No. 82-738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DR. ETHEL D. MIGRA,

Petitioner,

—v.—

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE GREATER CLEVELAND CHAPTER OF THE ACLU AS *AMICI CURIAE*

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INTEREST OF AMICI CURIAE*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to the protection of the civil rights and liberties of Americans. The Greater Cleveland Chapter of the ACLU is one of its affiliates. Since its founding in 1920, one of the constant concerns of the ACLU has been the need to provide adequate legal mechanisms to protect against and remedy violations of constitutionally protected rights. Foremost among those mechanisms are the sanctions available under § 1983 against those state officials who abuse the official power entrusted to them.

The ACLU has frequently appeared before this Court in support of the historic role of 42 U.S.C. § 1983 in remedy-

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*Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

ing violations of federal civil rights, and in deterring departure from constitutional standards.

STATEMENT OF THE CASE

The petitioner, Dr. Ethel D. Migra, had been employed by the Warren City School District Board of Education (hereinafter "Board") as Supervisor of Elementary Education on a yearly basis pursuant to written contracts for the school year commencing on August 13, 1976, and continuing without interruption for each year thereafter until June 15, 1979.[1] The petitioner's responsibilities included, among others, directing a commission appointed by the School Board to devise a voluntary desegregation plan for Warren City schools in compliance with the federal Emergency School Aid Act, § 718 of Title VII, 20 U.S.C. § 1617.[2] In this capacity, petitioner had actively and publicly supported controversial desegregation policies which the School Board

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1. Federal complaint (FC) at ¶ 7.

2. FC ¶ 8.

vehemently resisted.[3] As a result of her views, the superintendent of schools and some board members publicly circulated malicious rumors about the petitioner in an attempt to eliminate her from her position.[4]

On April 17, 1979, the School Board, at a regular meeting with all five members present, unanimously approved renewal of Dr. Migra's contract for the 1979-80 school year.[5] One week later, on April 24, 1979, the Board held a special meeting at which it rescinded the petitioner's contract renewal by a vote of three to one, without extending written notice to a fifth member of the Board as required under Ohio law.[6]

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3. FC ¶¶ 14, 15.

4. FC ¶ 16.

5. FC ¶ 16.

6. Cert. Petition at C-20.

As a result of the Board's rescission of her contract, the petitioner brought suit in the common pleas court of Trumbull County, Ohio against the Board and the Board members who voted to terminate her contract. Although pleaded in five counts, the complaint essentially asserted two causes of action: (1) breach of the employment contract by the Board;[7] and (2) conspiracy to interfere tortiously with the petitioner's contract.[8] The state judge, sua sponte, continued the tort claims while he held trial on the merits of the contract claim,[9] a procedure to which the defendants did not object. On March 20, 1980, the state judge entered a written opinion holding that the April 24, 1979 special

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7. State complaint (hereinafter "SC") Counts I - III.

8. SC Counts IV and V.

9. See Migra v. Warren City School District Board of Education, No. 79-CV-571 at 1 (Common Pleas Court, Trumbull County, March 20, 1970) (hereinafter "State Trial Court Opinion").

meeting was invalid, and that the Board therefore unlawfully breached the petitioner's contract. He ordered her reinstated with back pay.[10] On July 9, 1980, the state judge dismissed the reserved tort claims without prejudice, referring to them as the petitioner's "second cause of action."[11]

One day later the petitioner filed the instant action against the respondents here (School Board, Superintendent of Schools and individual Board members), in the United States District Court for the Northern District of Ohio under 42 U.S.C. §§ 1983 and 1985, alleging a conspiracy to violate her First, Fifth and Fourteenth

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10. State trial court opinion at 1-15. On appeal solely from the contract holding, the Ohio Court of Appeals for the Eleventh District eventually affirmed the state trial court's opinion, No. 3048 (Ohio Ct. App. 11th Dist., June 7, 1982). See also infra n.26.

11. Trial Court Judgment Entry, Case No. 79-CV-271 (July 9, 1980).

Amendment rights.[12] In essence, petitioner alleged that the respondents punished the exercise of petitioner's free speech and advocacy of desegregation[13] and falsely and maliciously stigmatized her resulting in the deprivation of her liberty interest in reputation and property interest in continued state employment,[14] without due process.[15]

On the respondent's motion for summary judgment, the federal district judge dismissed the complaint on res judicata grounds[16] reasoning that the petitioner

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12. FC at ¶ 1.

13. FC at ¶ 27.

14. FC at ¶ 24.

15. See also FC at ¶ 28.

16. The federal trial judge also dismissed the Fourteenth and Fifth Amendment due process claims on statute of limitations grounds, finding defamation the most analogous state cause of action to these claims and applying the one-year statute of limitations applicable to defamation (footnote continued on following page)

could have raised her federal civil rights claims in the state contract action.[17] The

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(footnote continued from preceding page) claims. These due process claims were apparently based on Board of Regents v. Roth, 408 U.S. 564 (1972) and Codd v. Velger, 429 U.S. 624 (1977) wherein this Court held that injury to reputation, committed under color of law accompanied by a resulting injury to more tangible interests such as continued employment, states a claim under the due process clause. Cf. Paul v. Davis, 424 U.S. 693 (1973). Since §§ 1985 and 1983 are silent on the question of a limitations period, 42 U.S.C. § 1988 requires in light of this deficiency that state law be applied to the extent it is not inconsistent with the purposes and policies underlying the civil rights acts. See Carlson v. Green, 446 U.S. 19, 23-25 (1980); Board of Regents v. Tomanio, 446 U.S. 478 (1980). While Ohio's one-year defamation statute of limitations might very well be appropriate under this standard, federal courts must also borrow state tolling rules under § 1988 to determine when a cause of action accrues. Tomanio, 446 U.S. 478 (1980). Since under the Ohio Supreme Court's recent pronouncement a dismissal without prejudice tolls the statute of limitations, Chadwick v. Barba Lou, Inc., 69 Ohio St.2d 222, 431 N.E.2d 660, 662-63 (1982), the state trial court's dismissal of the analogous state conspiracy claims without prejudice tolls the statute of limitations and the district court's dismissal on statute of limitations grounds was clearly erroneous. It is unclear, however, whether this issue is now before the Court.

17. Cert. Petition at C-17 - 31.

district court apparently discerned and applied a wholly federal rule of res judicata since he made no reference to 28 U.S.C. § 1738 or Ohio preclusion law. The Sixth Circuit Court of Appeals, in a one-page order, affirmed the judgment below on the district court's opinion.[18] This Court granted the petition for certiorari to review the question whether 28 U.S.C. § 1738 and the res judicata doctrine barred the petitioner's civil rights claims. 51 U.S.L.W. 3496 (January 11, 1983).

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18. Cert. Petition at B-16. The Sixth Circuit later denied the motion for rehearing. Cert. Petition at B-17.

SUMMARY OF ARGUMENT

Under 28 U.S.C. § 1738, the federal court should have looked to the Ohio rule of res judicata, and should not have barred petitioner's civil rights claims if Ohio would not have precluded them on the basis of petitioner's prior state court judgment on her contracts claim. Had the court done so, it would have found that Ohio still adheres to the traditional, narrow definition of "claim or demand" for res judicata purposes. Under the Ohio rule, petitioner's contracts judgment would not bar a second action on either her tort claims, which were severed from the contract claim, or the tort-related federal claims under 42 U.S.C. §§ 1983 and 1985.

Ohio law makes clear in another respect that petitioner's civil rights claims would not, under the circumstances of this case, be precluded by the contract judgment. The tort claims here were

severed and continued sua sponte by the trial court and were later dismissed "without prejudice", all without objection from the defendants at any point. Under those circumstances, petitioner could have refiled her tort claims without running afoul of Ohio's preclusion rules; and her federal civil rights claims, analogous to her tort claims and dependent on similar proof, would be subject to the same treatment under Ohio preclusion law.

Since Ohio law would not bar petitioner's civil rights claims, this Court need not and should not reach the further question whether, if Ohio would have precluded those claims, § 1738 should be construed to permit such full preclusion of civil rights claims. If it does so, however, amici submit that the policies of § 1738 and § 1983, considered together, require adoption of a rule of qualified preclusion, under which facts and issues

previously litigated would be subject to full collateral estoppel effect, but claims not raised or decided in state court proceedings could be subsequently reasserted in federal actions under 42 U.S.C. §§ 1983 and 1985. Considerations of comity support such an approach, which limits occasions in which federal courts will be called upon to decide questions of state law, and which will encourage exhaustion of state judicial remedies. Moreover, since state courts do not commonly preclude state claims which could have been but were not brought as pendent claims in federal civil rights actions, or which were asserted but over which the federal court declined to exercise jurisdiction, it would be anomalous for federal courts to grant greater preclusive effect to federal claims which were not raised in state court.

Considerations of judicial economy

underlying § 1738 also militate in favor of only a qualified rule of preclusion. The state judicial exhaustion which such a rule will induce may well reduce the number of federal civil rights claims asserted in courts generally, and full preclusion will undoubtedly sharply increase federal caseloads.

Finally, the basic policies underlying § 1983 suggest that Congress did not intend to foreclose litigants from asserting federal claims in federal courts merely because they chose to exhaust state judicial remedies. Indeed, given the narrow res judicata definition of a single "claim or demand" in the mid-nineteenth century, see Cromwell v. County of Sac, 94 U.S. 351, 354 (1877), it is clear that Congress would not have expected that a state judgment on a claim arising only under local law would preclude a subsequent action raising constitutional

claims that had not been presented to or decided by a state court.

I. SECTION 1738 DOES NOT BAR PETITIONER'S CONSTITUTIONAL ACTION SINCE OHIO WOULD NOT ACCORD PRECLUSIVE EFFECT TO HER STATE CONTRACTS JUDGMENT.

By its terms, 28 U.S.C. § 1738 requires federal courts to give the same effect to state court judgments "as they have by law or usage in the courts ... from which they are taken." 28 U.S.C. § 1738; see also Kremer v. Chemical Construction Co., ___ U.S. ____ , 102 S.Ct. 1883, 1889, reh. denied 103 S.Ct. 20 (1982) ("Section 1738 ... commands a federal court to accept the rules chosen by the state from which the judgment is taken."); Allen v. McCurry, 449 U.S. 90, 96 (1980). Thus, if petitioner establishes that Ohio would not accord res judicata effect to her present action, its preclusion is not justified by the clear language of section

1738.[19] Nevertheless the federal district court judge did not even consider Ohio law in granting summary judgment to respondents on the basis of res judicata.[20]

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19. In Point II below we consider whether even if a state would otherwise preclude the subsequent assertion of claims that could have been raised in a prior proceeding, § 1738 requires doing so, if the subsequent claims are constitutional claims over which Congress vested the federal courts with jurisdiction in 42 U.S.C. § 1983 and § 1985. For convenience's sake, amici will hereafter sometimes refer to petitioner's federal claims as § 1983 claims, since the inclusion of a § 1985 claim makes no difference in the present context.

20. In holding that petitioner's § 1983 claims were precluded by res judicata, the district court relied solely on two Sixth Circuit cases and made no apparent attempt to discern Ohio state law. Cf. Bishop v. Wood, 426 U.S. 341, 345-47 (1976). Only one of those, Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6th Cir. 1970), considered Ohio law and the case it relied on, Burton, Inc. v. Durkee, 162 Ohio St. 433, 123 N.E.2d 432 (1954), was inapposite, since it involved only collateral estoppel (issue preclusion), not claim preclusion, which is at issue here. The leading Ohio cases on res judicata, by contrast, which are addressed infra at 16-18, were not cited or discussed in Coogan. There is no question, of course, but that issue preclusion is fully applicable here. Allen v. McCurry, supra.

Had it done so, it would not have granted defendants' motion to dismiss on grounds of res judicata. Under Ohio law, petitioner's prior state court judgment on her contracts claims would not preclude her subsequent action on constitutional claims arising from the same facts, especially under the circumstances of this case.

A. Under Ohio Law Petitioner's Constitutional Claims Are A Separate Cause Of Action Arising Out Of The Same Transaction As Her Contract Claims And Are Therefore Not Barred Under Ohio Law Of Res Judicata.

The traditional formulation of res judicata is that

> a judgment estops not only as to every ground of recovery or defense actually presented in this action, but also as to every ground which might have been presented ... when applied to the demand or claim in controversy ... But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted.

Cromwell v. County of Sac, 94 U.S. 351, 353 (1877). This formulation, valid generally and in Ohio, disguises a critical area of disagreement which has led to a sharp diversity of state opinion concerning the actual application of res judicata. As this Court has observed, the scope of res judicata is correspondingly greater or smaller depending on how broadly a state defines "the definition of 'claims' in bar and merger contexts." Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 327 (1971). See generally Currie, Res Judicata, The Neglected Defense, 45 U.Chi.L.Rev. 317, 338-342 (1978). The lower court's application of res judicata here was erroneous precisely because it failed to inquire into how Ohio defines a cause of action for res judicata purposes, and to recognize that Ohio adheres to the traditional narrow definition of cause of action under which the judgment on peti-

tioner's contract action would not have barred subsequent state-court litigation of her tort claims, and would not bar the subsequent litigation of her constitutional claims in either state or federal court.

Analysis begins with the state judge's own characterization of petitioner's claims. He referred to petitioner's tort claims as her "second cause of action", State Court Opinion at 1, and sua sponte continued those claims while he held trial on the merits of the contract claim, a procedure to which defendants did not object.

Moreover, under Ohio rules, in sharp contrast to the more "modern" view taken by the Restatement (Second) of Judgments § 61 (1980), one transaction may give rise to more than one cause of action. As stated in Norwood v. MacDonald, the leading Ohio case, "[A] judgment in a former action does not bar a subsequent action where the cause of action prose-

cuted is not the same, even though each action relates to the same subject matter." 142 Ohio St. 299, 52 N.E.2d 67 (1942), ¶ 2 of syllabus; Henderson v. Ryan, 13 Ohio St. 2d 31, 37-38, 233 N.E.2d 503, 510-11 (1968) (where attorney was codefendant in previous fraud action, second action by same plaintiff against attorney for negligence is not precluded though arising from the same transaction).[21] See also

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21. In Henderson, the Court noted in dicta that Ohio's trend toward more liberal joinder furthered judicial efficiency. Henderson, 13 Ohio St. 2d at 38. The Court expressly found "still valid", however, the "primary right -- primary duty theory" under which one set of facts may give rise to two causes of action, though under the "transaction" theory only one cause of action would arise. Id. at (509-510); see also Sharp v. Shelby Mutual Ins. Co., 15 Ohio St. 2d 134, 140-141, 239 N.E.2d 49, 53-54 (1968) (plaintiff's claims are different causes of action under either "same evidence" or "single factual unit" tests). These 1968 cases are the Ohio Supreme Court's most recent pronouncements on the definition of cause of action.

City of Columbus v. Union Cemetery Association, 45 Ohio St. 2d 47, 50 341 N.E. 2d 298, 301 (1976) "The Ohio views on res judicata and estoppel by judgment are well-expressed in Norwood ... [quotes § 2 of syllabus] ..."); Johnson's Island, Inc. v. Board of Township Trustees of Danbury Township, 69 Ohio St. 2d 299, 305, 431 N.E.2d 672, 674 (1982) (follows Norwood for Ohio res judicata rules).

Ohio thus follows the traditional view of res judicata as stated in Cromwell v. County of Sac, 94 U.S. at 354, on which Norwood expressly relied:

> It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated; therefore, such possible question is to be considered as excluded from consideration in a second

> action between the same parties as a different demand .. [G]rounds of recovery or defense in one action, ... may not exist in another action upon a different demand ... a party acting on consideration like these ought not to be precluded from contesting, in a subsequent action, other demands arising out of the same transaction. [emphasis added.][22]

For example, the Ohio Supreme Court recently found that res judicata did not bar a second suit between the

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22. Cromwell is cited in Norwood at 142 Ohio St. 229, 52 N.E.2d 67, 71. The narrow traditional definition of cause of action is also reflected in United States v. Moser, 266 U.S. 236 (1924), United States v. Stone & Downer Co., 274 U.S. 225 (1927), and Commissioner v. Sunnen, 333 U.S. 591 (1948).

the same parties where both suits concerned a pension trust arranged by the employer, but where the "pivotal issue" of the first suit was different from that of the second. Luli v. Sun Products Corp., 60 Ohio St. 2d 144, 150, 398 N.E. 2d 553, 557 (1979); see also Sharp v. Shelby Mutual Ins. Co., 15 Ohio St. 2d 134, 140-141, 239 N.E. 2d 49, 53-54 (1968) (wrongful withholding of insurance payment caused plaintiff two separate injuries which may be maintained separately).

Analysis of Ohio law makes clear not only that a single event can give rise to separate causes of action which need not be brought in a single lawsuit -- unlike the Second Restatement view -- but also that the particular claims petitioner sought to litigate in federal court, which had

not been litigated in state court, in fact constitute a "different claim or demand" under Ohio law.

Ohio has a well-developed test for identity of causes of action, and under that test petitioner's current action is not identical to her state court claims. The inquiry includes several questions: whether the same demand is involved, i.e., tort or contract injuries; whether the same evidence will sustain each cause of action; and whether the claims in each action accrued at the same time. Norwood v. McDonald, 142 Ohio St. 299, 311, 52 N.E. 2d 67, 74 (1943); Francis H. Fisher, Inc. v. Midwesco Enterprise, Inc., 477 F.Supp. 169, 173-73 (S.D. Ohio 1979), aff'd mem. 657 F.2d 267 (6th Cir. 1981) (applying Ohio res judicata law); Falk v. United States,

375 F.2d 561, 564 (6th Cir. 1967) (where cause of death litigated in state court was different from that alleged in federal tort claim action, Ohio law of res judicata does not bar federal action).

That constitutional claims involved in the §1983 action are not the same as the claim adjudicated in petitioner's favor in the contract action is evidenced by the trial court's treatment of petitioner's analogous tort claims as separate and severable. The contract issue concerned only whether the Board had breached its contract with petitioner, or had violated Ohio's Sunshine Law by meeting in secret. The contract was one obligation between petitioner and the Board. A second obligation existed, however, which petitioner alleges the Board members violated

by their conspiracy to penalize her exercise of First Amendment rights. Under Ohio law, where one action causes a breach of two duties, one in contract and one in tort, separate actions may be maintained. "Although the same episode forms the basis of the two recoveries, they do not grow out of the breach of the same duty." Midvale Coal Co. v. Cardox Corporation, 152 Ohio St. 437, 451, 89 N.E.2d 673, 680 (1949), (overruled on other grounds, Fischer Construction Co. v. Strand, 175 Ohio St. 31, 191 N.E. 2d 166 (1963)), ¶4 of the syllabus; see also Henderson v. Ryan, 13 Ohio St. 2d at 35 (" ... Defendant committed two wrongful acts, each constituting a cause of action ... the reasoning of the case, that two duties were breached, ... is still valid.")

So far as "whether the same evidence would sustain both" causes of action is concerned, the "best and most accurate test of identity of causes of action," Fisher, 422 F. Supp. at 172-173; Norwood, 142 Ohio St. at 311; see also I Ohio Jur. 3d 466, Actions, § 88 (1977), a firm conclusion of separate causes here is also required. The contract trial adjudicated only whether the Board of Education could revoke its renewal of Dr. Migra's contract, and concluded that it had breached its contract obligations to her. The question whether individuals on the Board conspired to induce this breach, and whether the purpose of the conspiracy was to punish the exercise of petitioner's First Amendment rights, concerns a different injury which requires different evidence, as the state court judge impli-

citly recognized by severing the tort claims and trying the contract issue alone first.

The third element of the Norwood test also indicates the separate nature of the claims. The right of action on the non-renewal of contract issues accrued only on April 17, but the violation of petitioner's First Amendment rights began when defendants began their alleged efforts to penalize her for expressing support for the desegregation plan.[23]

In short, despite the district court's view, Ohio law, exemplified by Norwood and its progeny, makes plain that petitioner's § 1983 claims constitute a separate claim or demand from the contract claim on which she previously had prevailed. Accordingly, Ohio would not require her to bring the civil rights claims

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23. FC ¶¶ 16, 22, 25, 27 (allegations of First Amendment claim).

with her contract claim, and would not give the contract claim a res judicata effect of barring a subsequent action on the constitutional claims, (whether they were brought independently or together with pendent state tort claims which had been dismissed without prejudice).

B. Under Ohio Law, As In Most Jurisdictions, A Judgment On One Claim Will Not Preclude A Subsequent Action On A Related Claim If The Court Has Ordered, Or The Parties Agreed That The Claims Be Severed.

The state court judge sua sponte separated petitioner's state tort claims before the trial of the contract action when, apparently without objection from either party, he "reserved and continued" that issue.[24] That continuance of the

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24. Ohio law vests the state court with discretion to continue a case to provide the parties a reasonable opportunity to try it on the merits. Curtis v. Chiaramonte, (footnote continued on following page)

tort claims had the practical effect of ordering a separate trial of that issue, since the contract claims proceeded immediately to trial and judgment. When the state court judge wrote an opinion on the contract claims, he again specifically reserved the tort claims; and they were thereafter dismissed, again without objection by either party, "without prejudice."[25]

(footnote continued from preceding page) 53 Ohio St. 2d 15, 16, 371 N.E.2d 839, 840 (1978). The court may continue "upon its own motion" to serve "the interest of substantial justice", Parsch Lumber Co. v. McGrath, 37 Ohio App. 37, 173 N.E. 629 (1930), or the administration of justice, Cincinnati Car Co. v. Snyder, 37 OCC 250, 254 (1915). Under Ohio Civil Rule 42(b), a separate trial may be ordered for "convenience", if "conducive to expedition and economy", or "to avoid prejudice", Civ.R.42 Rules Governing the Court of Ohio (1982), but the parties' due process rights to a hearing must be adequately protected. Dir. of Highways v. Kleines, 38 Ohio St. 2d 317, 320, 313 N.E.2d 370, 372 (1974).

25. In a recent opinion which evidences Ohio's liberal policy toward reinstituting actions dismissed without prejudice, the Ohio Supreme Court quoted Black's Law Dictionary, 5th Ed., to the effect (footnote continued on following page)

Under these circumstances, petitioner's tort action was plainly not merged in the contract judgment, and she could not be denied a subsequent trial on the merits of the tort claims.

Ohio law (and general principles of res judicata as well) recognize that since the rule against splitting of claims is for the primary benefit of defendants, where defendants acquiesce in the splitting they are barred from raising the defense of res judicata. Shaw v. Chell, 176 Ohio St. 375, 199 N.E.2d 869 (1964)(separate action for person injuries not precluded by previous action for property damage from the same accident, since defendant failed to object); Nationwide

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(footnote continued from preceding page) that the inclusion of "without prejudice" in a dismissal order "show[s] that the judicial act is not intended to be res judicata of the merits of the controversy". Chadwick v. Barba Lou, Inc., 69 Ohio St. 2d 222, 227,n.4, 431 N.E. 2d 660, 662-63 n.4 (1982).

Insurance Co. v. Steigerwalt, 21 Ohio St.2d 87, 255 N.E.2d 570 (1970)(same). Cf. Restatement (Second) of Judgments, § 26(a). Failure to object to the splitting of plaintiff's claim is tantamount to consent. Shaw, supra; Nationwide, supra. When a defendant fails to object he is considered to have implicitly consented to the maintenance of separate actions. Shaw, 176 Ohio St. at 380, Mayfield v. Kovac, 41 O. App. 310, 314, 181 N.E. 28, 29 (1932). Cf. Maher v. City of New Orleans, 516 F.2d 1051, 1056 (5th Cir.1976)(no preclusion where issues presented in federal court had been expressly excluded from consideration in

state court).

Defendants made no attempt to object to the state judge's continuance of the tort claim. Nor did they seek to have the tort claim dismissed with prejudice. Indeed, defendants' present claim that they viewed the tort claim as part of the contract issue is controverted by their own behavior. After the contract judgment was adjudicated, but months before the tort claim was dismissed, defendants sought appellate review of the contract claim alone, viewing plaintiff's recovery on that claim as a final judgment.[26]

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[26]On the first attempted appeal from the state court contract judgment, the Ohio Court of Appeals for the Eleventh District dismissed the appeal for lack of jurisdiction, finding that the appeal was not taken from a final judgment since the reserved

[footnote continued on following page]

Similarly, under Ohio law, a dismissal without prejudice is not a bar to a subsequent action on the same cause of action Board of Health of St. Bernard v. City of St. Bernard, 19 Ohio St.2d 49, 52 249 N.E.2d 888, 891 (1969) (where first action which had proceeded to argument was dismissed without prejudice, Appeals Court's dismissal of second action on basis of res judicata must be reversed); Moherman v. Nichols, 140 Ohio

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[footnote continued from preceding page]
tort claims were pending when the appeal was docketed in April, 1980. After this decision, the state trial judge post-dated the order dismissing the tort claims without prejudice from July 9, 1980 to October, 1981, see state Trial Court Judgment Entry, Case No. 79-CU-571 (July 9, 1980), apparently to enable the defendants to file a second appeal within the 30-day limit under Ohio law.

450, 45 N.E.2d 45 (1942) (reversing dismissal of second action on basis of res judicata). The parties are free to litigate the matter as though the dismissed action had not been commenced, id.; see also Eaton v. French, 23 Ohio St. 560, 562 (1873), except that under Rule 41(a)(1) an action may not be re-instituted after two dismissals. Where an action includes multiple claims and some are dismissed, the dismissal applies only to those specific claims and the other claims remain before the court. State ex rel. Potain v. Mathews, 59 Ohio St. 2d 29, 33, 391 N.E. 2d 343, 345 (1979).

Indeed, to this extent, the Ohio view is no different from the view of most courts, under which after a dismissal of one of several claims

without prejudice, a judgment on the other claims is not res judicata to the federal action on the dismissed claim. See Lemon v. Druffel, 253 F.2d 680, 685 (6th Cir. 1958), cert. denied 358 U.S. 821 (1958); Abramson v. University of Hawaii, 594 F.2d 202, 207 (9th Cir. 1979) (where state court dismissed sex discrimination claims without hearing them but adjudicated contract claims, federal court is not barred by Hawaii res judicata rules from hearing her constitutional claims); Minker v. St. Louis-San Francisco Railway Co., 574 F.2d 1056, 1059 (10th Cir. 1978)(where some, but not all claims were dismissed without prejudice in state court, under Oklahoma rules the dismissed claims may be heard in federal court).

Under these circumstances, where

it is plain that Ohio would not hold petitioner precluded from bringing a subsequent action on tort claims which had been severed, continued, and finally dismissed without prejudice, it follows that Ohio would accord no greater preclusive effect to petitioner's §1983 claims, which are analogous to the tort claims and would have depended on identical proofs. None of the policies embodied in a state's preclusion law would suggest barring the §1983 claims here where the trial judge's actions -- to which defendants did not object -- would have required an additional trial on the related tort claims in

any event.[27]

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27. Had petitioner originally joined civil rights claims with her tort and contract claims in state court, there can be no doubt on this record that the civil rights claims would have been severed and continued along with the tort claims, since they were so analogous and depended -- unlike the contract claim -- on similar proofs.

Indeed, since the state trial judge appeared entirely unwilling to consider Dr. Migra's tort claims it is very well possible that precluding the virtually identical civil rights claims would deny her the full and fair opportunity to raise those claims that due process requires. See Allen v. McCurry, 449 U.S. at 95 n. 7.

II. A FEDERAL COURT MAY ADJUDICATE FEDERAL CONSTITUTIONAL QUESTIONS WHICH WERE NEITHER RAISED NOR DETERMINED IN A PRIOR STATE PROCEEDING

As amici have shown, this case must be resolved in petitioner's favor by resort to settled Ohio res judicata principles.[28] Since neither this

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28. In Allen, this Court did not determine how res judicata should apply in federal courts considering the effect to be given state decisions. 449 U.S. at 93 n.2, 105 n.25. It therefore did not determine whether in considering a state judgment §1738 limits federal courts to considering only the preclusive rules of the rendering state, an approach possibly relied on in Kremer v. Chemical Construction Co., 72 L.Ed.2d 262, 271 (1982), or permits consideration of general principles as well. See Montana v. United States, 440 U.S. 147 (1979) (analyzing preclusive effect of state judgment only under general principles, without addressing state law). Amici suggest that this issue need not be decided here, since, for the reasons presented supra, preclusive effect would not be warranted in either event.

Court nor any other has ever held that §1738 requires a federal court to accord greater preclusive effect to a state court's judgment than would courts of the state itself, the judgment below must be reversed. Consideration of whether federal courts should grant lesser preclusive effect to prior state judgments in subsequent §1983 actions would be inconsistent with this Court's well-established policy of avoiding resolution of difficult federal questions when not necessary to a decision of the case. See Minnesota v. National Tea Co., 309 U.S. 551, 555 (1940); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Nevertheless, if such an inquiry is undertaken here, amici submit that

considerations of federal-state comity, judicial economy and the legislative intent behind §1983 make clear that §1738 does not bar the assertion of §1983 constitutional claims in federal court so long as they were neither presented nor considered in prior state proceedings.

There are three ways to resolve the conflict between the policies inherent in §1738 and §1983. The first approach would treat §1983, like federal habeas corpus, as an exemption from traditional preclusion law because of the importance of the rights at issue. That approach, however, was rejected, largely on grounds of statutory construction, in Allen v. McCurry, supra.

The second approach would subject §1983 actions to full issue and claim preclusion without regard to the sig-

nificance of the rights at issue. Prior decisions of this Court, however, appear to reject this approach as well. See, e.g., England v. Board of Medical Examiners, 375 U.S. 411 (1964); Wooley v. Maynard, 430 U.S. 705 (1977); cf. Patsy v. Board of Regents, ___ U.S. ___, 73 L.Ed.2d 172 (1982); Mitchum v. Foster, 407 U.S. 225 (1972); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). The holdings and reasoning of each of these cases make clear that this Court has discerned policies in § 1983 which, in certain circumstances at least, outweigh the judicial economy interests which underlie the preclusion doctrines.

The third possible approach to § 1738 and § 1983 is to fashion a doctrine of qualified preclusion which furthers the policies of both statutes by according full collateral estoppel effect to

facts and issues previously decided under Allen v. McCurry, but which does not preclude the assertion of a federal constitutional claim in federal court merely because it might have been asserted in an earlier state proceeding. In short, while collateral estoppel would operate in § 1983 cases, res judicata would not act to bar the assertion of a federal constitutional claim. This Court has suggested such a qualified preclusion approach in the past.[29]

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29. See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977) (deciding constitutional claim in federal action notwithstanding three prior state proceedings in which the plaintiff could have raised his constitutional claim); Florida ex rel. Hawkins v. Board of Control, 355 U.S. 839 (1957) (denying petition for certiorari from state supreme court raising constitutional claim not raised in the state proceedings "without prejudice to petitioner's seeking relief in an appropriate United States district court"). See also Allen v. McCurry, 449 U.S. at 95 n.7 (suggesting the existence of factors that might require exceptions to normal preclusion rules in particular cases). But see Mertes v. Mertes, 411 U.S. 961 (1973); White v. Howard, 347 U.S. 910 (1954).

It is the rule of the Second Circuit[30] and one which other circuits have utilized as well.[31] Qualified preclusion furthers

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30. Grossman v. Axelrod, 646 F.2d 768 (2d Cir. 1981); Tomanio v. Board of Regents, 603 F.2d 255 (2d Cir. 1979), rev'd on other grounds 446 U.S. 478 (1980); Ornstein v. Regan, 574 F.2d 115, 119 (2d Cir. 1978); Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977); Lombard v. Board of Education of New York City, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975).

31. See, e.g., New Jersey Education Assn. v. Burke, 579 F.2d 764, 774 (3d Cir.), cert. denied, 439 U.S. 894 (1978)("To hold that state court litigation bars a federal forum from deciding any claims which might have been raised before the state court would turn the state court into quicksand. It would not only serve as a trap for unwary plaintiffs who desire a federal tribunal but encourage competently represented litigants to forego any venture into state jurisdiction to exhaust state administrative and judicial procedures on pain of losing their right to a federal hearing"); Maher v. City of New Orleans, 516 F.2d 1051, 1056-59 (5th Cir. 1975), cert. denied, 426 U.S. 905 (1976); Blunt v. Marion City Board of Education, 515 F.2d 951, 956 (5th Cir. 1975); Mack v. Florida Board of Dentistry, 430 F.2d 862 (5th Cir. 1970), cert. denied, 401 U.S. 960 (1971); Getty v. Reed, 547 F.2d 971 (6th Cir. 1977); Mulligan v. Schlacter, 389 F.2d 231 (6th Cir. 1968); (footnote continued on following page)

the policies underlying § 1738 by forbidding time-consuming relitigation of facts and preventing federal judgments which might contradict those already entered by state courts, while furthering the policies of federalism by: (1) limiting federal court adjudication of state law issues; (2) encouraging the exhaustion of state judicial remedies; and (3) honoring the congressional determination that there should be a federal judicial forum for the adjudication of previously undecided questions of federal law.

(footnote continued from preceding page) Bickham v. Lashof, 670 F.2d 1238, 1248 (7th Cir. 1980); Kurek v. Pleasure Driveway & Park Dist., Etc., 557 F.2d 580 (7th Cir. 1977); Goodrich v. Supreme Court of State of South Dakota, 511 F.2d 316, 318 and n.8 (8th Cir. 1975); Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971); but see Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1351 (9th Cir. 1981)(state court judgment denying relief on tort theories precludes consideration of constitutional claims arising from same facts). cert. granted on other grounds sub nom. Kush v. Rutledge, 50 U.S.L.W. 3998.27 (July 2, 1982); Coogan v. Cincinnati Bar Assn., 431 F.2d 1209 (6th Cir. 1970); Robbins v. District Court, 592 F.2d 1015 (8th Cir. 1979).

As amici now show, the important policies this Court has discerned in both § 1738 and § 1983 require permitting the litigation in federal court of § 1983 claims which have not previously been submitted to nor decided by state courts, so long as facts and issues previously decided are accorded their proper collateral estoppel effect. Moreover, to the extent that Congress can be said to have spoken on that matter, there is every reason to believe that the approach suggested here is the one which Congress presumably favored in 1871.

a. The notion of comity mandates respect for separate state and national functions, "sensitivity to the legitimate interests of both state and national government" and requires the "national government, anxious though it may be to vindicate and protect federal interests ... to do

so in ways that will not unduly interfere with the legitimate activities of states." Younger v. Harris, 401 U.S. 37, 44-45 (1971). Where a state court has actually adjudicated a claim or issue, application of collateral estoppel through § 1738 to preclude subsequent federal litigation that might reverse or otherwise call the correctness of the state court ruling into question serves to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system". Kremer v. Chemical Construction Co., 72 L.Ed.2d 262, 271 n.6 (1982); Allen, 449 U.S. at 96.[32]

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32. By contrast, federal courts declining to apply claim preclusion would not be "second-guessing [state] judges, which, were it so, would indeed be offensive to accepted principles of federal-state comity, ... common sense and judicial modesty." Tomanio v. Board of Regents, 603 F.2d 255, 258 n.1 (1979), rev'd on other grounds, 446 U.S. 478 (1980). Similarly, there is no issue in this case, as there
(footnote continued on following page)

However, comity is a two-way street requiring state courts to accord appropriate respect to the special function and particular expertise of federal courts. Just as "federal courts should not be overeager to hold on to determination of issues that might be more appropriately left to settlement in state court litigation", United Mine Workers v. Gibbs, 383 U.S. 715, 726 n.15 (1966) quoting Strachman v. Palmer, 117 F.2d 427, 431 (1st Cir. 1949), "recognition of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law", England v. Board of Medical Examiners, 375 U.S. 411, 415-16 (1964).

(footnote continued from preceding page) was for example in Allen, of an attempt to collaterally attack a judgment or decision of a state court. The plaintiff here prevailed in the state action. Cf. Rooker v. Fidelity Trust Co., 261 U.S. 114 (1923).

Accordingly, while individual considerations not present here, such as substantial overlap in proof,[33] might in rare cases suggest the prudent adjudication of both state and federal claims in one forum, appropriate concern for federal-state com-

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33. Of course the possibility of vexatious or wasteful litigation through the redetermination of issues necessarily decided in the state proceeding is insubstantial since the collateral estoppel doctrine is fully applicable. See Allen, 449 U.S. 90 (1980). Indeed, in this case, since the plaintiff prevailed in the prior state court action, the district court will have to consider on remand whether under Ohio law she may rely on collateral estoppel "offensively" to preclude relitigation of issues necessarily decided in the state contract case. Cf. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

ity militates against res judicata rules that would require such an approach. This conclusion is specifically reinforced by England v. Board of Medical Examiners, 375 U.S. 411 (1964), which permits a plaintiff in federal court whose cause of action has been remitted to the state court for determination of unsettled issues of state law under Pullman-type abstention[34] to reserve a federal forum for the resolution of federal constitutional claims, and United Mineworkers v. Gibbs, 383 U.S. 715 (1966), which permits federal courts to decline to adjudicate pendent state claims arising from the same operative facts as federal claims, without prejudice to the subsequent assertion of the state claims in state court. Indeed, state courts have refused to apply claim preclusion to state claims which were never even presented to the federal court for adjudication in prior federal

34. See Railroad Comm'n. v. Pullman Co., 312 U.S. 496 (1941).

litigation, on the ground that the federal court would have declined discretionary pendent jurisdiction over the state claims under Gibbs. See, e.g., Pope v. City of Atlanta, 240 Ga. 177, 179-80, 240 S.E.2d 241, 243 (1977); see generally Rest.2d of Judgments, § 61.1, comment e (Tent. Draft No. 5, 1978) at 160. Thus interpreting § 1738 as precluding the assertion of federal claims which could have been raised in related state proceedings would in many instances provide the anomalous result of requiring federal courts to accord greater preclusive effect to state court judgments than the state courts would have given federal court judgments, had the order of adjudication been reversed.

A rule of qualified preclusion which did not bar the subsequent federal court adjudication of constitutional claims not previously raised nor decided by state

courts would further principles of comity in another way as well. Although this Court, looking to the legislative history of § 1983, has held that litigants are not required to exhaust state judicial remedies, it has been commonly recognized that comity is in fact furthered where such exhaustion, even if not required, nevertheless takes place. See, e.g., McNeese v. Board of Education, 373 U.S. 668, 679 (1963)(Harlan, J., dissenting); cf. Patsy v. Board of Regents, 73 L.Ed. 2d at 188 (O'Connor, J., concurring). As Justice Stevens observed, in a slightly different context, comity is furthered by a decision "to bring suit in the state courts first; for such a decision gives the State an opportunity to correct, through construction of state law, a potential constitutional error, and may obviate entirely any need to present the claim to a federal court." Board of

Regents v. Tomanio, 446 U.S. 478, 493 (1980)(concurring opinion). The strict res judicata rule respondents urge here will in all likelihood severely impede such voluntary resort to state courts and lead many litigants to proceed directly to federal court, in an attempt to litigate both federal and state claims simultaneously in federal court. A preclusion rule which results in enhanced federal court caseloads, while multiplying the occasions for federal courts to rule on difficult and close questions of state law, can hardly be said to further principles of comity.[35]

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35. Federal courts may, of course, react to an attempt to litigate state claims in federal court by declining to entertain pendent jurisdiction, abstaining, or, if possible, certifying doubtful questions of state law to state courts. In preclusion terms, of course, such activity would permit a litigant to pursue state claims in state court and federal claims in federal court free from collateral estop-
(footnote continued on following page)

Thus, permitting plaintiffs to proceed in state court first without subsequent claim-preclusion consequences might very well "spare the federal courts some unnecessary work ... reduce the strain on federal-state relations and ease the task facing the [federal] courts," Tomanio, 446 U.S. at 495-96 (Brennan, J., dissenting), particularly at a time when the burden on federal courts and ultimately on this Court is at its apogee.

(footnote continued from preceding page) pel or res judicata. E.g., England; Gibbs. Where, as here, a litigant has voluntarily taken his state cliam to state court, he should not be penalized by being wholly precluded from raising a timely federal constitutional claim in federal court, so long as the fact-finding of the state court is respected. It makes little sense to treat a litigant who voluntarily seeks to advance federalism policies more harshly than a litigant who seeks to litigate state claims in federal court.

b. The primary purpose underlying the judicially created res judicata doctrine is a concern for the efficacious use of judicial resources. See generally Allen v. McCurry, 449 U.S. at 94. The doctrine also relieves parties of the cost and vexation of multiple lawsuits, and encourages reliance on adjudication by preventing inconsistent judgments. Montana v. United States, 440 U.S. 147, 153-154 (1979); Baltimore S.S. Co. v. Phillips, 274 U.S. 136, 320-21 (1927).

In light of the decision by the state court, to which defendants did not object, reserving determination of the tortious conspiracy claims to a subsequent trial, those concerns have no application in the present case. Nor, apart from the specific facts of this case, do those concerns support the strict rule of preclusion of all federal claims which might have been raised in a state court

action, as respondents urge. To the contrary, the policies this Court has discerned behind res judicata support a rule affording strict fact and issue preclusion, but not claim preclusion, to prior state proceedings.

As this Court observed in Allen, the principal benefits of preclusion arise from "collateral estoppel in particular." 449 U.S. at 94. The saving of judicial time and effort is apparent in preventing relitigation of issues and facts; and if petitioner's § 1983 claims proceed in federal court, that court will be spared any duplicative effort in that regard. Allen v. McCurry, supra. But there is no reason to suppose that the state court would have resolved petitioner's First Amendment claims, had they been presented in the state court, more quickly than could a federal court. Like the tort claims which the state judge decided to try after the contract claims,

in a separate proceeding, the First Amendment claims raised substantially different issues than the contract claim which had previously been resolved. Moreover, they involved law with which many federal judges are substantially more familiar than their state counterparts.

c. Finally, the policies embodied in § 1983, although not sufficient to imply a wholesale exemption of civil rights actions from § 1738, provide strong reasons, along with principles of comity and judicial economy, to support a rule declining to bar § 1983 claims not previously decided by state courts, so long as any facts or issues decided are subject to collateral estoppel.

First, and most importantly, it seems clear that the 42nd Congress, which enacted what is now § 1983, would have assumed that resolution of state claims

in a state court would not bar a subsequent action raising constitutional claims arising from the same factual situation. See Cromwell v. County of Sac, 94 U.S. at 353 (1877); 1 H. Herman, Law of Estoppel and Res Judicata §§ 92, 96 ("cause of action"), 98, 103, 111 ("issue") (1886); Developments in the Law -- Res Judicata, 65 Harv.L.Rev. 818, 841-43 (1952); Allen v. McCurry, 449 U.S. at 114 (Blackmun, J., dissenting). Since the question at issue here concerns the circumstances in which the 42nd Congress intended plaintiffs with constitutional claims to have a federal forum, and since in 1871 plaintiffs in petitioner's shoes would have had one, that intention should be controlling here. It does no violence to § 1738 to so construe it, since its framers, like the Court nearly one hundred years later, would similarly have considered a cause of action arising out of the Constitution a different claim from

a state contracts action, (as Ohio still does today).[36]

Second, declining to bar § 1983 actions in federal court because of a related state judgment raising different claims honors the clear intention of the 42nd Congress to afford a federal forum for the resolution of federal rights. It is not sur-

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36. We do not believe that this Court's observation in Allen, 449 U.S. at 97, that there was no mutuality of estoppel in 1871 implies that the expectations of the 42nd Congress are not relevant. Assuming, as the Court seems to have, that the state police defendants in Allen were privies to the state in the previous criminal judgment, traditional principles of collateral estoppel in 1871 would have led to the same result as modern doctrine. Here, by contrast, that is not so: although the most recent Restatement would require all causes of action arising from a single factual incident to be brought in a single lawsuit, that was assuredly not the law in 1871. Cromwell v. County of Sac, supra.

prising or unique for Congress to have insisted on such a preference. In an analogous area, for example, it has long been clear that plaintiffs with antitrust claims over which Congress provided exclusive federal jurisdiction may first pursue state breach of contract actions as well. See, e.g., Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir.), cert. denied 350 U.S. 825 (1955).

Just as the important policies behind res judicata are not harmed by such a procedure, which simply honors a congressional preference for federal resolution of certain kinds of claims without implying disrespect of state courts, so too the policies behind § 1983, canvassed in such cases as Mitchum v. Foster, England v. Board of Medical Examiners, Monroe v. Pape, and Patsy v. Board of Regents are not violated by the rule amici urge here.

"Congress clearly conceived that it was altering the relationship between the states and the nation with respect to federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." Mitchum v. Foster, 407 U.S. 225, 242 (1972). See also Monroe v. Pape, 365 U.S.167, 180 (1961); Harrison v. NAACP, 360 U.S. 167, 181 n.11 (1959) (Douglas, J., dissenting). Congress recognized that "federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities [and those such as the petitioner here who speak out in minorities' behalf] than elected state judges." England, 375 U.S. at 427 (Douglas, J., concurring). Accordingly, the legislative debates lead-

ing up to the passage of § 1983's predecessor are replete with references to the special role of federal courts to protect constitutional rights. See Steffel v. Thompson, 415 U.S. 452, 472-73 (1974).

Representative Coburn stated most eloquently:

> The United States Courts are further above mere local influence than the county courts; their judges can act with more independence; cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage ... we believe we can trust our United States courts, and we propose to do so.

Cong. Globe, 42d Cong., 1st Sess., 460 (1871).

This view was echoed by Representative Lowe:

> [R]ecords of the [state] tribunals are searched in vain for evidence of effective redress [of federally secured rights] ... The case has arisen ... when the federal government must resort to its own agencies to carry its own

> authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired.

Cong. Globe, 42d Cong., 1st Sess., 374-376 (1871). See also Allen, 449 U.S. at 106-110 nn.3-9 (Blackmun, J., with Brennan and Marshall, J.J., dissenting); Mitchum, 407 U.S. at 238-242 nn.28-32.

While this well-established legislative history, as recognized and developed by this Court, may not be sufficient to imply the wholesale repeal of § 1738 in civil rights actions, it is still a significant consideration which along with notions of comity, federalism and judicial economy, supports construing § 1738 and § 1983 together not to preclude federal court adjudication of § 1983 claims not previously presented to or decided by state courts.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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*Counsel for amici gratefully acknowledge the assistance of Lucinda Starrett, a second year student at the University of Pennsylvania School of Law in the writing of this brief and of Sandra Weaver, a second year student at the University of Michigan School of Law in its preparation.

February 24, 1983