December 19, 1983

Mr. Justice:

Re: SOC's comments in Migra.

I have given some thought to SOC's comments in this case, and I think that you may be able to accommodate her concerns without clarifying the opinion in the manner that she seems to want.

SOC would prefer to have your opinion decide that state claim preclusion law applies in all situations; such a position would conflict with your dissent in Allen. In addition, I think that to write such a broad opinion would be a mistake because state procedures and state preclusion law may vary considerably from state to state, and it is difficult to foresee the odd results that differing state laws can produce. See, E.g., Kremer. I also doubt whether WJB and TM would go along with an opinion of the form that SOC would like.

Although I think that full accommodation of SOC's concerns therefore would be a mistake, I think that part of her concern can be satisfied in a compromise that would not alter your opinion significantly. I think that SOC feels that use of the term "plaintiff" on pages 7 and 9 creates an inference that the result would be different if petr had been a defendant in herprior suit. Because she apparently would like the result to be the same in either situation, she does not want to join an opinion with such an inference. I think that you can remove the inference without constraining your freedom to decide a future cases in whatever manner you would like. On the attached copy, I

have indicated changes that should satisfy her concern, but would still leave open the questions that you would like to leave open.

As for footnote 7, I do not think she would object to it if the other changes were made. Footnote 7 merely explains your dissent in Allen, and the reason that this case is different. I do not think that the footnote carries with it any inference that the Court would decide differently in a case involving a plaintiff who was a defendant in a prior proceeding; it just indicates that your vote--as well as the votes of those that joined you in dissent--might be different. I think that if you point all of this out to her in an explanatory letter, she should be receptive--though I confess I do not know anything about how easy she is to please.

I have gone ahead and drafted a short explanatory letter that you might use if you decide to make the changes that I have suggested.

Dear Sandra,

Thank you for your note of 12/6/1983. Let me explain briefly my position and offer some changes in my opinion that, while not clarifying it in precisely the manner that you would like, would perhaps satisfy your concerns.

As you know from my dissent in Allen, I am of the view that there may be circumstances in which §1983 abrogates the operation of §1738. I realize that a majority of the Court may not share that view, and you may recall that I found the assignment of this

opinion to me somewhat incongruous. Because I wish to leave myself free in a future case in which I think that application of state claim preclusion law would contravene the policies of §1983, however, I have written this opinion narrowly. Moreover, I think that in the event that the opinion were written more broadly, I would lose the votes of several other members of the Court.

I realize that some of the language used on pages 7 and 9 may create an inference that the case would have been decided differently had the petitioner been a defendant in the earlier state court proceeding. I think that I can remove that inference without making the opinion broader than it needs to be. On the attached pages I have indicated changes that I think would accomplish that result. I do not think that the other members of the Court would find them objectionable.

With the changes that I have suggested, I do not think that footnote 7 creates any inference concerning how the Court would decide a future case. The footnote merely explains why my vote in this case is consistent with my dissent in Allen.

Sincerely,

I do not know the appropriate timing in a situation like this one. SOC may be more receptive to this note after other members of the Court, such as WJB and TM have joined, as I hope that they will. On the other hand, she may appreciate a quick response.

RB

> or restrict the traditional doctrines of preclusion. . . . [T]he legislative history as a whole . . . lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and res judicata. Since repeals by implication are disfavored . . . much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." 449 U. S., at 97–99.

Allen therefore made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered.

The Court in *Allen* left open the possibility, however, that the preclusive effect of a state-court judgment might be different as to a federal issue that a § 1983 ~~plaintiff~~ litigant could have raised but did not raise in the earlier state-court proceeding.[6] 449 U. S., at 97, n. 10. That is the central issue to be resolved in the present case. Petitioner did not litigate her § 1983 claim in state court, and she asserts that the state-court judgment should not preclude her suit in federal court

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[6] Most federal courts that have faced this question have ruled that claim preclusion is applicable to a § 1983 action. See *Isaac* v. *Schwartz*, 706 F. 2d 15 (CA1 1983); *Nilsen* v. *City of Moss Point*, 701 F. 2d 556 (CA5 1983); *Castorr* v. *Brundage*, 674 F. 2d 531 (CA6), cert. denied, —— U. S. —— (1982); *Lee* v. *City of Peoria*, 685 F. 2d 196 (CA7 1982); *Robbins* v. *District Court of Worth County, Iowa*, 592 F. 2d 1015 (CA8), cert. denied, 444 U. S. 852 (1979); *Scoggin* v. *Schrunk*, 522 F. 2d 436 (CA9 1975), cert. denied, 423 U. S. 1066 (1976); *Spence* v. *Latting*, 512 F. 2d 93 (CA10), cert. denied, 423 U. S. 896 (1975). Some appear to have decided otherwise. See *Lombard* v. *Board of Ed. of the City of New York*, 502 F. 2d 631 (CA2 1974), cert. denied, 420 U. S. 976 (1975); *New Jersey Education Assn* v. *Burke*, 579 F. 2d 764 (CA3), cert. denied, 439 U. S. 894 (1978).

For comment as to federal-state comity considerations, see Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317 (1978).

bodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for ~~a plaintiff's~~ federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources. ~~Thus, a plaintiff who obtains a state-court judgment is barred by that judgment from bringing in federal court a suit that would be precluded in the courts of the State from which the original judgment emerged.~~

In the present litigation, petitioner does not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court.[7]

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[7]The author of this opinion was in dissent in *Allen*. The rationale of that dissent, however, was based largely on the fact that the § 1983 plaintiff in that case first litigated his constitutional claim in state court in the posture of his being a *defendant* in a criminal proceeding. See 449 U. S., at 115–116. In this case, petitioner was in an offensive posture in her state court proceeding, and could have proceeded first in federal court had she wanted to litigate her federal claim in a federal forum.

In the event that a § 1983 plaintiff's federal and state law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, *e. g.*, *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964).

In the event that a § 1983 plaintiff has both federal and state law claims and seeks to adjudicate them all in federal court, a federal court may be barred by the Eleventh Amendment from granting certain types of relief if the suit is against the State or state officials acting in their official capacities. See *Pennhurst State School and Hospital* v. *Halderman*, —— U. S. —— (1984). In that situation, after the plaintiff's federal claims have been adjudicated, the plaintiff would have to go to state court to obtain the relief that could not be awarded by the federal court. Federal preclusion law would not bar such a suit because the relief sought was not available in the federal forum.