

In the Supreme Court of the United States

PAMELA POLEJEWSKI,
Petitioner

v.

STATE OF MONTANA,
Respondent

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA*

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Over 170 animals were seized from Petitioner Pamela Jo Polejewski in May of 2020. Following a hearing where Polejewski was represented by counsel, the state district court ordered Polejewski to pay a cost of care bond regarding the seized animals pursuant to Montana statute. Mont. Code Ann. § 27-1-434 (2021). Polejewski failed to pay the bond and the animals were forfeited. *Id.*

Polejewski raised the constitutionality of the statute for the first time on appeal to the Montana Supreme Court in 2020. Polejewski did not timely seek a writ of certiorari from the Montana Supreme Court's unpublished 2020 decision, which declined to consider constitutional arguments not preserved for appeal. *State v. Polejewski*, 2020 MT 287N, 402 Mont. 427, 474 P.3d 1289 ("Polejewski I"). After remittitur, Polejewski sought reconsideration in state district court. The district court denied consideration of the constitutional arguments on *res judicata* grounds. The Montana Supreme Court affirmed the application of Montana's claim preclusion doctrine in a 2021 unpublished decision. Pet. App. 1-6. The question presented is:

Whether the Montana Supreme Court erred in concluding that Polejewski's constitutional challenges to Mont. Code Ann. § 27-1-434 (2021) were barred by claim preclusion.

RELATED PROCEEDINGS

State v. Polejewski, 2020 MT 287N, 402 Mont. 427, 474
P.3d 1289

State of Montana v. Pamela Jo Polejewski, No. DC-7-2020-
0000310-IN (Mont. 8th Jud. Dist. Ct.)

Pamela Jo Polejewski v. Cascade County, No. 4:21-cv-
00115-BMM-JTJ (D. Mont.)

Pamela Jo Polejewski v. Cascade County Officials, No.
4:21-cv-00129-BMM (D. Mont.)

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JURISDICTION

Petitioner Pamela Jo Polejewski (“Polejewski”) invokes jurisdiction under 28 U.S.C. § 1257(a), ostensibly alleging that the constitutionality of Montana’s Animal Welfare Statute, Mont. Code Ann. § 27-1-434 (2021), was drawn into question below. This is incorrect. This Court “has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim ‘was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.’” *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). Here, the Montana Supreme Court’s decision below only considered the district court’s application of Montana’s claim preclusion doctrine. The Montana Supreme Court declined to address any constitutional challenge to the Animal Welfare Statute because Polejewski’s constitutional arguments were never properly presented to it. This Court lacks jurisdiction under 28 U.S.C. § 1257(a) to hear the present case because the decision below did not actually draw into question “the validity of a statute of any State” under the Constitution of the United States. 28 U.S.C. § 1257(a); *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

The time for seeking a writ of certiorari regarding *Polejewski I*, which concluded in a November 10, 2020, unpublished decision that Polejewski had failed to properly preserve her constitutional arguments, has long since passed. SUP. CT. R. 13; 28 U.S.C. § 2101. This Court accordingly lacks jurisdiction to consider the Montana Supreme Court’s determination in *Polejewski I* that Polejewski failed to preserve her constitutional arguments by operation of 28 U.S.C. § 2101(c).

INTRODUCTION

While this case originated in the seizure and forfeiture of over 170 abused and neglected animals from Polejewski under a Montana statute requiring forfeiture if a cost of care bond was not paid, this is not a civil forfeiture case. This case does not even present a question of or conflict with federal law. Polejewski never properly presented or preserved her constitutional arguments regarding Mont. Code Ann. § 27-1-434 (2021) (“the Animal Welfare Statute”) for review by the Montana Supreme Court. Polejewski, though represented by counsel, never raised any constitutional challenge to the Animal Welfare Statute in the relevant district court proceedings in May of 2020. Polejewski instead first presented her constitutional arguments to the Montana Supreme Court in *Polejewski I*. 2020 MT at ¶ 5, 402 Mont. at 427, 474 P.3d at 1289. *Polejewski I* declined to consider these improperly preserved—i.e., waived—constitutional arguments. *Id.*

The Montana Supreme Court’s unpublished November 30, 2021, decision below likewise declined to consider improperly preserved constitutional arguments and only reviewed the district court’s application of Montana’s claim preclusion doctrine. Pet. App. 3. This Court lacks jurisdiction to review a purely state law question regarding the application of Montana’s claim preclusion doctrine. *See* 28 U.S.C. § 1257(a). The Montana Supreme Court has neither considered nor ruled upon Polejewski’s waived constitutional challenges to the Animal Welfare Statute. Polejewski improperly asks this Court to resolve the constitutionality of a Montana statute before that question has been put to the Montana Supreme Court. There is

no federal question or conflict at issue in this case, no jurisdiction under 28 U.S.C. § 1257, and no compelling reason to grant the petition. SUP. CT. R. 10.

Further, this Court lacks jurisdiction to consider the Montana Supreme Court’s unpublished November 10, 2020, decision, which originally declined to consider Polejewski’s constitutional arguments because they were first raised on appeal. *See* 28 U.S.C. § 2101(c); *Fed. Election Comm’n v. NRA Pol. Victory Fund*, 513 U.S. 88, 90 (1994). The jurisdictional time-limit for seeking a writ of certiorari regarding the November 10, 2020, decision has long passed. 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

I. Factual Background

Law enforcement responded to a structure fire at Polejewski’s property on May 6, 2020. Pet. App. 2. Responding law enforcement assisted Polejewski with moving dozens of animals to safety and observed dying or deceased animals as well as animals in dilapidated conditions and poor health. *Id.* Contrary to Polejewski’s misrepresentation (*see, e.g.*, Pet. 2), law enforcement obtained a search warrant on May 7, 2020, and returned to Polejewski’s property with a veterinarian. *Id.* Law enforcement thereafter seized 172 animals due to suspected abuse and neglect and Polejewski was criminally charged with aggravated animal cruelty and cruelty to animals under Montana law. *Id.*

II. Statutory Framework

The Montana Animal Welfare Statute was substantially amended in 2019 to provide for the cost of caring for animals when large numbers of animals are seized due to suspected abuse and neglect, like here. Following seizure, prosecutors may

petition for a civil cost of care hearing before the state district court. Mont. Code Ann. § 27-1-434(1) (2021). The court may not release the animals if it finds by a preponderance of the evidence that animals were subjected to cruelty. Mont. Code Ann. § 27-1-434(6)(a) (2021). If the animals are not released, the court must also set a renewable bond “in an amount sufficient to cover the reasonable expenses expected to be incurred in caring for the animals for a period of 30 days.” *Id.* The respondent may request an additional hearing to adjust the bond amount or request a lien on real property in lieu of the bond, but, if the respondent fails to deposit the bond, the animals are forfeited to the county. Mont. Code Ann. § 27-1-434(6)(d) to (g) (2021). If the respondent is found not guilty of any criminal charges connected with the seized animals the county shall return the animals and the full amount of the bond and release any lien. Mont. Code Ann. § 27-1-434(7)(b)(i) (2021). If the animals were forfeited to the county and the respondent is found not guilty, the county must pay the respondent the fair market value of the animals at the time of seizure. Mont. Code Ann. § 27-1-434(7)(b)(ii) (2021).

III. Proceedings Below

The State of Montana filed a cost of care petition pursuant to Mont. Code Ann. § 27-1-434 (2021) on May 18, 2020. Pet. App. 2. The Cost of Care Petition alleged that Polejewski was charged with felony aggravated animal cruelty (Mont. Code Ann. § 45-8-217 (2019)); misdemeanor cruelty to animals (Mont. Code Ann. § 45-8-211(1)(b) (2019)); and three separate counts of felony cruelty to animals (Mont. Code Ann. § 45-8-211(1)(c)(iii) (2019)). The Cost of Care Petition noted that the state seized 172

animals under a search warrant, including over 50 dogs and puppies, 19 cats and kittens, 15 goats, 9 horses, one pony, one mini horse, 12 rabbits, 6 pigs, and several dozen types of birds. Cascade County undertook housing and caring for the seized animals. The Cost of Care Petition requested that the animals be held and cared for by the county pending disposition of the criminal proceedings and also sought entry of a renewable bond in an amount sufficient to cover the county's reasonable care expenses for 30 days. *See* Mont. Code Ann. § 27-1-434(6) (2021).

The state district court held a hearing on the Cost of Care Petition on May 26, 2020. Pet. App. 2. At the hearing, Polejewski was represented by counsel but did not present any witness testimony or exhibits. *Id.* Despite Polejewski's misrepresentation in her Petition (*see, e.g.*, Pet. 2), the State of Montana presented a wide range of uncontested testimony from law enforcement, veterinarians, and animal shelter workers on the condition of the animals and the costs of required care. Pet. App. 3.

Polejewski did not raise any constitutional arguments at the May 26, 2020, hearing. Pet. App. 3. Polejewski's argument at the May 26, 2020, cost of care hearing instead centered upon a request that the animals be returned and that Polejewski be afforded time to improve conditions on her property.

The state district court issued a June 5, 2020, order finding that there was no evidence that Polejewski could care for the 172 seized animals during the pendency of the criminal proceedings and that the uncontested cost of care evidence was reasonable and likely understated. Pet. App. 3. The June 5, 2020, order concluded that the animals could not be released to Polejewski under Mont. Code Ann. § 27-1-

434 (2021) and directed that Polejewski pay a renewable bond in the amount of \$31,019.60 every 30 days to provide for the reasonable cost of care for the seized animals. *Id.* Failure to pay this bond would result in forfeiture of the animals as provided in Mont. Code Ann. § 27-1-434(6)(e) (2021). *Id.* Polejewski did not pay the bond. Pet. App. 3.

Polejewski appealed the June 5, 2020, order to the Montana Supreme Court. *Polejewski I*, 402 Mont. at 427, 474 P.3d at 1289. However, Polejewski declined to appeal any factual or evidentiary issues. *Id.* Polejewski and her counsel instead argued on appeal, for the first time, that Mont. Code Ann. § 27-1-434 (2021) was unconstitutional. *Id.* The Montana Supreme Court declined to consider these new constitutional arguments, determining in an unpublished 2020 opinion that they were not properly preserved. *Id.* Applying Montana law regarding waiver, *Polejewski I* held that “it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider,” and concluded that “we decline to review Polejewski’s constitutional challenges raised for the first time on appeal.” *Polejewski I*, 402 Mont. at 427, 474 P.3d at 1289; *see also* Pet. App. 3, 7. *Polejewski I* accordingly affirmed the June 5, 2020, order. *Id.*

After remittitur from *Polejewski I*, the State “exercised its right to forfeiture and released the animals for adoption.” Pet. App. 3. Polejewski also filed what she termed a “motion for reconsideration” in state district court, reasserting her constitutional arguments. Pet. App. 3, 7. Following a February 18, 2021, hearing, the state district court concluded in a March 26, 2021, order that “reconsideration” of

Polejewski's waived constitutional arguments was barred by *res judicata*. Pet. App. 4, 11, 14.

Polejewski appealed the March 26, 2021, district court order and reiterated her waived constitutional arguments. Pet. App. 4. The Montana Supreme Court again declined to consider Polejewski's waived constitutional arguments regarding Mont. Code Ann. § 27-1-434 (2021) and the application of that statute in the June 5, 2020, district court order, which was affirmed in *Polejewski I*. Pet. App. 5. The Montana Supreme Court only considered whether the state district court correctly applied Montana's claim preclusion doctrine. *Id.* As the court below explained, “[i]n *Polejewski I*, this Court held Polejewski waived her constitutional challenges by failing to properly preserve those objections before the district court at the May 26, 2020, hearing. Here, Polejewski again seeks to bring constitutional challenges based on the same cause of action in *Polejewski I*.” Pet. App. 5. Because the “parties, subject matter, issues and capacities of the parties are identical to *Polejewski I*,” the Montana Supreme Court held that “[t]he District Court correctly determined Polejewski's claims are barred by claim preclusion.” *Id.* There was no consideration of any constitutional argument. *Id.* Polejewski now petitions for writ of certiorari regarding the Montana Supreme Court's application of Montana's claim preclusion doctrine.

REASONS FOR DENYING CERTIORARI

I. This Court Lacks Jurisdiction Under 28 U.S.C. § 1257(a).

Polejewski seeks review of the Montana Supreme Court's November 30, 2021, application of Montana's claim preclusion doctrine, not of any determination of the constitutionality of the Animal Welfare Statute. Pet. App. 5. This Court's certiorari

jurisdiction over state court decisions, like the Montana Supreme Court’s below, is rooted in 28 U.S.C. § 1257. Section 1257 provides that a final judgment of the highest court of a state may be reviewed by this Court by writ of certiorari if, as relevant here, the constitutionality of a state statute is drawn in question. 28 U.S.C. § 1257(a). This Court has applied § 1257 by determining that “we will not consider a petitioner’s federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.” *Adams*, 520 U.S. at 86. Neither factor is present here: Polejewski did not properly present her constitutional arguments to the Montana Supreme Court, and that court expressly declined to address her constitutional arguments as a result. Pet. App. 5.

Because the Montana Supreme Court’s decision below was silent on the constitutionality of the Animal Welfare Statute, this Court assumes that the federal issue was not properly presented. *Adams*, 520 U.S. at 86-87; *Street v. New York*, 394 U.S. 576, 582 (1969). Polejewski bears the burden of defeating this presumption, by, for example, demonstrating that she complied with Montana’s requirement that she first present her constitutional arguments to the state district court. *Id.*; *see also State v. Normandy*, 2008 MT 437, ¶ 18, 347 Mont. 505, 198 P.3d 834 (“It is axiomatic that we will not review an argument, much less a constitutional challenge, that is raised for the first time on appeal.”); *In re Custody of Arneson-Nelson*, 2001 MT 242, ¶ 37, 307 Mont. 60, 36 P.3d 874 (“A constitutional issue is waived if not presented at the earliest opportunity.”). Polejewski cannot overcome her burden because it is indisputable that she never presented any constitutional arguments regarding the

Animal Welfare Statute at the May 26, 2020, hearing on the State’s Cost of Care Petition. Recognizing Polejewski’s resulting waiver, the Montana Supreme Court twice held that Polejewski failed to preserve her constitutional arguments and twice expressly refused to consider these waived arguments. Pet. App. 5 (“The District Court correctly determined Polejewski’s claims are barred by claim preclusion.”); *Polejewski I*, 402 Mont. at 427, 474 P.2d at 1289 (“We decline to review Polejewski’s constitutional challenges raised for the first time on appeal.”).

The Montana Supreme Court’s decision below specifically declined to consider Polejewski’s waived constitutional arguments regarding the Animal Welfare Statute. Consideration of such a federal or constitutional question is the key basis for this Court’s jurisdiction under 28 U.S.C. § 1257(a). And, this case does not present the sort of “very rare exception” to this Court’s rule that it will refuse to consider petitioner’s claims that were not addressed below. *See Howell*, 543 U.S. at 446, n. 3 (noting that this Court previously chose to reach a question that was not presented to the state court “because the other party had no objection to reaching the question, and because the case had previously been remanded to the state court on other grounds.”). This Court lacks jurisdiction under 28 U.S.C. § 1257(a).

II. This Court Lacks Jurisdiction Under 28 U.S.C. § 2101 to Review the June 5, 2020, District Court Order.

The Montana Supreme Court’s decision below arose out of Polejewski’s improper request that the state district court “reconsider” the June 5, 2020, order, affirmed in *Polejewski I*, after remittitur from *Polejewski I*. Pet. App. 3. The Montana Supreme Court’s November 30, 2021, decision below held that Polejewski’s serial

challenges to the June 5, 2020, order were barred by claim preclusion. Pet. App. 5. Polejewski's Petition to this Court is an extension of her improper, serial attacks upon the June 5, 2020, order, despite that order's affirmance in *Polejewski I* and the running of the time permitted to seek a writ of certiorari to this Court regarding that November 11, 2020, decision. SUP. CT. R. 13; 28 U.S.C. § 2101(c). This Court lacks jurisdiction under 28 U.S.C. § 2101(c) to consider Polejewski's belated, serial attack upon the June 5, 2020, order, in addition to this Court's lack of jurisdiction under 28 U.S.C. § 1257(a).

Specifically, the Montana Supreme Court's decision below affirmed the district court's application of claim preclusion to halt Polejewski's serial, improper attacks on the June 5, 2020, district court order. Pet. App. 3-5. The June 5, 2020, order directed the county to retain possession of the seized animals and required Polejewski to pay \$31,019.60 every 30 days as a cost of care bond under Mont. Code Ann. § 27-1-434 (2021). Pet. App. 3. The June 5, 2020, order resulted from the May 26, 2020, hearing, wherein Polejewski never raised the constitutionality of the Animal Welfare Statute. Pet. App. 5.

The June 5, 2020, court order was the basis of *Polejewski I*. *Id.*; *Polejewski I*, 402 Mont. at 427, 474 P.3d at 1289. Polejewski's appeal to the Montana Supreme Court in *Polejewski I* declined to raise any factual or evidentiary issues with either the May 26, 2020, hearing or the June 5, 2020, order and only presented newly raised constitutional arguments regarding the Animal Welfare Statute. *Polejewski I*, 402 Mont. at 427, 474 P.3d at 1289. The Montana Supreme Court declined to review the

constitutional challenges raised for the first time on appeal and affirmed the June 5, 2020, order in an unpublished November 11, 2020, decision. *Id.*

Montana’s claim preclusion doctrine barred Polejewski from waging incessant attacks on the June 5, 2020, order following remittitur in *Polejewski I*. Pet. App. 4-5; *see also Adams v. Two Rivers Apartments, LLLP*, 2019 MT 157, ¶ 8, 396 Mont. 315, 444 P.3d 415 (2019). Polejewski’s Petition is an extension of her incessant collateral attacks upon the June 5, 2020, order, including a federal case in the District of Montana, *see Pamela Jo Polejewski v. Cascade County*, No. 4:21-cv-00115-BMM-JTJ (D. Mont.), but the Montana Supreme Court issued a final judgment affirming that order on November 11, 2020. *Polejewski I*, 402 Mont. at 427, 474 P.3d at 1289. Any writ of certiorari intended to bring any judgment in a civil action before this Court “shall be taken or applied for within ninety days after the entry of such judgment or decree.” 28 U.S.C. § 2101(c). The petition for a writ of certiorari here was first filed on January 12, 2022, which is 428 days after *Polejewski I* affirmed the June 5, 2020, order. *Compare Pet. 1 with Polejewski I*, 402 Mont. at 427, 474 P.3d at 1289. This Court has “repeatedly held that this statute-based filing period for civil cases is jurisdictional.” *Bowles v. Russell*, 551 U.S. 205, 212 (2007). Insofar as Polejewski’s petition actually seeks to call into question the validity of *Polejewski I*’s affirmance of the June 5, 2020, order 428 days after *Polejewski I* was decided, “it must be dismissed for want of jurisdiction.” *Bowles*, 551 U.S. at 213.

III. Polejewski Misleadingly Claims This Case Presents a Vehicle for Consideration of Civil Asset Forfeiture Laws.

Polejewski's petition repeatedly claims this case presents a vehicle for considering the constitutionality of civil asset forfeiture laws. *See, e.g.*, Pet. 3, 8-10. This is a clear misstatement of Montana law that the respondent is obligated to note. SUP. CT. R. 15.2.

Montana's Animal Welfare Statute is not a civil asset forfeiture law. The Animal Welfare Statute was enacted to temporarily lessen animal care costs imposed on Montana taxpayers during the pendency of large animal abuse cases, like here. Mont. Code Ann. §§ 27-1-434(6) & (7) (2021); Mont. S. Comm. on Agriculture, Livestock, and Irrigation, Hearing on SB 320, 66th Leg., Reg. Sess. (Mar. 14, 2019), 15:48:45-55, 5:52:20-30, 15:55:31-16:00:30. The legislation was spurred, in part, due to the fiscal impacts of previous large animal abuse cases, including one involving Polejewski. *See, e.g.*, *State v. Polejewski*, 2009 MT 315N, ¶ 3, 352 Mont. 553, 218 P.3d 500. The Animal Welfare Statute does not provide for an *in rem* proceeding to punitively seize and dispose of property for the county's gain. *See* Mont. Code Ann. § 27-1-434 (2021). Both the bond and the animals, or their fair market value, must be returned to the respondent following a not guilty verdict. Mont. Code Ann. § 27-1-434(7) (2021). Polejewski cannot analogize the Animal Welfare Statute to allegedly problematic civil asset forfeiture laws or imply some ulterior improper profit motive absent in the law. *Compare* Mont. Code Ann. §§ 44-12-101 to -213 (2021) *with* Mont. Code Ann. § 27-1-434 (2021); *see also* 21 U.S.C. § 881; *Leonard v. Texas*, 137 S. Ct.

847 (2017). And, while a forfeiture occurred here due to Polejewski’s failure to pay the cost of care bond, the animals were given up for adoption. Pet. App. 3.

The Animal Welfare Statute does not provide the alleged free-ranging authority to seize and profit from property tangentially connected to a crime. *See Pet. 3, 6-7.* The statute is instead narrowly focused on providing for the temporary care, and attendant care costs, of allegedly abused animals where large seizures stand to impose correspondingly large financial burdens on local governments. There is no punitive intent or effect in the statute, only a plainly denominated intent to provide, through a civil petition and hearing, for reasonable care costs during the pendency of criminal proceedings. Mont. Code Ann. § 27-1-434(6), (7), & (9) (2021); *see also Hudson v. United States*, 522 U.S. 93, 100 (1997); *U.S. v. Brooks*, 872 F.3d 78, 93 (2d Cir. 2017) (“The forfeiture of a bail bond functions as damages for breach of the civil contract, not as a punishment for the commission of a criminal offense.”).

Even if this Court possessed jurisdiction, this case is not the proper vehicle for determining the constitutionality of state civil asset forfeiture laws. The Animal Welfare Statute is not a civil asset forfeiture law, despite Polejewski’s claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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