

No. 17-1196

In the Supreme Court of the United States

RYAN FRAZIER and LIBERTARIAN PARTY
OF COLORADO,

Petitioners,

v.

WAYNE WILLIAMS, in his official capacity as Colorado
Secretary of State, *et al.*,

Respondents.

*On Petition for Writ of Certiorari to the
Colorado Supreme Court*

**AMICUS CURIAE BRIEF FOR THE
LIBERTARIAN PARTY NATIONAL COMMITTEE
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

May a state use one set of civil procedures for state claims brought in state courts, but different rules for federal claims brought under 42 U.S.C. § 1983?

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INTEREST OF *AMICUS CURIAE*¹

The Libertarian Party, the third-largest political party in the United States, was founded in 1971 to promote the principles of liberty set forth in its Statement of Principles. The Libertarian Party's interests are frequently implicated by state election laws, including those that burden candidates and voters for disapproving or straying outside of the Democratic and Republican duopoly. Accordingly, the Libertarian Party and its state affiliates have repeatedly presented their views on such issues to this Court, both as a party (for example, in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), and *Clingman v. Beaver*, 544 U.S. 581 (2005)) and as an amicus (for example, in *Burdick v. Takushi*, 504 U.S. 428 (1992), *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

The Libertarian National Committee's interest in this case flows directly from the Libertarian Party's cherished values. The Party's core commitment is to individual liberty; it opposes government rules and

¹ Pursuant to Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part; no counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than amicus or its counsel made such a monetary contribution. The parties have consented to the filing of this brief. See Rule 37.2. Due to the timing of counsel being retained and the process for approval to participate by Amicus's Board, notice was not provided to all parties 10 days in advance of the filing of this brief. However, counsel for both Petitioners and Respondent have consented to the late notice and waived any objection to the timeliness of the notice.

restrictions that burden liberty, and it seeks to advance legal rules that promote individual freedom, including in the political realm. Here, Colorado has adopted a rule that precludes alternative political parties, including the Libertarian Party, from pressing their federal constitutional challenges to state electoral rules in state court. This threatens *Amicus's* ability to overcome unconstitutional restrictions and achieve political change.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Colorado Supreme Court's creation of a bifurcated system for litigating state law and Section 1983 claims wrongly seeks to burden litigants who bring substantial constitutional claims under Section 1983. If not corrected, this procedural discrimination against a citizen's right to vindicate U.S. Constitutional claims in state court will prevent many valid civil rights claims from ever being heard. It may be convenient for states, such as Colorado, to enact procedural barriers to litigants bringing civil rights claims (including the ability to seek recovery of attorneys fees under Section 1988 if claims are successful), but federal law does not allow states to shirk responsibility for hearing federal civil rights claims for mere convenience.

Colorado's Supreme Court has dictated that federal claims challenging the state's election machinery cannot be joined in the single proceeding in state court where state-law challenges are exclusively heard, including state constitutional claims. This violates the Supremacy Clause. On a number of occasions this Court has ruled that state courts of general jurisdiction

must, barring a neutral explanation, entertain federal claims. Colorado has failed to offer a neutral explanation. Instead, it has discriminated against federal constitutional claims based on its misguided belief that the federal claims are “inconsistent” with the state court’s processes. This sort of discrimination is plainly unconstitutional.

Two cases from the Colorado Supreme Court, handed down the same day, are joined in this Petition. In *Frazier v. Williams*, 401 P.3d 541 (Colo. 2017), a candidate for the Republican Party’s nomination for United States Senate, Mr. Frazier, was denied ballot access for lack of a sufficient number of supporting petition signatures. Frazier filed suit in Colorado district court, the state’s trial court of general jurisdiction, in order to challenge the state’s decision. Frazier made two claims: first, a state-law claim that he had complied with state law, and second, a federal First Amendment challenge under 42 U.S.C. § 1983 to Colorado’s ballot access scheme. Following a successful appeal to the Colorado Supreme Court, Frazier succeeded in having his name restored to the ballot. Applying established Colorado law, the trial court concluded that Frazier’s § 1983 claim was properly joined in the case and that it justified an award of attorney’s fees to Frazier under 42 U.S.C. § 1988(b).

In *Williams v. Libertarian Party of Colorado*, 401 P.3d 558 (Colo. 2017), a candidate for state senate for the Libertarian Party, Mr. Butt, sought to run in a 2013 recall election. The Secretary of State denied his request to circulate his petition because his request came after the state’s petition deadline. Butt and the Libertarian Party challenged the decision in Colorado

district court using both a state-law cause of action and 42 U.S.C. § 1983. Butt's state-law action asserted violations of Colorado's Constitution; his federal action charged violations of the First Amendment. The district court ruled for Butt under the state constitution and dismissed his federal claim. On appeal, the state court of appeals reversed and remanded. It concluded that Butt's First Amendment claim under § 1983 was properly joined with the state-law proceeding and instructed the district court to address whether Butt was entitled to attorney's fees under 42 U.S.C. § 1988(b).

The Colorado Supreme Court reversed both decisions, holding "a section 1983 claim may not be brought in a [state-law] section 1-1-113 proceeding." *Williams*, 401 P.3d at 559; Colo. Rev. Stat. § 1-1-113. It explained that "inconsistencies between section 1983 and a section 1-1-113 proceeding reinforce the conclusion that the former cannot be raised in the latter." *Frazier*, 401 P.3d at 545. "For example, section 1-1-113 limits appellate review. ... Section 1983 contains no similar limitation on appellate review." *Id.* "Similarly, section 1983 allows 'any citizen of the United States or other person within the jurisdiction thereof to bring a claim. Section 1-1-113, by contrast, limits those who may file a verified petition to 'any candidate, or any officers or representatives of a political party, or any persons who have made nominations or ... any eligible elector.'" *Id.* (citations omitted). Because of these "substantial inconsistencies between section 1983 and section 1-1-113 proceedings, section 1-1-113 does not provide an appropriate procedure for adjudicating section 1983 claims." *Id.* (footnote omitted).

The Colorado Supreme Court's forced splitting of federal challenges from state claims threatens much mischief. As several Justices have pointed out in the context of takings claims, forced splits between courts create "anomalies," cause "gamesmanship," and threaten "confusion." Other than prejudicing federal claims, little is accomplished by Colorado's requirement. The Colorado Supreme Court's mandated scheme of state election law claims being brought in a separate action from federal civil rights claims is an extreme anomaly and will encourage gamesmanship, including by a state that simply does not want to face exposure for § 1988 attorney's fees.

REASONS FOR GRANTING THE WRIT

I. Colorado's Discrimination Against Federal Claims Violates the Supremacy Clause.

Colorado has created a system expressly designed to make it harder to pursue § 1983 civil rights claims in the context of state election law challenges. This discriminatory treatment undermines substantial federal interest in all citizens being able to pursue civil rights claims in state court actions.

"Since at least 1934, the Supreme Court has consistently found that a state may not discriminate against federal claims, regardless of whether the discrimination takes a substantive, procedural, or jurisdictional form." Samuel P. Jordan, *Reverse Abstention*, 92 B.U.L. REV. 1771, 1774 (2012). *See also* Vicki C. Jackson, Printz and Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. J. 111, 113-14 (1998) (the "anti-discrimination principle, coupled with the existence of state courts of wide jurisdiction, will thus

provide an arguable basis for overcoming state court refusal to entertain federal claims in most cases.”); Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1988 Wis. L. Rev. 1465, 1505-06 (the rule against jurisdictional discrimination requires state courts to adjudicate federal claims brought against state defendants where those defendants would be subject to suit under an analogous state law”) (footnote omitted).

A number of this Court’s precedents prove this point. In *Howlett v. Rose*, 496 U.S. 356 (1990), for example, Florida’s courts of general jurisdiction refused to entertain § 1983 claims brought against school board officials. The Court observed that these state courts “of general jurisdiction ... exercise[] jurisdiction over tort claims by private citizens against state entities ... of the size and type of petitioner’s claim here, and [] can enter judgment against them.” *Id.* at 378 (footnotes omitted). “A state policy that permits actions against state agencies for the failure of their officials” under state law, the Court reasoned, “but yet declines jurisdiction over federal actions for constitutional violations by the same persons can be based only on the rationale that such persons should not be held liable for § 1983 violations in the courts of the State.” *Id.* at 380. “That reason, whether presented in terms of direct disagreement with substantive federal law or simple refusal to take cognizance of the federal cause of action, flatly violates the Supremacy Clause.” *Id.* at 380-81.

In *Haywood v. Drown*, 556 U.S. 729 (1999), this Court extended this principle to bar even ostensibly neutral jurisdictional rules that shifted both § 1983 claims and state-law actions against particular officials

from one state court to another. There, New York directed that actions (of any sort) against correctional officers be filed in the state's court of claims rather than in its courts of general jurisdiction. The result was that while § 1983 claims could generally be filed in state courts of general jurisdiction, § 1983 suits against corrections officers (as well as state-law actions) had to be filed in the state court of claims. This Court ruled that having made the decision to create courts of general jurisdiction, New York could not justify shutting their doors to § 1983 claims through the expedient of supplying an alternative judicial mechanism. “[A]lthough States retain substantial leeway to establish the contours of their judicial systems,” the Court explained, “they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.” *Id.* at 736.

So strong is the presumption in favor of state court jurisdiction over federal claims, the Court in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 207 (1991), ruled that South Carolina's courts were required to entertain federal claims under the Federal Employer's Liability Act (FELA) even if those claims could not be heard in federal court and the state lacked analogous workers' compensation claims: “the Supremacy Clause makes that statute the law in every State, fully enforceable in state court.” (Citing *Howlett*, 496 U.S. 356).

Of course, this is not to say that all of a state's courts must entertain all federal claims. States are free to enact neutral rules directing the administration of their courts. See *Haywood*, 556 U.S. at 735-36 (“we have emphasized that only a neutral jurisdictional rule

will be deemed a ‘valid excuse’ for departing from the default assumption that ‘state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.’”)(citations omitted). Rules singling out federal claims for disparate treatment, however, can hardly be deemed neutral. No precedent from this Court has ever so held.

Here, the Colorado Supreme Court (in a reversal of prior precedent) singled out federal claims for disparate treatment. State-law claims, including state constitutional claims, fall within the jurisdiction of Colorado’s district courts -- even in section 1-1-113 proceedings. Federal constitutional claims brought under § 1983 do not. The justifications proffered by the Colorado Supreme Court do not even pretend to be neutral. The Court asserted that § 1983’s procedural “inconsistencies” justified refusing jurisdiction. One problem with this point is that § 1983 itself demands no particular appellate procedures. States need not provide expedited or interlocutory appeals in § 1983 actions, *see Johnson v. Fankell*, 520 U.S. 911 (1997), for example, just as they need not provide juries, *see City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999); *State ex rel. Cherry v. Burns*, 602 N.W.2d 477 (Neb. 1999), or anything else. Section 1983 litigants use a state court’s procedures, whatever they may be. But putting this aside, the justification fails for the simple reason it is not neutral. It uses differences in § 1983 as an excuse for rejecting it. Such an expression of dissatisfaction with federal policy is not neutral. It plainly violates the Supremacy Clause.

II. Colorado Impermissibly Forces Candidates and Parties to Split Their Federal and State Challenges to Election Laws.

Further evidence of the Colorado Supreme Court's discrimination against federal claims is found in its unique "splitting" requirement: "[w]hen a section 1983 claim is brought in a section 1-1-113 proceeding, the district court should dismiss the claim without prejudice with leave to refile it in a separate action, which should then be assigned, where possible, to the same judge." *Frazier*, 401 P.3d at 545. It is not readily apparent what is achieved by this forced split when the same judge entertains the two actions simultaneously, other than to deprive a potentially successful civil rights claim from being eligible for § 1988 attorney's fees awards. Indeed, the desire to have the State avoid paying attorney's fees is the only apparent motivation. Consider when successful litigants with combined state and federal claims present a colorable federal claim but prevail on the state claim, then in the normal course, attorney's fees are available under § 1988. With Colorado's artificially "split" litigation, potentially heard by the same judge in the same hearing, then the same litigant with the same claim would likely not have any ability to recover under § 1988.

What is clear is that Colorado's procedure of forcing different judges to hear the two matters separately can have nightmarish procedural consequences. Consider how § 1983 litigants generally have the right to join their federal and state-law challenges to state laws in a single court. To be sure, joinder will not take place in federal court (absent a waiver by the defendant) because of the Eleventh Amendment. *See City of*

Chicago v. International College of Surgeons, 522 U.S. 156, 177 n.3 (1997) (Ginsburg, J., dissenting); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). Still, § 1983 plaintiffs ordinarily can (and usually do) choose to join their federal and state claims in a single state court proceeding. As Professor Bone explains, “[w]henever two lawsuits are filed, there is always a risk that one will be precluded if the other reaches final judgment first. Thus, parties fearful of preclusion might decide to bring their federal and state claims in state court.” Robert G. Bone, *Revisiting the Policy Case for Supplemental Jurisdiction*, 74 IND. L.J. 139, 145 (1998). See also M. BROWN & K. KINPORTS, CONSTITUTIONAL LITIGATION UNDER § 1983 482 (3d ed. 2013) (observing that splitting claims risks preclusion as well as abstention problems and that there is “good reason for joining state and federal claims in a single proceeding”); E. CHERMERINSKY, FEDERAL JURISDICTION 554 (3d ed. 1999) (describing preclusion problem when state claims cannot be joined in a single federal court proceeding). And even when preclusion can be avoided, litigation costs and temporal constraints in election proceedings make multiple proceedings more costly, consume precious time, and waste valuable judicial resources.

Colorado’s newly minted splitting requirement achieves all of these negative results. It deprives § 1983 plaintiffs their lone opportunity to join their federal and state arguments challenging election law decisions in a single proceeding. It forces them to file multiple actions, split either between state and federal courts or within the state court system itself. It risks preclusion. It carries with it what Justices of this Court have previously criticized in the context of Fifth

Amendment takings precedent as creating “anomalies,” encouraging “gamesmanship,” and spreading “confusion.”

By way of analogy, consider the difficulty of delaying adjudication of federal claims while state law claims go forward in the Fifth Amendment context. This Court in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), ruled that takings claims must first be heard in state courts under state laws before federal Fifth Amendment claims can “ripen.” The result is a forced split between state and federal claims, not unlike what the Colorado Supreme Court has demanded in the election context. The procedural machinations and anomalies that have flowed from this forced split have been frequently questioned by members of this Court, *see, e.g., Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409, 1411 (2016) (Thomas, J., dissenting from denial of certiorari) (pointing to “gamesmanship” and “confusion” created by requirement); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring in judgment) (noting “anomalies,” including preclusion, created by forcing taking plaintiffs to split their claims), so much so that this Court granted review in *Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, 2018 WL 1143827 (U.S., March 5, 2018), to reconsider the propriety of *Williamson County*’s multiple-proceeding logic.

Just as with takings claims, Colorado’s forced splitting of election-law challenges threatens disorder, confusion, gamesmanship, and anomalies -- on top of its waste of resources. *See* Petition for Writ of

Certiorari, *Knick v. Township of Scott*, No. 17-647, at 2 (U.S., Oct. 31, 2017) (cert. granted March 5, 2018) (arguing that “[t]hrough its interaction with claim and issue preclusion and removal jurisdiction, the state litigation ripeness rule [created by *Williamson County*] deprives property owners of reasonable judicial access for a takings claim, impedes the orderly development of takings law, and causes a tremendous waste of judicial and litigant resources.”).

Without this Court’s actions, Colorado and potentially other states so emboldened by the express discrimination against federal civil rights claims, will continue to enact insurmountable procedural barriers to make it impossible for citizens to vindicate crucial constitutional rights under § 1983 and § 1988. This Court’s review and reversal is fully warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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