November 16, 1983

Mr. Justice:

Re: Migra, No. 82-738,

I have been meaning to write you a note about this case before you set your mind to writing the opinion, but events of the last week have kept me preoccupied. In any event, I hope that you have have not gotten very far on the opinion at this point. It is my understanding that you intend to write a narrow affirmance that 1) assumes that the DC applied state preclusion law; and 2) affirms the CA6 because petr had the opportunity to bring her suit in a federal forum. For the reasons that follow, it may be more desirable to change the disposition from an affirmance to a remand.

As you may recall, this case seems to have turned into something very different from what I think everyone thought it would be at the time that cert was granted. I think that the case originally was granted to decide whether claim preclusion applies to state court judgments in §1983 actions. That question was left open expressly in Allen v. McCurry, 449 U.S. 90 (1980), which decided only that issue preclusion does apply. Before oral argument, it seemed that there would be two opinions in the case: one joined by you, TM and WJB, stating that claim preclusion applies to this case because petr had an opportunity to use a federal forum; and a majority opinion joined by the rest of the Court stating that claim preclusion applies regardless of whether a federal forum was available.

At oral argument, two wrinkles emerged. First, several members of the Court focused on the fact that the DC opinion leaves considerable ambiguity over which law of claim preclusion, federal or state, was applied in this case. This issue is of no consequence except to the parties in this suit. Unfortunately, it attains considerable significance because it changes the appropriate disposition of the case. Several justices--TM[1], WJB, JPS, SOC[2]--apparently feel that the Court should vacate and remand with instructions to the DC to apply state law.

Second, JUSTICE WHITE suggested that in addition to whatever preclusive effect a state court judgment is to have under state law, there may be an independent federal law that precludes a subsequent suit even if state law does not. This argument had not been raised by either party or mentioned by the DC and CA6. Nevertheless, it appears that four members of the Court--LFP, WEB, BRW, WHR--are sympathetic to that view, though some may not write separately to make the point.

Because of the split among the Court, it seems that your vote will determine the disposition--i.e. whether to vacate and

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[1]TM's vote at conference technically was to affirm. His clerk came by to tell me, however, that that vote was based on the assumption, which I think you shared, that the Court was going to assume that the DC had applied state preclusion law. His clerk said that if there is an opinion endorsing a remand with an instruction to apply state preclusion law, he would prefer that disposition.

[2]I gather from SOC's clerk that she does not endorse JUSTICE WHITE's suggested federal law, but that she is largely indifferent as to whether the case is remanded or affirmed. Her clerk indicated that she has a slight preference for a remand.

remand or affirm. As I understand it, your vote at conference was to affirm. Because the other members of the Court who are likely to agree with your view on the merits (WJB and TM) would prefer to vacate and remand, however, they are likely to dissent from an affirmance on the trivial issue of which law the DC actually applied. The members of the Court who would agree with your disposition, however, do not agree with your view of the merits; they all want a broad opinion, and several seem to want a separate federal preclusion law. It seems likely, therefore, that your opinion would turn into a concurrence, with a plurality opinion written by one of the justices who would affirm. That plurality opinion might very well endorse JUSTICE WHITE's view that there is a separate federal preclusion law that bars a second suit in this case. With a little leaning on SOC, that plurality might even become a majority.

I do not think anything of importance would be lost if instead of affirming you vacated and remanded the case to the DC. Such a disposition is one that would probably be joined by WJB and TM. SOC and JPS would likely concur in the disposition, writing separately to say that in their view §1738 applies in all cases. The rest of the Court would write in dissent both on the disposition and on the merits. This outcome would seem vastly preferable to your being alone. Because the different disposition--vacate and remand instead of affirm--is of no importance beyond this case, you would not have lost anything. Moreover, if a dissenting opinion were to suggest the federal

preclusion law outlined by JUSTICE WHITE, it would be in dissent rather than in a plurality opinion.

I realize that vote-counting is a hopelessly imprecise game, and I certainly do not have complete confidence that the votes will fall the way that I have suggested. It appears, however, that none of the members of the Court will join a narrow opinion that affirms the CA6 (I realize, of course, that you did not ask for this assignment). It seems, therefore, that you have nothing to lose by vacating and remanding, and you may very well obtain a plurality and prevent the other votes to affirm from writing a plurality opinion that adopts JUSTICE WHITE's view of preclusion.