

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHARLES OF
JUSTICE SANDRA DAY O'CONNOR

December 19, 1983

Re: No. 82-738 - Migra v. Warren City School District Board

Dear Sandra:

December 16, 1983

Thank you for your inquiry of December 16. You will recall that this case was misassigned to me.

Of course, defendants as well as plaintiffs should be concerned by the state law of claim preclusion. At this stage of the writing, however, I chose not to go into that aspect because (1) I was and am fearful that it will chase away at least two votes of Justices who just might join and (2) because the issue really is not before us. I feel that of late we have been tending to pass judgment on issues that are not before us and that have not been argued. This obviously is a developing area of the law, and I would much prefer to take it step by step.

sending my formal joinder, however

My last comment also has reference to Byron's approach. There was a good bit of sympathy for his view at the conference but, I believe, something less than a majority. I would prefer to refrain at this time from comment on a separate federal rule overlying the state rule of §1738. This again was not specifically before the lower courts and certainly was not briefed by the parties, although there was a good bit of discussion about it at the oral argument. I have available an alternative draft of the opinion which mentions and leaves open the possibility of a federal rule, but it does not go so far as Byron apparently wishes to go in this case. I can fall back on that if necessary, but, for the first circulation, at least, I chose not to use that draft.

In sum, I would prefer, for the time being and until the votes become apparent, to leave the draft about as it is. If, however, you would be more content, I would be willing (1) to change the word "plaintiff" to "litigant" in the third line of the paragraph that begins on page 7, (2) to eliminate the words "a plaintiff's" in the third line on page 9, and (3) to eliminate the last sentence of the paragraph that ends on page 9.

Sincerely,

Justice O'Connor

RE OKed