No. 82-738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DR. ETHEL 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

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BRIEF AMICUS CURIAE OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a plaintiff in a federal court action brought under 42 U.S.C. § 1983 precluded from litigating an issue that he might have, but in fact did not, raise in a previous state court action?

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The National Education Association ("NEA") files this brief *amicus curiae* with the consent of the parties.

INTEREST OF AMICUS CURIAE

NEA is a nation-wide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public school districts, colleges and universities throughout the United States. One of the principal purposes of NEA is to protect the legal rights of its members through, among other means, litigation in federal and state courts. This case presents an important question *vis-a-vis* the relationship between these two forums, and NEA has a substantial interest in its outcome.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court concluded that in enacting 42 U.S.C. § 1983, Congress did not "intend[] to allow relitigation [in § 1983 actions] of federal issues decided after a full and fair hearing in a state court." *Id.* at 101. The instant case presents a question that this Court expressly left open in *Allen*: "whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation." *Id.* at 94 n.5; *see id.* at 97 n.10.[1] As we demonstrate in the Argument section of this Brief, prior pronouncements of this Court (Section 1), the underlying purposes of 42 U.S.C. § 1983 (Section 2), and considerations of sound judicial administration (Section 3), all point to an affirmative answer.

ARGUMENT

This case had its genesis in a decision by respondent Board of Education to terminate the employment of petitioner. In petitioner's view, this action constituted both a breach of contract under Ohio state law and a violation of her rights under the First and Fourteenth Amendments to the United States Constitution. In an effort to deal with the matter without reaching the federal constitutional issues, petitioner filed an action in state court asserting only her state-law claims. On the basis of these

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[1] The courts of appeals are divided on the issue: three circuits have held that a litigant may raise § 1983 claims in federal court that were not raised before and resolved by a state court, *see Bickham v. Lashof*, 620 F.2d 1238, 1246 (7th Cir. 1980); *New Jersey Education Ass'n v. Burke*, 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978); *Lombard v. Bd. of Education*, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975), while a number of other circuits have reached a contrary conclusion, *see* cases cited in *Castorr v. Brundage*, 51 U.S.L.W. 3285 (Nov. 12, 1982) (White, J., dissenting from denial of certiorari.)

state-law claims, the state court found for petitioner, and granted her certain relief.

Petitioner considered the relief granted to her by the state court inadequate and, accordingly, filed a § 1983 action in federal court.[2] In this action, she relied on her federal constitutional claims,[3] asserting, *inter alia*, that the Board's decision to terminate her employment was based on the fact that she had exercised certain First Amendment rights.[4] The district court dismissed the action and the Court of Appeals for the Sixth Circuit affirmed. Although acknowledging that petitioner's § 1983 claims were neither raised nor decided in the previous state court action, the lower courts held that traditional state-law *res judicata* rules nonetheless precluded litiga-

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[2] Before the § 1983 action was filed, petitioner had been ordered reinstated by the state court and the respondent thereafter had terminated her employment for a second time. In her federal court complaint petitioner alleged that both terminations violated her constitutional rights. Only the constitutional violations alleged in connection with the first termination are presently relevant, however, as petitioner was precluded from litigating only these claims in her § 1983 action. (The district court dismissed petitioner's § 1983 claims relating to her 1980 termination on the merits and those claims are not before this Court.)

[3] Petitioner's federal court action was "in no way 'designed to annul the result of [the] state [judgment].'" *Wooley v. Maynard*, 430 U.S. 705, 711 (1977). Different considerations are involved when a § 1983 action does represent a collateral attack on a state court judgment, and the analysis set forth herein is not directed to that situation.

[4] Petitioner's § 1983 claim, which for present purposes must be taken as true, is that her employment was terminated for, among other things, protected activities involving desegregation of the district's schools and development of the district's social studies curriculum. Petitioner also alleged that the respondents violated her Fourteenth Amendment right to due process.

tion of these claims *to the extent that they could have been litigated in the state court action.*[5]

What this holding means is that persons in petitioner's situation may not obtain both a state court adjudication as to the merits of their state-law claims and a federal court adjudication as to the merits of their federal constitutional claims; in order to obtain an adjudication as to the merits of all their claims, such persons must bring their state-law claims in federal court or their federal constitutional claims in state court. As we now demonstrate, 28 U.S.C. § 1738 does not require this result.[6]

1. The reasoning of this Court in *Atlantic Coast Line R. R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) indicates that 28 U.S.C. § 1738 should not be interpreted to produce the result reached by the courts below. That case arose out of picketing by the respondent Brotherhood against the petitioner Railroad. The Railroad initially sought a federal district court injunction against the picketing, but the injunction was denied. The Rail-

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[5] These *res judicata* rules are made generally applicable by 28 U.S.C. § 1738, which provides in relevant part:

> The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as They have by law or usage in the courts of such State. . . .

[6] Although for purposes of argument, we assume that Ohio's *res judicata* rules would bar petitioner from litigating her federal constitutional claims in a second state court action, this may not in fact be the case. *See* Petitioner's Brief.

In addition to the situation presented in the instant case, the question left open in *Allen v. McCurry* also could arise if a putative plaintiff in a § 1983 action sought to assert a federal constitutional claim which could have been raised as a defense to, or a counterclaim in, a previous state court action in which he had been a defendant. In the latter situation, the application of traditional *res judicata* rules to bar unlitigated federal claims would deprive the putative plaintiff of a choice of forum. *Compare, England v. Louisiana State Board*, 375 U.S. 411 (1964).

road then went to state court, and an injunction was issued based upon violations of state law. At the request of the Brotherhood, the federal district court enjoined enforcement of the state court injunction. This Court reversed, concluding that the federal court injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283, inasmuch as it was not "necessary in aid of" federal court jurisdiction. The Court explained:

> While the railroad could probably have based its federal case on pendent state law claims as well, it was free to refrain from doing so and leave the state law questions . . . to the state courts. *Conversely, although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone.* In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts. Therefore, the state court's assumption of jurisdiction over the state law claims and the federal preclusion issue did not hinder the federal court's jurisdiction so as to make an injunction necessary to aid that jurisdiction.

Id. at 295-96 (citations omitted) (emphasis added).

Although, strictly speaking, *Atlantic Coast Line R. R.* did not involve an application of *res judicata* rules pursuant to 28 U.S.C. § 1738, the underscored statement constitutes an explicit and unequivocal endorsement of the construction of that section that we urge in the instant case: permitting a federal court to entertain a § 1983 action raising federal constitutional claims that could have been, but in fact were not, raised or decided in a previous state court action involving only state-law claims.

When viewed against the backdrop of our federal system, there can be little question but that the interpretation of § 1783 suggested by *Atlantic Coast Line R. R.* is proper. "[F]rom the beginning we have had in this country two essentially separate legal systems," each of

which "proceeds independently of the other." *Atlantic Coast Line R. R., supra*, 398 U.S. at 286. In this setting, "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). The lower court's appliction of 28 U.S.C. § 1738—which would require a plaintiff who desires a federal forum for his federal constitutional claims to bring his state-law claims in federal court, and would penalize a plaintiff for bringing his state-law claims in state court instead—scarcely complies with the latter mandate. In contrast, the approach taken in *Atlantic Coast Lines R. R.*—which allows separate state and federal actions raising state and federal claims (but applies collateral estoppel to prevent relitigation of already-litigated issues in such actions)—which avoid needless "interfer[ence] with the legitimate activities of the States." It thus represents a reasonable accommodation to the necessities of the federal system.[7]

2. The choice that the decision below puts before a putative plaintiff is, moreover, incompatible with the underlying purposes of § 1983. In enacting § 1983 "Congress assigned to the federal courts a paramount role in protecting constitutional rights," *Patsy v. Board of Regents*, 102 S.Ct. 2557, 2561 (1982), "offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation," *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as

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[7] As the Third Circuit observed in adopting this approach:

> Such a rule avoids the tendency of the 'could-have-litigated' test to discourage the use of state forums to determine matters of state law while at the same time giving due regard to matters actually decided by state tribunals. *New Jersey Education Ass'n v. Burke*, 579 F.2d 764, 774 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978).

guardians of the people's federal rights, to protect the people from unconstitutional action under color of state law . . . ." *Id.* at 242. *See also Steffel v. Thompson*, 415 U.S. 452 (1974).

Congress realized, when it enacted § 1983, that—as this case illustrates—conduct violative of the federal constitution, and hence actionable under § 1983, is often actionable under state law as well. "It is abundantly clear that one reason [§ 1983] was passed was . . . because, by reason of prejudice, passion, intolerance or otherwise, *state laws* might not be enforced." *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (emphasis added). This concern, as well as the "grave congressional concern that the state courts had been deficient in protecting *federal* rights," *Allen v. McCurry*, *supra*, 449 U.S. at 98-99 (emphasis added), led Congress to create a "federal remedy [which] is supplementary to the state remedy," *Monroe v. Pape*, *supra*, 365 U.S. at 183.

In light of the congressional skepticism of state courts that led to the enactment of § 1983, it would be anomalous indeed to hold that a plaintiff who wishes to present a state-law claim to state court—presumably because it is expert in state-law matters—is required to present his § 1983 claims to the state court as well. And the alternative that the decision below offers to a § 1983 claimant —he may invoke his § 1983 rights in a federal forum, but he then will be precluded from asserting his state-law claims in state court—is equally unpalatable. The net effect would be to channel state-law claims away from the state courts, which would "unduly interfere with the legitimate activities of the States." *Younger v. Harris*, *supra*, 401 U.S. at 44.

It is, in short, virtually unthinkable that the Congress that enacted § 1983 intended either to force federal constitutional claims into the (then-suspect) state courts or to interfere with the state court's freedom to hear state-law claims if the facts also implicate federal con-

stitutional rights.[8] Thus, there is especially strong reason, in the § 1983 context, to construe 28 U.S.C. § 1738 as allowing plaintiffs to proceed in state court with state-law claims and in federal court with § 1983 claims (subject, of course, to the application of collateral estoppel in either proceeding with respect to issues actually litigated in the other).[9]

3. Finally, practical considerations relating to the efficacious functioning of the federal courts also militate strongly against the holding below. The experience of NEA and its affiliates indicates that, if forced by *res judicata* rules to make an either/or choice between a state and federal forum for their combined state-law and federal constitutional claims, civil-rights plaintiffs would tend to choose the latter, invoking the federal court's pendent jurisdiction with respect to their state-law claims.[10] Thus,

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[8] The narrow definition of "cause of action" that existed when § 1983 was enacted makes it even more unlikely that Congress intended the result dictated by the lower courts' decision. Indeed, under the *res judicata* rules in 1871, a plaintiff may well have been permitted to bring his breach of contract and constitutional cliams in separate state court actions. *See Allen v. McCurry, supra,* 449 U.S. at 114 & n.16 & sources cited (Blackmun, J., dissenting).

[9] Even if, contrary to the reasoning of *Atlantic Coast Line R. R., supra,* § 1738 generally precludes a plaintiff from litigating a federal claim that might have been but was not raised in a previous state court action, the § 1983 legislative history reviewed in text indicates that at the very least Congress impliedly intended, in enacting § 1983, to create a narrow exception to this rule so as to permit a plaintiff to bring to federal court § 1983 claims which were not litigated in state court.

[10] In *Allen v. McCurry, supra,* 449 U.S. at 194 n.23, this Court concluded that there was little likelihood that application of *res judicata* to bar relitigation of issues raised in defense to a state court criminal prosecution would result in further burdening of the federal courts, as "it is difficult to imagine a defendant risking conviction and imprisonment because he hoped to win a later civil judgment based upon an allegedly illegal search and seizure." Here, in contrast, it is not at all "difficult to imagine" a

the likely result of the rule announced by the courts below will be to bring to an already-burdened federal court system a host of state-law claims which more appropriately are, and otherwise would be, resolved in state courts. And in any § 1983 action in which a decision in plaintiff's favor on the state-law claims would make it unnecessary to reach the federal constitutional issues, the federal court would be required to rule initially on the state-law claims. *E.g., Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Ashwander v. TVA*, 297 U.S. 288 (1936); *Spector Motor Co. v. McLaughlin*, 323 U.S. 101 (1944).

To be sure, there are certain steps that the federal courts could take to avoid deciding the state-law claims, but the net effect of these steps would be to bring about—after the expenditure of precious federal judicial resources—precisely the result that could be achieved by construing § 1738 in the manner that we urge in this case. For example, a federal court could abstain from deciding the state-law claims under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); if it did so, the plaintiff then would be free to pursue his state-law claims in state court without being barred by *res judicata* from subsequently pursuing § 1983 claims in federal court. *See England v. Louisiana State Board, supra.*[11] Alternatively, a federal court could avoid deciding the state-law claims by re-

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plaintiff foregoing asserting state claims in state court in order to preserve his right to a federal forum.

Of course, some plaintiffs, even if permitted to bring separate state and federal court actions, will choose to consolidate all their claims in one action. Whatever the decision in this case, it will not affect such plaintiffs. Our concern here is with those plaintiffs, like petitioner, who would prefer a state court decision on their state-law claims and a federal court decision on their § 1983 claims.

[11] *England* impliedly creates an exception to traditional *res judicata* rules and allows a federal court, which has abstained on a state-law claim and remitted plaintiff to state court, to decide "reserved" federal claims after the state court proceeding has been concluded, regardless of whether state *res judicata* law would treat the "reserved" federal claims as barred.

fusing to exercise pendent jurisdiction over them, *see Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (although because, by definition, the state and federal claims will be sufficiently related that the omission of one ordinarily would bar litigation of the other, the exercise of pendent jurisdiction generally would be appropriate) ; if the court declined jurisdiction over the state claims, the plaintiff would, of course, be free to pursue them in state court. Thus, either an abstention decision or a decision not to exercise pendent jurisdiction would bring about a result —separate litigation of the state-law and federal constitutional claims—that could be achieved without requiring the expenditure of federal judicial resources, simply by allowing the plaintiff to proceed *ab initio* in state and federal court with his state and federal claims.

In sum, the interests of sound judicial administration would not be served if 28 U.S.C. § 1738 were applied to preclude a plaintiff from litigating his state-law and § 1983 claims in separate forums. To the contrary, this would force federal courts to decide a host of state-law issues which are better adjudicated by state courts or, alternatively, would require federal courts to expend their resources to authorize "claim splitting" of precisely the type that would be achieved by permitting separate state and federal actions.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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