided in the earlier proceeding. On appeal to the state Supreme Court, the decision was affirmed. The decision held that res judicata could be applied even though there was not a strict identity of parties. More important, the court held that Ohio principles of res judicata would bar a second action raising federal constitutional claims, where such constitutional claims could have been raised by a party to the first action.

> "Decisions of this court, and of other jurisdictions, have established that the doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action. Accordingly, if a defendant, as the appellant here, previously neglected to assert the [constitutional] defense, he is precluded from raising it subsequently by virtue of the existence of the judgment rendered in the former action." 431 N.E. 2d, at 675.

It was this principle of res judicata that the DC applied to this case when it dismissed petr's second suit. It is unquestionable that the Ohio courts would have entertained petr's constitutional claim if she had presented it to them. Despite petr's protestations to the contrary, there is also little doubt but that under Ohio law, petr's federal and state law claims constituted a single cause of action. Petr was hired to work for the Warren City Board of Education, and she was terminated on grounds that she considered unlawful. In her state court proceeding, petr could have challenged her termination on any ground she wished, including her constitutional claim. She chose to challenge it only on state law grounds, and on those grounds she prevailed. She now seeks further litigation, not on grounds

that a state court would not consider, but on grounds that a state court was never asked to consider.

In this regard, it makes no difference that petr's "analogous ... tort claims" (ACLU Br. at 36) were dismissed without prejudice in the state court proceedings. Those claims charged only that the individual defendants had conspired to deprive petr of her contract rights; they made no mention of a constitutional claim. Were it not for the statute of limitations, petr could still bring suit in state court on the state tort claim. By having part of a cause of action separated and then dismissed, petr did not also reserve the right to bring new claims that might be "analogous" to the state law claims.

There is nothing in the legislative history or prior decisions of this Court that would support the view, advanced by petr, that traditional principles of issue preclusion apply in §1983 action, but traditional principles of claim preclusion do not. In Allen v. McCurry, supra, this Court explicitly stated that:

> "In 1871 res judicata and collateral estoppel could certainly have applied in federal suits following state court litigation between the same parties or their privies, and nothing in the language of §1983 remotely expresses any congressional intent to contravene the common law rules of preclusion or to repeal the express statutory requirments of the predecessor of 28 U.S.C. §1738." 449 U.S. at 97-99.

That position was expressly reaffirmed by this Court less than a year ago in Kremer v. Chemical Construction Corp., supra. In view of these two decisions, there is no support for the view that Congress, in enacting §1983, expected the federal courts to apply only the issue preclusion aspect of traditional preclusion

doctrines, but not the claim preclusion aspect of those same doctrines.

Petitioner's proposed "double standard" for preclusion should also be rejected because it would violate well-established principles of federal-state comity. To encourage state defendants to reserve federal issues for separate federal actions would offend the policy of federalism underlying Younger v. Harris, 401 U.S. 37 (1971). As explained by Professor Currie:

> Younger reflects the policy that federal courts should "not duly interfere with the legitimate activities of the State" and that the friction incident to federal interference ought not to be tolerated so long as state courts provide an adequate opportunity to resolve federal claims. A litigant who has failed to make full use of his state court opportunity has not made a showing that the opportunity was inadequate." Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 338 n.153 (1978).

Petr has offered no convincing policy reasons that an exception to traditional preclusion concepts is required under the circumstances of this case. The essence of petr's argument here is that because she is asserting federal claims, she cannot be denied her day in a federal court. This argument was categorically rejected in Allen. Equally unconvincing is petr's claim that to preclude a second action in federal court is to "make a federal forum unavailable to the petitioner." (Br. Pet. at 25). Clearly, a federal forum was available to the petr in this case. Petr elected a different forum, however, and cannot now be heard to complain that the federal courthouse doors were closed to her.

The federal policy concerns actually present in this case all counsel against petr's position. The federal judiciary is

currently facing a tremendously overcrowded docket. Petr's position would enable every litigant who believed that his constitutional rights had been violated to obtain federal review of his claims even though he had already engaged the same defendants in state court litigation. That situation would only exacerbate the burdens already faced by the federal courts. In addition, petr's position contravenes the important policies of finality, repose, and fairness to defendants that have been embodied in the doctrine of res judicata since the very origins of the English common law.

The DC also was correct to hold petr's claim barred by Ohio's one year statute of limitations that applies to the tort of defamation. It is well-settled that in §1983 actions a federal district court must apply the most analogous statute of limitations. Petr's constitutional claim is based upon the "mental distress, humiliation, embarrassment and defamation of her character and reputation." Because these various claims are most closely analogous to the common law claims of defamation and intentional torts, they are barred by the one year statute of limitations applicable to such torts in Ohio.

C. Amici.

Four amicus briefs have been filed in this case. Three of the amici support the petr's position.[3] The brief of the

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[3]The amici supporting petr are: The National Education Association; The American Civil Liberties; The Edwin F. Mandel Legal Aid Clinc.

National Education Association is concise and well-written, but it does not really add anything to the arguments of petr. The brief filed by the ACLU is also very good in its explanation of the relationship between the issue in this case, the decision of this Court in Allen, and the doctrinal principles of collateral estoppel and res judicata. The brief argues that this Court should develop a doctrine of "qualified preclusion," in which state court judgments would bar only subsequent §1983 suits on facts and issues that were actually submitted to and decided in the state court proceeding. Such a doctrine would strike the optimnal balance between considerations of comity, judicial economy and the legislative intent behind §1983. Although the arguments made by the ACLU are no different from petr's, they are presented somewhat more clearly.

There is one amicus brief filed in support of resp and it does not add anything to the position of the resp.[4]

D. Petr's reply.

Petr's reply makes essentially three arguments. First, petitioner contends that because her tort claims against the individual members of the Board were never adjudicated by the state court, her claims in federal court cannot be barred by res judicata. Second, she claims that the instant suit is based upon separate and distinct claims from the cause of action in the state court. The federal action seeks relief for harm distinct

[4]The amicus brief supporting resp is filed jointly by the State of Maryland and the American Council on Education.

from the employment termination adjudicated in the state court. Third, petr contends that §1983's policy to ensure that a litigant has a federal forum would be contravened by barring the suit in this case.

E. Resp's supplemental brief.

The supplemental brief merely calls the Court's attention to two recent circuit court cases that have adopted the "transactional" definition of a cause of action. Isaac v. Schwartz, 706 F.2d 15 (CA1 1983); Nilsen v. City of Moss Point, Miss., 701 F.2d 556 (CA5). Resp contends that such a definition is the law in Ohio following the Johnson's Island case.

III. DISCUSSION

The issue in this case is one of statutory construction. It arises because of the inherent tension between 28 U.S.C §1738, and the policy goals that underlie §1983. On the one hand, §1738 suggests that state court judgments are entitled to the same preclusive effect in federal court that they would have in the courts of the state from which they emerge. On the other hand, §1983 seems to imply that a federal forum is to be available for certain types of federal offenses. This case arises out of the inevitable conflict created when serving both goals.

For the most part, this case is straightforward. It is controlled by the principles established in Allen and Kremer. You were in dissent in both of those cases, but for reasons that I think do not apply to this case. I therefore recommend that you vote to affirm the CA6. Although the concerns that you raised in your dissents in Allen and Kremer do not apply to this

case, a broad opinion in this case would conflict with their general thrust. For that reason, I suggest that you suggest a narrow opinion, or that you write separately to say that although res judicata is proper in this case, it is not proper in all §1983 suits.

In Allen, this Court considered whether a state court's determination of one issue in a §1983 action could bar relitigation of that issue in federal court. Petr in the case was an individual who had been convicted of possession of heroin and assault with intent to kill. At a hearing before his criminal trial, petr moved to suppress evidence that had been seized at his home at the time of his arrest. Petr claimed that the seizure had been in violation of the Fourth Amendment. The trial court denied the motion to suppress, and petr was convicted. Petr filed a §1983 damage action in federal court against the officers who had seized the evidence, claiming that they had violated his constitutional rights. The DC interpreted the claim to be based on the alleged unconstitutionality of the search and seizure. The court granted summary judgment for the defendants, holding that collateral estoppel prevented petr from relitigating the search-and-seizure question already decided against him in state court. The CA8 reversed, finding that the §1983 action was the only access that petr had to litigate his constitutional claim in a federal court, and that petr was entitled to have a federal forum for his federal claim.

This Court reversed. The Court noted that 28 U.S.C. §1738 requires that federal courts give preclusive effect to state

court judgments whenever the courts of the State from which the judgment emerged would do so. That statute has existed, in its present or very similar form, since May 26, 1790. Section 1983 does not expressly repeal or modify it, and the Court in Allen described the question presented by the case as whether §1983 implicitly intended any modification. After reviewing the legislative history, the majority concluded that §1983 was intended to create a federal cause of action, not to alter the preclusive effect of state court judgments. Accordingly, the state court determination of the search-and-seizure issue in the case was entitled to the same preclusive effect that it would have in a subsequent state court suit.

You were joined in dissent by Justices Brennan and Marshall. You indicated that your disagreement with the majority was not over the applicability of preclusion doctrines to §1983 suits generally, but rather their application under the facts of Allen. Your dissent stated:

> "I do not doubt that principles of preclusion are to be given such effect as is appropriate in a §1983 action. In many cases, the denial of res judicata or collateral estoppel would harm relations between federal and state tribunals. Nonetheless, the Court's analysis in this particular case is unacceptable to me." Allen v. McCurry, 449 U.S. at 107.

The factual aspect of Allen that the dissent found especially troubling was the fact that petr had no choice of forum in which first to raise the search and seizure issue. The issue arose when he was a defendant in a state criminal case, where the risk of conviction puts pressure on a defendant to raise all possible defenses. It therefore makes no sense to suggest that a criminal

defendant who raises a Fourth Amendment claim at a criminal trial "freely and without reservation submits his federal claims for decision by the state courts,." See Allen, 449 U.S. 115-116 (Blackmun, dissenting, quoting England v. Medical Examiners, 375 U.S., at 419). In the view of your dissent, the major motivation behind enactment of §1983 was the perception that justice was not being done in the states dominated at the time by the Klan. It is incongruous to assume that Congress intended the federal courts to give full preclusive effect to prior state adjudications, when the purpose of the statute was to right the wrongs perpetrated in those state courts. The issue in Kremer was in some ways related to the issue in Allen. In that case, the Court determined the preclusive effect in a Title VII suit that should be given a state administrative determination that had been reviewed in state court. The petr in that case filed a complaint with the New York State Division of Human Rights, alleging that he had been discharged from employment on account of his religion. After investigating the complaint, the agency determined that there was no probable cause for believing that petr's discharge had been unlawful. Petr sought review in state court, where the decsion of the agency was found not to be arbitrary and capricious. Petr then filed a complaint with the EEOC, which agreed with the state agency, and issued a right-to-sue notice. Petr then filed a Title VII suit in federal district court. The court gave full preclusive effect to the determination of the state agency which had been "reviewed" by a state court. Accordingly, because that determination would bar

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any future suit in state court the federal court held that it barred any future suit in federal court, including one brought pursuant to Title VII. This Court affirmed on essentially the same grounds as district court.

Once again you were in dissent joined by Justices Brennan and Marshall. The dissent argued that judicial review in state court of the determinations of a state agency should not be given preclusive effect in a Title VII suit. The dissent gave two principal reasons. First, the legislative history of Title VII indicated that proceedings in other forums were not to be given preclusive effect in a Title VII suit. Second, and more important, the state court judicial review of the agency proceeding in Kremer was not a de novo reconsideration of the merits of the particular case. Rather, the inquiry was to determine whether theagency action had been "arbitrary and capricious." Thus, in Kremer the petr was never given de novo consideration of his case in any judicial forum. Such circumstance conflicts with the clear purpose of Title VII.

The difference between the majority and the dissent positions in Allen and Kremer was not over the proper analytic framework that should be applied in preclusion cases. Both sides appear to agree with the general proposition that 28 U.S.C. §1738 requires federal courts to give preclusive effect to state court judgments unless some other statute effects a repeal or modification of that requirement. The difference between the two positions concerns the willingness, in a particular case, to find that a federal policy requires modification of the general rule.

Thus, the dissent in Allen found that an exception to §1738 is needed where the effect of that statute would otherwise be to deprive a §1983 litigant of the opportunity to have a federal forum determine the merits of his constitutional claim. Likewise, in Kremer, the dissent concluded that the scheme created by Title VII does not contemplate giving preclusive effect to the determination of a state agency followed by "review" in a state court under an "arbitrary and capricious" standard. The majority in both cases refused to imply any exceptions to §1738, despite the somewhat inequitable results that inevitably follow.

The issue in this case, therefore, comes down to the question whether application of §1738 in this case conflicts with the federal policy embodied in §1983. I suggest that it does not. The thrust of your dissent in Allen, with which I agree, is that §1983 requires that a litigant have the opportunity to bring his claim in a federal forum. That opportunity was present here. Petr originally could have brought her entire cause of action, consisting of both state and federal claims, in federal court. She chose not to do so. That choice is very different from choice given the petr in Allen, whose federal claim first arose when he was a defendant in a criminal trial. The only way that he could have obtained a federal forum for his federal claim would have been to allow submission of the seized evidence in his criminal trial without objection.

In short, if §1738 ever requires that res judicata effect be given to a state court judgment in a subsequent §1983 suit, this

case seems to be a likely candidate. Petr was in an offensive posture in the state court proceedings, and she prevailed on the claims that she presented. Thus, there is no evidence that her state forum was unreceptive to her claims.

Recognizing that the equities of this particular case are not on petr's side, the ACLU takes the view that state court judgments should never create claim preclusion in a later §1983 suit in federal court. In the ACLU's view, the inherent tension between §1738 and §1983 should be settled by holding that issue preclusion (collateral estoppel) is the only preclusion doctrine applicable in a §1983 suit. Such a holding would mean that a later §1983 suit would be barred only if the issue had been raised and litigated in state court. Such a holding would not be in actual conflict with Allen, because that case held only that collateral estoppel applies in §1983 suits.

The problem with this argument is that it loses sight of the reason that §1983 might warrant an exception to §1738's general rule that state court judgments are to be given preclusive effect. Section 1983 was motivated in part by a distrust of the decisions of some state courts in cases involving civil rights. If a state court is not to be trusted with determination of federal rights, it would make little sense to use §1983 to fashion an exception to §1738 that applies only where a state court did not decide an issue. Any distrust of state courts must apply equally to claims that they decide and to claims that are never reached. The unfair aspect of Allen is not that the petr's claims were decided in a state court; it is that they were

decided there against his will. Thus, although the ACLU's position is not in conflict with Allen, §1983 does not support drawing a distinction between the collateral estoppel and res judicata effect of state court judgments.

If there is a sense in which giving preclusive effect to the state court judgment in this case would be inequitable, it stems from the unsettled nature of Ohio preclusion law. Resp concedes that in the past Ohio courts have applied res judicata concepts somewhat narrowly in determining what constitutes a single cause of action for purposes of creating a res judicata bar. In the instant case, however, resp defends the DC's interpretation of Ohio preclusion law by relying heavily on Johnson's Island. Resp's describe that case by stating that it "dramatically broadens the scope of [res judicata] as it now exists in Ohio." The problem with Johnson's Island, is that it postdates the date of the DC decision in this case. Therefore, although it may now be clear that petr's federal and state claims constituted a single cause of action, it may not have been clear at the time that petr chose to separate them.

Petr devotes much of her brief to arguing that the DC erred in determining that all her claims constituted a single cause of action. She also claims that the dismissal of her tort claims in the state proceeding reduces the preclusive effect of those proceedings on her later federal claims. Although this Court could review whether the DC properly interpreted Ohio preclusion law, I assume that the Court will choose to show the traditional deference to lower federal courts on issues of state law.

Although in this case petr may have been trapped by the vagaries of state preclusion law, such a result is inevitable under §1738. In that statute Congress apparently chose to have state laws govern the preclusive effect of state court judgments. There is no indication that §1983 was intended to make §1738 entirely inapplicable to §1983 suits. Your dissent in Allen argues for a much more limited exception; §1983 indicates only that Congress intended to modify §1738 where state preclusion law would deprive a civil rights litigant of the opportunity to bring his federal claim in a state court. Where such an opportunity is provided, however, the state preclusion law is to apply, whatever it may be.

I expect that a majority of the Court will vote to affirm this case. Although I recommend that you join such a vote, I think that the scope of the opinion is important. Based on the majority opinions in Allen and Kremer, I expect that a majority will want to hold that res judicata is applicable to all §1983 suits. Such a holding would be inconsistent with the position that you took in Allen. I recommend that you affirm in this case because the result in this case does not deprive a litigant in a §1983 suit from having a federal forum if she so chooses in the first instance. Given the inevitable variations in state preclusion laws, however, there well may be circumstances where state res judicata law would operate to deprive a litigant of the opportunity to choose a federal forum. In that situation, the interpretation of §1983 set out in your Allen dissent suggests that application of res judicata would be inconsistent with

congressional intent. Accordingly, I suggest pushing for an opinion which holds simply that application of res judicata in this §1983 suit is consistent with the dual federal policies embodied in §1738 and §1983.

The problems of too broad an opinion in this case can be illustrated with reference to the interplay of this case and Pennhurst. If Pennhurst is written the way that LFP currently intends, injunctive relief arising out of state law claims will only be available in state courts. Such relief might be desired in a suit which also contains a §1983 claim against a state official. Thus, a litigant might be forced into state court in order to obtain relief that is unavailable in federal court, and then find himself precluded from bringing his §1983 claim in federal court because he could have brought it in his state court proceeding. Such a result would conflict with the policy of providing access to a federal forum for §1983 claims. The problem is not presented by this case, but I mention it to make you aware of the nature of future problems that might emerge from a holding that res judicata is fully applicable to suits brought under §1983.

IV. Conclusion

This case requires application of the principles outlined in your dissent in Allen. Your dissent argued that §1738 requires that prior state court judgments be given preclusive effect in subsequent §1983 suits, unless the the circumstances of the particular case would make such preclusion inappropriate. The aspect of Allen that made collateral estoppel inappropriate was

che petr never had an opportunity to present his federal
ım to a federal court. This aspect is not present in this
ıse. Petr had a choice to proceed with her cause of action in either state or federal court. She chose state court, but failed to raise her federal claim there. Section 1738 requires a federal court to give the same preclusive effect to a state court judgment that it would have in other courts of the state. Because the judgment in petr's state court proceeding would bar further litigation in state court of other claims, state or federal, arising from the same cause of action, this suit in federal court is barred by res judicata.