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ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MARK HOWLETT, A MINOR, BY AND THROUGH
ELIZABETH HOWLETT, HIS MOTHER, NATURAL
GUARDIAN AND NEXT FRIEND, Petitioner V.
SCOTT ROSE, AS SUPERINTENDENT OF SCHOOLS
FOR PINELLAS COUNTY, FLORIDA

CASE NO: 89-5383

PLACE: Washington, D.C.

DATE: March 20, 1990

PAGES: 1 THROUGH 53

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARK HOWLETT, A MINOR, BY AND :

4 THROUGH ELIZABETH HOWLETT, :

5 HIS MOTHER, NATURAL GUARDIAN :

6 AND NEXT FRIEND, :

7 Petitioner :

8 v. : No. 89-5383

9 SCOTT ROSE, AS SUPERINTENDENT :

10 OF SCHOOLS FOR PINELLAS :

11 COUNTY, FLORIDA :

12 - - - - -x

13 Washington, D.C.

14 Tuesday, March 20, 1990

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States at
17 10:04 a.m.

18 APPEARANCES:

19 GARDNER W. BECKETT, JR., ESQ., St. Petersburg, Florida;
20 on behalf of the Petitioner.

21 CHARLES ROTHFELD, ESQ., Washington, D.C.; on behalf of the
22 Respondent.

C O N T E N T S

1		
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	GARDNER W. BECKETT, JR., ESQ.	
4	On behalf of the Petitioner	3
5	CHARLES ROTHFELD, ESQ.	
6	On behalf of the Respondent	22
7	<u>REBUTTAL ARGUMENT OF</u>	
8	GARDNER W. BECKETT, JR., ESQ.	
9	On behalf of the Petitioner	50
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 this Court, was not granted.

2 The Circuit Court of Pinellas County, Florida is
3 a court of general jurisdiction in which this action was
4 brought. The Circuit Court of Pinellas County dismissed
5 the action on two ground. The first ground was that the
6 sovereign immunity of the state of Florida barred the
7 action. The second ground was that the administrative
8 remedies had not been exhausted.

9 On appeal, the District Court of Appeals of the
10 Second District of Florida affirmed on the first ground
11 and did not reach the second ground, the first ground
12 being that there was a want of jurisdiction because of the
13 sovereign immunity of the school board. Under Florida
14 law, the school board is immune from suit.

15 The question presented, therefore, is whether or
16 not the school board is immune under Federal law.

17 The Supreme Court of Florida, with one justice
18 dissenting, denied review, and this Court granted
19 certiorari.

20 The first question to be addressed is simply the
21 fact that the broad ground on which the District Court of
22 Appeal of Florida affirmed the dismissal is, as a matter
23 of law, incorrect. Namely, that whether or not
24 jurisdiction exists when a state court exercises or
25 attempts to exercise jurisdiction under 1983 is solely a

1 matter of state law.

2 QUESTION: Well, Mr. Beckett, would it be fair
3 to say that another way of presenting -- of phrasing the
4 question is whether a state court has to entertain an
5 action brought under Section 1983?

6 MR. BECKETT: No, Your Honor, we don't think
7 that because we think there's an intermediate ground in
8 which this Court has taken the position that where the
9 suit brought on a Federal claim is a claim which is within
10 a class of claims that the state customarily exercises
11 jurisdiction over.

12 Then, even without addressing the question of
13 whether the state would have to do it by direction of
14 Congress, they would have to do it simply because it is
15 within a class of claims which the state does entertain.

16 QUESTION: So your -- your position is that the
17 state entertains claims just like this against the State
18 of Florida, but it doesn't entertain a claim against --
19 under Section 1983?

20 MR. BECKETT: Not against the State of Florida,
21 Your Honor, because one of the distinctions to be made is
22 that although the school board is immune from suit under
23 Florida law, it is not immune from suit under the rulings
24 of this Court under 1983.

25 QUESTION: And so what are the other claims just

1 like this that are so similar that Florida entertains that
2 -- that this should be entertained too?

3 MR. BECKETT: If Your Honor please, going back
4 to Claflin against Houseman, an 1876 case in which Justice
5 Bradley rendered the opinion of the Court, the claim there
6 was based on a -- an assignment in bankruptcy. The state
7 court refused to entertain it on the ground that the
8 assignment in bankruptcy was solely a matter of Federal
9 law.

10 In a rather elaborate opinion, Justice Bradley
11 explained that because of the dual nature of our court
12 system and the dual nature of the laws of this country,
13 that it -- the state court was required to entertain the
14 action, an assignment in bankruptcy, because it routinely
15 handled assignments in other matters.

16 In other words, the mere fact that it was an
17 assignment from Federal law was not a reason to deny the
18 claim.

19 QUESTION: Well, then what are the kinds of
20 claims that Florida courts routinely handle that would
21 cover this sort of claim?

22 MR. BECKETT: Florida, Your Honor, has a general
23 statute which abolishes or waives the statutory immunity
24 of the state and its agencies in all tort claims except
25 tort claims involving so-called discretion or

1 discretionary acts.

2 It -- there have been a number of rulings,
3 including a ruling by the Supreme Court of Florida, that
4 this general waiver of tort liability does not extend to
5 constitutional torts under 1983. And thus, we have the
6 juxtaposition which Your Honor is inquiring about, a
7 general release of authority, a general waiver with
8 respect to torts, but as to constitutional torts, no
9 waiver. That's the -- that's the general set-up.

10 QUESTION: Is there a waiver as to torts which
11 were claimed to be violations of the state constitution?
12 Have the Florida courts spoken on that?

13 MR. BECKETT: Not by -- not in the legislature.
14 There are one or two cases where the Florida Supreme Court
15 has ruled that a denial of due process can be of such a
16 nature that even though there is no provision under state
17 law, it simply will not be allowed.

18 One other point I'd like to make, Your Honor, in
19 connection with that, is that in Owen against the City of
20 Independence this Court established the rule that there is
21 no discretion to violate the Constitution.

22 And so anticipating the argument in the -- which
23 we have received in the brief from the opposition, one of
24 the arguments is that the discretionary -- the
25 discretionary exception to the waiver covers this case.

1 We maintain that it does not because of this Court's
2 position in Owen, simply that it's not constitutionally
3 permissible to violate the Constitution.

4 Therefore, there cannot be any discretion in
5 that area. Consequently, the general waiver also has to
6 include this class of cases unless there is going to be a
7 discrimination against Federal law.

8 Another case illustrating the same point is
9 Mondou against New York, a 1912 case, under the Federal
10 Employees Liability Act. There the state of New York
11 refused to enforce the FELA simply because it was contrary
12 to the policy of the state of New York. This said that --
13 this Court said that any exception to enforcement must
14 depend on some outside reason. It may not depend on
15 simply a dislike of the cause of action.

16 In McKnett against San Francisco and -- St.
17 Louis and San Francisco Railway, a 1934 decision written
18 by Justice Brandeis, the operative provisions of the law
19 there -- of the law of Alabama there were that a
20 proceeding which existed under the common law or under
21 statute law could be brought in the courts of general
22 jurisdiction of Alabama.

23 But the FELA could not be brought because it was
24 under Federal law and the express language of the Alabama
25 statute did not include a claim based on Federal law. In

1 reversing the case, Justice Brandeis said that the
2 question of jurisdiction, although originally a matter of
3 state concern, is ultimately a question of Federal
4 concern. And if the only reason the similar claim is not
5 enforced is simply because it is a claim based on Federal
6 law, that distinction cannot be observed. And the court
7 must entertain that claim along with the other claims.

8 QUESTION: Mr. Beckett, could I ask --

9 QUESTION: The other end. Yeah.

10 QUESTION: Could I ask you to come back to this
11 -- this discretionary point. Florida law says, and you
12 agree, that a tort claim will not lie under its waiver of
13 sovereignty with respect to discretionary acts, and your
14 response is that there is no discretion to violate the
15 Constitution.

16 Well, is that what Florida means by -- by
17 discretion? I mean, I assume that there is no discretion
18 to commit any tort in that sense.

19 MR. BECKETT: Well, that's not the sense in
20 which it's used in Florida, Your Honor. There are a great
21 many cases, in amicus brief in particular, in which it's
22 pointed out that any exercise of -- of discretion such as
23 an executive decision, where to put a traffic light, a
24 policeman's failure to make an arrest which ultimately
25 resulted in a crime by the person not arrested -- all of

1 those things involving discretion and the exercise of
2 official duties generally are said to be discretionary and
3 consequently not waived.

4 QUESTION: Well, why -- why isn't there some
5 discretion involved here on the part of the principal as
6 to whether he had authority to make the examination of the
7 car that he did and as to whether the procedures that were
8 provided in the hearings were adequate? Why isn't there
9 some discretionary --

10 MR. BECKETT: There is a --

11 QUESTION: -- judgment implied in that?

12 MR. BECKETT: There is a distinction, Your
13 Honor, between making a mistake and violating the
14 Constitution. That's our position.

15 For example, a decision that he had authority to
16 change the hours of the school or that he had authority to
17 change -- to put the car in a different parking lot, are
18 all discretionary matters.

19 But he did not have discretion to violate the
20 Constitution by breaking into the automobile when it was
21 lawfully parked and locked and there was not danger that
22 he was going to run away or anything like that. It was --
23 the violation is of the reasonable --

24 QUESTION: Didn't he have some discretion to
25 decide whether there was danger that it was going -- going

1 to be taken before -- before he could get a warrant and
2 before proper investigation could be made?

3 MR. BECKETT: No, Your Honor.

4 QUESTION: Didn't somebody have to make that
5 decision?

6 MR. BECKETT: No. The facts were that the car
7 was lawfully parked in lot where it had been lawfully
8 parked in lot before. Apparently, there was a desire to
9 drive a construction truck through that area and the
10 assistant principal was contacted and it was decided that
11 it was necessary to move the car.

12 Our position is that that did not give him
13 authority to violate the Fourth Amendment by making an
14 unreasonable breaking in of the car. He had alternatives,
15 and I think that's what Your Honor is suggesting. If you
16 say, for example, did he have time to get a warrant --

17 QUESTION: Well, you're making a quite different
18 argument though now. Now you're making the argument that
19 in the facts of this case there was no discretion
20 involved. But the --

21 MR. BECKETT: Because he --

22 QUESTION: But your initial argument was that no
23 violation of Section 1983 could come within Florida's
24 discretionary exception because there is simply never any
25 discretion to violate the Constitution. That's a much

1 broader argument.

2 MR. BECKETT: I don't think I've changed that,
3 Your Honor. The -- if there -- if --

4 QUESTION: Well, you haven't changed it but your
5 not defending it either. You're defending a quite
6 different proposition.

7 MR. BECKETT: If, as a matter of fact, there was
8 some reasonable action that could be taken, that was the
9 action which the statute -- or which the Fourth Amendment
10 required. That is a factual matter.

11 It's our position that there were ample actions
12 that he could have taken without breaking into the car.
13 Therefore, the breaking in was unreasonable, and
14 therefore, it was a violation. We don't deny he had a
15 choice, but the choice he made violated the Fourth
16 Amendment.

17 QUESTION: Mr. Beckett, did you raise in -- in
18 the courts below the question whether the complaint
19 against the officials in their individual capacity had
20 been dismissed?

21 MR. BECKETT: No, Your Honor. We did not.
22 Under Florida law, a -- a granting of a motion to dismiss
23 is error if it -- if it can be reversed on any ground.
24 And we did not pursue those separate matters.

25 QUESTION: Do you -- do you know whether Florida

1 courts will entertain 1983 actions against individual
2 officers in their individual capacity?

3 MR. BECKETT: We do know and they will. Yes.
4 There is an abundant law that the -- that the sovereign
5 immunity claim here extends --

6 QUESTION: So in this -- in this case you say
7 that even if -- even if under Florida law the case against
8 the officials in their official capacity should have been
9 dismissed, in other cases they entertain the suits in the
10 individual capacity.

11 MR. BECKETT: That's correct, Your Honor, and
12 it's our opinion that such a distinction could have been
13 made with the court in this case. But it was not and we
14 did not pursue that aspect of it. We pursued what we
15 thought was the central concern. That is to say, the
16 claim of sovereign immunity against the school board.

17 QUESTION: There's -- that they refuse to
18 entertain 1983 actions entirely --

19 MR. BECKETT: No.

20 QUESTION: -- or you can't really say that --

21 MR. BECKETT: No, and I --

22 QUESTION: -- they -- they are --

23 MR. BECKETT: -- and if I -- if I gave that
24 impression, that is not our position.

25 QUESTION: No.

1 MR. BECKETT: Our position is that where there
2 is a distinction, as there is in this case, between
3 liability under 1983 and immunity under the state law,
4 1983 controls.

5 The question of immunity under 1983 is a Federal
6 question and that of course was settled in Martinez.
7 Here, the court on the ground that we particularly attack,
8 said the school board was not liable because under Florida
9 law it was not liable, and that was the end of the matter.

10 QUESTION: Well, you wouldn't -- you wouldn't
11 say that if -- if Florida had never waived any of its
12 sovereign immunity for ordinary torts or any other set of
13 torts, you wouldn't say that Florida had to entertain 1983
14 suits would you?

15 MR. BECKETT: We wouldn't say it on this basis,
16 Your Honor. We would have to make it on a different
17 basis, simply that it was the purpose of Congress to make
18 it enforceable in state courts regardless.

19 Our position here is, as I said earlier, I
20 believe is an intermediate position. Once the state is
21 under -- undertaken to grant jurisdiction or entertain a
22 claim of the class of claims --

23 QUESTION: Tort claims -- tort claims.

24 MR. BECKETT: In this case, tort claims, of
25 which the Federal claim is itself a member, then it may

1 not refuse to entertain that claim merely because it's a
2 Federal claim.

3 QUESTION: Well, would a -- would a Florida
4 state court have entertained a tort suit by your client
5 against Scott Rose as superintendent of schools for
6 Pinellas County simply based on a violation of state tort
7 duty?

8 MR. BECKETT: No, it would not if you mean in
9 his official capacity.

10 QUESTION: Yes.

11 MR. BECKETT: It would not.

12 QUESTION: Well, so why -- isn't fair to say
13 that Florida is treating both claims based on the Federal
14 Constitution on state tort law the same here? They're not
15 allowing them against this particular entity in its
16 official capacity?

17 MR. BECKETT: We don't think so, Your Honor, and
18 the reason is -- the reason that I enunciated a little
19 earlier, the fact that there is no discretion to violate
20 the Constitution and the only exception to the waiver is
21 the discretionary exception, though we think that as a
22 matter of fact it cannot be brought within the
23 discretionary --

24 QUESTION: Excuse me. The -- the discretionary
25 exception is the reason that an ordinary tort suit was not

1 have been bringable in Florida? Is the -- is the
2 discretionary exception the reason you responded to the
3 Chief Justice the way you did, that the suit could not be
4 brought?

5 MR. BECKETT: No. It's not, Your Honor. The
6 reason the suit could not be brought against the school
7 board or against the superintendent in his official
8 capacity is because they are immune from suit in their
9 official capacities. If they were not immune, then the
10 question would arise as to whether the act was
11 discretionary.

12 QUESTION: Well --

13 MR. BECKETT: We say that it couldn't be
14 discretionary --

15 QUESTION: They're immune, but you mean that --
16 you mean they were protected by sovereign immunity.

17 MR. BECKETT: That is correct.

18 QUESTION: Yes.

19 MR. BECKETT: That is correct. We also take the
20 position that under Federal law sovereign immunity is just
21 one more example of an immunity claim which can be brought
22 or asserted under 1983. And we, of course, take the
23 further position that it cannot be maintained.

24 QUESTION: Well, Mr. Beckett, if a state decided
25 to waive its sovereign immunity, let's say only for

1 intentional torts of any kind, do you think that you would
2 be entitled to bring an action in state court based on
3 Section 1983 for that kind of a tort?

4 MR. BECKETT: The question would be whether or
5 not the tort we were seeking to redress was intentional.

6 QUESTION: Yes, let's assume that.

7 MR. BECKETT: If it were, it would clearly fall.
8 We would --

9 QUESTION: Well, you don't think then that there
10 could be any room for saying that a neutral state waiver
11 of sovereign immunity to a limited extent can be upheld
12 even though it's based on Section 1983 in state court?

13 MR. BECKETT: That's really correct, Your Honor,
14 and the reason is the reason I stated, that there is no --
15 there is no authority to violate the Constitution.

16 QUESTION: Well, but that certainly isn't a
17 discriminatory kind of statute, is it -- that kind of
18 waiver? There's -- the kind that we're discussing doesn't
19 discriminate against Federal claims. It's neutrally
20 applicable to both state and Federal claims.

21 MR. BECKETT: We don't think it's neutral if the
22 only effect of it is to preclude the assertion of a
23 Federal claim which is --

24 QUESTION: Well, that isn't the only effect. By
25 assumption, it would preclude a state court action based

1 on an intentional -- I mean, it would waive it for
2 intentional torts only.

3 MR. BECKETT: That's true. That's true.

4 QUESTION: And why isn't that neutral?

5 MR. BECKETT: Simply because under -- under this
6 Court's decision as in Owen, it is not permissible to
7 violate the Constitution. And both of these examples are
8 intentional.

9 QUESTION: Well, of course, you could file your
10 suit in Federal court, could you not?

11 MR. BECKETT: We could.

12 QUESTION: Yes.

13 MR. BECKETT: That's correct.

14 QUESTION: Was there -- was there a reason for
15 not filing it in Federal court?

16 MR. BECKETT: Yes, there was, Your Honor. It's
17 -- we felt it was desirable to explore this area and to
18 make 1983 available in state court. It was a deliberate
19 decision to raise this question.

20 QUESTION: But that puts your client in -- this
21 particular client in a bind doesn't it? Here he is up
22 here now arguing an issue which need not have been faced
23 had he been in Federal court.

24 MR. BECKETT: That's true, and that was
25 discussed with the client, and we explained to him what we

1 thought we could do with this case. And he was in accord
2 with that.

3 QUESTION: I read your -- I read your brief as
4 suggesting a state may not -- may not make itself or its
5 -- may not make its agencies or this local -- the counties
6 and cities immune -- give them sovereign immunity because
7 the Eleventh Amendment doesn't give them sovereign
8 immunity.

9 MR. BECKETT: Well, as Your Honor knows the
10 Eleventh Amendment has two --

11 QUESTION: Well, I know but --

12 MR. BECKETT: -- has two -- two steps removed --

13 QUESTION: -- you do argue that in your brief,
14 don't you?

15 MR. BECKETT: I don't believe we argue it that
16 way. The Eleventh Amendment is two steps removed. The
17 first is that we're in state court.

18 QUESTION: Yes.

19 MR. BECKETT: And the second is as result of
20 this Court's recent decision in Will, the state in its
21 agencies are immune in any event.

22 And this Court said that in Doyle against the
23 Mt. Healthy City School Board, in which it also said that
24 a school board was more like a county and a municipality,
25 and for that reason, the liability carries over. We

1 simply seek to enforce that liability in state court
2 rather than in Federal court.

3 QUESTION: Well, what law do you think -- you
4 say that -- one of your arguments is that the scope of
5 immunity defense under 1983 is governed by Federal law.

6 MR. BECKETT: That's true.

7 QUESTION: What Federal law determines the --

8 MR. BECKETT: 1983.

9 QUESTION: -- immunity in this case?

10 MR. BECKETT: 1983. This Court has over a --

11 QUESTION: Well, tell me how it solves this
12 problem.

13 MR. BECKETT: Over a period of time this Court
14 has recognized many immunities under 1983: executive
15 immunity in Tenney against Brandhove, judicial immunity in
16 Ray against Pierson. That's the only two that occur to me
17 immediately, but there are any number -- in fact I have
18 a --

19 QUESTION: Well, go ahead, go ahead.

20 MR. BECKETT: -- a list of them here. Scheuer
21 against Rhodes was executive immunity.

22 QUESTION: Well, how does 1983 help you in this
23 case in -- in establishing the limits of immunity?

24 MR. BECKETT: Well, we start with the
25 proposition that 1983 on its face shows no immunities.

1 This Court has recognized that there are a number of
2 common law immunities which are built -- which Congress
3 presumably built into 1983. One of them is not the
4 immunity of school boards. So we therefore say that 1983
5 controls this case as a matter of Federal law.

6 QUESTION: On that basis -- on that basis
7 Florida just hasn't any business extending sovereign
8 immunity to cities or its school boards. That seems to be
9 your argument.

10 MR. BECKETT: Extending sovereign immunity.

11 QUESTION: Yes, or giving sovereign immunity to
12 -- or providing that cities may not be sued for
13 constitutional torts in their -- in the state courts.

14 MR. BECKETT: Now, I'm not sure I --

15 QUESTION: You say 1983 forbids that.

16 MR. BECKETT: No, I don't think we say 1983
17 forbids it. It's up to the State of Florida initially as
18 to what of its agencies or creatures it will grant
19 immunity. And the State of Florida has done so.

20 Our position is that under 1983 only those
21 immunities which this Court has recognized as a matter of
22 Federal law apply in state court. And one of those is not
23 the immunity of school boards.

24 QUESTION: I see.

25 MR. BECKETT: Therefore, the school boards are

1 not immune under Federal law even though they are immune
2 under state law.

3 QUESTION: Thank you, Mr. Beckett.

4 Mr. Rothfeld.

5 ORAL ARGUMENT OF CHARLES ROTHFELD

6 ON BEHALF OF THE RESPONDENT

7 MR. ROTHFELD: Mr. Chief Justice and may it
8 please the Court:

9 This case is fundamentally about the power of
10 the states to establish and limit the jurisdiction of
11 their own courts, and there is a single dispositive
12 question here: whether a state court must entertain a
13 Section 1983 when it lacks jurisdiction to do so under
14 state law and when it also lacks jurisdiction to entertain
15 analogous actions that are based on state law.

16 And here I must disagree with the reading of
17 Florida law that Mr. Beckett presented to you when he said
18 that there was discrimination between state and Federal
19 claims.

20 It is clear in this case that this district
21 court of appeal didn't entertain petitioner's 1983 action.
22 It simply concluded that because the school board,
23 Respondent, has a common law immunity, an action against
24 it simply will not lie at all in state court.

25 QUESTION: Well, its language, Mr. Rothfeld, did

1 say an action pursuant to Section 1983 will not lie in
2 state courts. Now what is the nature of the disability?

3 MR. ROTHFELD: I think it is clearly a lack of
4 jurisdiction in the state courts. Under Florida law,
5 sovereign immunity is grounded in the state constitution
6 and under that law of Florida, as in most states,
7 sovereign immunity entirely divests the court of subject
8 matter jurisdiction to decide the case.

9 QUESTION: But the court below didn't really say
10 we lack subject matter jurisdiction. It said we don't
11 entertain Section 1983 suits.

12 MR. ROTHFELD: Well, it said this action will
13 not lie, and it went on to say --

14 QUESTION: Yes.

15 MR. ROTHFELD: -- that Petitioner was asking the
16 Florida courts to recognize an action under Federal law
17 that are not -- it does not otherwise recognized.

18 QUESTION: Well, do state courts in Florida have
19 jurisdiction over any Section 1983 claims?

20 MR. ROTHFELD: Yes, they do. We agree that
21 state courts routinely entertain actions against local --
22 against officials where sovereign immunity is not a
23 jurisdictional bar.

24 I think that clearly in our view what the court
25 was doing here was applying the subject matter

1 jurisdictional bar that is created by sovereign immunity
2 rules. I think that there is no question. I don't
3 understand Petitioner to disagree.

4 QUESTION: Well, what is the extent of the
5 waiver in Florida? Is it a waiver as to all but
6 discretionary torts?

7 MR. ROTHFELD: Well, let me say as a preliminary
8 matter, I think Petitioner is not well placed to make his
9 argument about discrimination here because he did not make
10 it to the state courts, which could have authoritatively
11 settled it. Before the state courts, he argued simply
12 that the Florida law of sovereign immunity was irrelevant
13 in this case.

14 He, therefore, did not argue discrimination. He
15 did not even argue, for that matter, that the waiver was
16 broad enough to permit his claim to proceed. And the
17 district court of appeal therefore explicitly said it was
18 not addressing the scope of the waiver.

19 Because Petitioner didn't present the argument
20 to the state court -- they could have authoritatively
21 settled it and solved this Court the problem of
22 investigating a complex area of Florida law -- he
23 shouldn't be heard to complain about that now.

24 Beyond that, the district court of appeal
25 clearly decided this case on the understanding that

1 analogous claims, claims analogous to Petitioner's based
2 on state law, would be barred. The court said explicitly
3 that Petitioner was asking the state court to -- the state
4 to open its courts to Federal claims that the state does
5 not otherwise recognize.

6 And in this very case, Petitioner asserted
7 claims based on the Florida constitution, along with his
8 1983 action. Both sets of those claims were dismissed
9 which seemed to me fairly persuasive evidence that the
10 Florida courts do not discriminate against claims based on
11 whether they are state or Federal.

12 Beyond that, if the court were to look beyond
13 the decision below to Florida law more broadly, it would
14 find, I think, that Florida's waiver is not
15 discriminatory.

16 QUESTION: Well, we're not very well equipped to
17 do that here. What do we do faced with an opinion couched
18 in this language?

19 MR. ROTHFELD: Well, I think the opinion on this
20 point is -- is clear that -- and, again, quoting that
21 petitioner is asking Florida to recognize Federal actions
22 that the state does not otherwise recognize. It seems to
23 me that that is a clear conclusion on the part of the
24 district court of appeal that there is no discrimination.
25 I think that conclusion by the state court about the

1 meaning of its state law should be dispositive here in
2 this Court.

3 If there is any doubt on the point -- I mean,
4 the briefs cite an enormous number of opinions from the
5 Florida courts dismissing actions brought against the
6 state or its political subdivisions involving
7 circumstances quite similar to this.

8 I mean, if the court has doubt about the scope
9 of Florida law, I think the solution would be to send the
10 decision back to the Florida courts to determine whether
11 discrimination exists, if the court thinks that that's a
12 dispositive factor.

13 But, again, I think that the decision below
14 rests -- gives the Court ample ground to conclude that
15 Florida courts do not view discrimination to exist.

16 QUESTION: Tell me how you define the extent of
17 the sovereign immunity that is waived, because the statute
18 -- it's the statute that waives, isn't it?

19 MR. ROTHFELD: That's right.

20 QUESTION: And it says that there's a waiver in
21 all actions in tort for money damages against the state or
22 its agents or subdivisions for injury or loss of property,
23 personal injury or death caused by the negligent or the
24 wrongful act or emission.

25 MR. ROTHFELD: I -- I think that the language

1 that Florida courts have focused on is a portion that
2 makes the state liable in circumstances in which a private
3 party would be liable and the Florida courts have
4 interpreted that, as we read their decisions, to exclude
5 an area of governmental activity from liability.

6 Now, Mr. Beckett said it's discretionary
7 activity and not governmental activity. But I think --

8 QUESTION: You mean -- you mean -- you just --
9 you just can't sue a city for damage to your property?

10 MR. ROTHFELD: I think you can't sue a city for
11 law enforcement, public safety --

12 QUESTION: I didn't -- well -- for damage to
13 your property?

14 MR. ROTHFELD: One can sue a city for certain
15 types of property damage, negligent property damage --

16 QUESTION: Or intentional property damage.

17 MR. ROTHFELD: Well, I think that the line drawn
18 by the Florida courts is very similar to the traditional
19 distinction between governmental and proprietary actions
20 and an action taken by a city employee which is said to
21 make the city liable, which is of a sort that the Florida
22 courts would characterize as governmental, as I think the
23 action in this case is, simply will not give rise to
24 liability.

25 QUESTION: Can they -- can you --- under -- can

1 you bring a suit under Florida law against a police
2 officer for beating up -- beating up a prisoner?

3 MR. ROTHFELD: Against an individual police
4 officer, yes, who is not protected by --

5 QUESTION: Well, how about suing the city for
6 that? How about suing the city for the act -- for that
7 conduct of the police officer?

8 MR. ROTHFELD: No. I would think not because
9 that is related to governmental activities. It is an --
10 an intentional violation of -- well, I should say -- stick
11 with the line that the Florida courts have drawn. And I
12 therefore think an action would not lie. And again in
13 this case, Petitioner asserted both state and Federal
14 claims as the basis for his complaint.

15 Both were -- were dismissed, which, again, seems
16 to me fairly persuasive evidence that this type of claim
17 is not cognizable when based on state law in the state
18 courts. Again, that was clearly the view of the state
19 court in this case. And I think that you should be held
20 to be dispositive of the meaning of state law.

21 This sort of evenhanded, nondiscriminatory
22 application of the jurisdictional rule is the sort of
23 thing that the Court has dealt with before, and I think
24 it's the sort of thing that the Court has indicated
25 clearly is not a violation of the Federal Constitution.

1 The Court has addressed in a variety of settings
2 similar to this the obligations that the supremacy clause
3 imposes on state courts to enforce Federal statutes. And
4 it has routinely made clear that jurisdictional bars in
5 the state -- in the laws of the states to consideration of
6 Federal actions are valid to permit state courts to
7 dismiss those actions.

8 The Court has said repeatedly, for example, most
9 recently in its decision this term in *Tafflin v. Levitt*,
10 that state courts may entertain Federal actions when they
11 have jurisdiction to do so under their state law and when
12 Congress hasn't vested exclusive jurisdiction in the
13 Federal courts.

14 The Court has indicated several times in the
15 cases that petitioner cites in *Testa* and *McKnett* and
16 *Mondou* that state courts must entertain Federal actions if
17 they have jurisdiction to do so under their state law, and
18 if they entertain analogous state law claims.

19 And at the same time, the Court has held
20 repeatedly in cases like *Douglas* and *Mayfield* and *Herb v.*
21 *Pitcairn* that states are not obligated to disregard
22 evenhanded limitations on their jurisdiction simply
23 because a claim that's presented to them is Federal.

24 The *Douglas* case presents a good example of this
25 principle in operation. It was a suit brought in state

1 court under a Federal statute, the Federal Employers
2 Liability Act. It was brought by a foreign -- by a
3 nonresident plaintiff against a foreign corporation
4 defendant. It was dismissed by the state court applying a
5 state rule that gave its courts discretion to refuse
6 jurisdiction over actions by foreign plaintiffs against
7 foreign defendants.

8 This Court upheld that rule as a valid excuse
9 for the denial of jurisdiction, even though it precluded
10 the state court from hearing a Federal action that had
11 been created by Congress.

12 QUESTION: What's the name of that case, Mr.
13 Rothfeld?

14 MR. ROTHFELD: Douglas v. New Hampshire and New
15 York Railway.

16 QUESTION: Is it -- is it cited in your brief?

17 MR. ROTHFELD: It is cited in amicus brief for
18 the National Association of Counties.

19 QUESTION: Which amicus brief?

20 MR. ROTHFELD: National --

21 QUESTION: Is there only one?

22 MR. ROTHFELD: For the National Association of
23 Counties. And it is discussed in the other briefs as
24 well.

25 Together, I think all of these lines of cases,

1 which are discussed by Petitioner in his brief, set out a
2 consistent reading of the supremacy clause. They preclude
3 states from picking and choosing Federal statutes to
4 enforce because they don't like some of them. They
5 preclude states from discriminating against Federal law
6 for gerrymandering their rules in a way that discriminates
7 against Federal claims.

8 But at the same time, they permit states to
9 create neutral jurisdictional rules to shape their courts
10 when those rules are applied evenhandedly to state and to
11 Federal claims.

12 QUESTION: Should -- should it really be based
13 on the question of whether the state courts have
14 jurisdiction of -- of these other actions? I mean, what
15 -- what if a state says, you know, this -- our courts are
16 courts of general jurisdiction. They have jurisdiction of
17 almost any action that could be brought.

18 But there is a defense of sovereign immunity
19 available to various state agencies and governmental
20 agencies if you're filing a claim for -- under a state law
21 for a tort. And we think the same sort of rule should be
22 applicable if you're bringing an action under Section
23 1983.

24 MR. ROTHFELD: Well, I -- the Court has
25 discussed these cases in jurisdictional terms, and that's

1 why we are emphasizing jurisdiction here. I mean, in the
2 Mayfield, another one of the cases that follows from
3 Douglas, and the Court said -- and, again, quoting from
4 the Court's opinion that -- that when the state denies
5 resort to its courts for reasons of local policy and
6 applies that policy impartially, that is valid. The Court
7 didn't explicitly hedge that in terms of jurisdiction and
8 I'm not sure, therefore, it's necessary to do so.

9 But the reason I think that it's useful to view
10 this case in jurisdictional terms is not only because the
11 Florida courts clearly view sovereign immunity as
12 jurisdictional, but because as a matter of intent of
13 Congress in writing a statute like 1983, I think it seems
14 to us quite clear that Congress did not have it in mind to
15 override neutral jurisdictional limitations on powers of
16 state courts to entertain claims.

17 QUESTION: Well, suppose instead a Florida
18 statute says that no Florida court shall have jurisdiction
19 to render judgment against -- against a state agency or
20 officer in his official capacity for more than \$10,000?

21 MR. ROTHFELD: Well --

22 QUESTION: That's the way it phrased -- it's
23 phrased. Would there then be a \$10,000 limit on -- on
24 1983 recovery?

25 MR. ROTHFELD: Well, I think that that would be

1 a more -- much more difficult case than this one, Justice
2 Scalia.

3 QUESTION: Why?

4 MR. ROTHFELD: I think that the analysis that
5 the Court has used in cases like this -- and let me set
6 out a range of cases which are I think are -- are
7 instructive. In cases like Felder and Martinez, which
8 Petitioner relies upon, where Federal courts entertained
9 actions under 1983, under any Federal statute, issue in
10 that case is the meaning of the Federal statute. The
11 elements of the cause of action, the defenses to the
12 statute, are Federal questions.

13 And Felder is a good example of that. The
14 procedural rule there was essentially an exhaustion of
15 remedies requirement. The Court said Congress addressed
16 that in 1983 and excluded exhaustion as a element of the
17 action. Therefore, the state's requirement in that
18 action, its attempt to modify the 1983 action, is
19 preempted. The question in a case like that is one of
20 congressional intent, as in any preemption analysis.

21 I think that this case, a jurisdictional -- a
22 classic jurisdictional case presents a very different sort
23 of question. A cause of action is not typically
24 understood to preempt a limitation on the jurisdiction of
25 courts or to conflict with the limitation on the

1 jurisdiction of courts.

2 And I think, again, cases like Douglas and
3 Mayfield and Herb against Pitcairn show that in this
4 setting, where there are state jurisdictional limitations
5 and a Federal action, the action typically takes the state
6 courts as it finds them.

7 Now, the case that you hypothesize is sort of a
8 middle case between those two sets of principles. It's a
9 -- it's a case where the state entertains the 1983 action.
10 And it entertains analogous state law actions. And I
11 think the question of whether Congress would have wanted
12 to preempt the limitation that you describe, even though
13 it's -- it's made by the court -- by the state in
14 jurisdictional terms, would be a more difficult question
15 than the one here.

16 Now, my -- my answer would be Congress should
17 not be deemed to have wanted to override jurisdictional
18 limitations of that sort, and however the court wants to
19 cabin the jurisdiction of its courts, that should be
20 dispositive. But again, that is a closer question than
21 this one.

22 There is no question that this sort of sovereign
23 immunity limitation has always been regarded as
24 jurisdictional, prior to the ratification of the
25 Constitution. So there is not question here of the

1 courts --

2 QUESTION: May I ask about the jurisdictional
3 character? Is it a jurisdictional defect that the school
4 board itself could waive?

5 MR. ROTHFELD: Apparently not. There is --
6 there is some --

7 QUESTION: Do you think the school board -- the
8 school board answered and the judgment was entered against
9 it and then three years later they could come in and
10 vacate the judgment on the ground that they really didn't
11 have authority to waive jurisdiction?

12 MR. ROTHFELD: My -- my understanding of the
13 most recent Florida law is that the waiver is not
14 possible. There is long-standing Florida authority that
15 the legislature must waive sovereign immunity of --

16 QUESTION: It's even more jurisdictional than
17 the Eleventh Amendment would be in a case involve --
18 brought in the Federal case? I mean, it's strict rule of
19 jurisdiction in here?

20 MR. ROTHFELD: I think that -- that is
21 reflective of the most recent law in Florida. Yes.

22 QUESTION: Which case do think most strongly
23 supports that proposition that -- by the Florida Supreme
24 Court?

25 MR. ROTHFELD: There was a recent case of the

1 Florida District Court of Appeal and I am afraid I can't
2 give you the name. I'll be happy to --

3 QUESTION: But is there Supreme Court of Florida
4 authority for the proposition that --

5 MR. ROTHFELD: The Supreme Court of Florida has
6 recently denied to answer a certified question on that
7 point by a state court --

8 QUESTION: But has the Supreme Court of Florida
9 spoken on the point that you're relying so heavily on?

10 MR. ROTHFELD: Not to my knowledge. Although I
11 -- I am not -- I'm not --

12 QUESTION: So you're relying on intermediate
13 court opinions?

14 MR. ROTHFELD: Well, I'm not relying on the --
15 absence of the an ability to waive. I am relying on the
16 fact that --

17 QUESTION: What is the strongest Supreme Court
18 of Florida authority that you have for the basic
19 proposition that this is a jurisdictional matter and not
20 something that can be waived?

21 MR. ROTHFELD: Offhand, Your Honor, I can't cite
22 you a case. I'll be happy, as I say, to -- to inform --

23 QUESTION: No, you don't. If you haven't got it
24 yet, why --

25 MR. ROTHFELD: Well, no, we cite a number of

1 cases in our -- in the briefs in this case.

2 QUESTION: I -- the opinion before us in this
3 case is not quite as clear as you suggest it is, I don't
4 think.

5 MR. ROTHFELD: Well, I think it is -- it is
6 quite clear that the Florida courts do regard sovereign
7 immunity as a defect in subject matter jurisdiction. I
8 mean, the Eleventh Amendment is as well regarded as a
9 defect and subject matter jurisdiction.

10 QUESTION: Again, what is the strongest Supreme
11 Court of Florida opinion supporting that proposition?

12 MR. ROTHFELD: Well, the question is that can be
13 raised at any time? Or --

14 QUESTION: Well, the one you said it's
15 definitely a jurisdictional defect.

16 MR. ROTHFELD: Well, that one case that is cited
17 in the briefs in this case is Schmauss v. Snoll, which is
18 an actually an intermediate court opinion of Florida --

19 QUESTION: I have been inquiring about supreme
20 court opinions --

21 MR. ROTHFELD: No, I --

22 QUESTION: -- and I guess there really aren't
23 any right on point, are there?

24 MR. ROTHFELD: Well, I -- it seems to me, Your
25 Honor, that the intermediate court opinions establish

1 Florida law for purposes of this Court, for the purposes
2 of the Federal court determining what Florida law means.
3 I think that what the views of what an intermediate
4 Florida court are --

5 QUESTION: Let me just get one other thing clear
6 in my mind that, had this case been brought in the Federal
7 court, your defense would not be valid in Federal court.
8 You agree with that, don't you?

9 MR. ROTHFELD: Yes. That's right. The state
10 jurisdiction --

11 QUESTION: Your reason for saying this is not
12 discrimination against the Federal cause of action is
13 because you say comparable claims in the state court would
14 also be dismissed?

15 MR. ROTHFELD: That's right.

16 QUESTION: Is -- is the case you refer to in
17 your colloquy with Justice Stevens, Schmauss against
18 Snoll, is that cited in your brief?

19 MR. ROTHFELD: This, again, is cited in the
20 amicus briefs in the case.

21 QUESTION: And that you regard as the strongest
22 case from the district court of appeal on this question of
23 jurisdictional?

24 MR. ROTHFELD: It's the strongest case that --
25 that is cited in the briefs in this case. I think there

1 are a great many cases. Another case which is cited in
2 the briefs in this case is one called Kaisner v. Kolb. I
3 think that there is no disputing the proposition. I am
4 sorry that I can't cite a case from the Supreme Court of
5 Florida, but I am sure that the supreme court has
6 recognized that.

7 In the Hill case, which is a case from the
8 Supreme Court of Florida, which the district court of
9 appeal relied on in this case, I think there are strong
10 indications that it is jurisdictional.

11 QUESTION: Mr. Rothfeld, when you refer to the
12 amicus brief, you mean the one that bears your name.

13 MR. ROTHFELD: That is right, Your Honor.

14 QUESTION: Because there is more than one here.

15 MR. ROTHFELD: Well, the amicus brief for the
16 National Association of Counties, as well as other --
17 other clients.

18 I think, again, to return Justice Stevens, lest
19 there be any doubt on this point, I think that there is no
20 question that the Florida courts regard the absence of
21 subject of -- well, regard sovereign immunity as
22 establishing a jurisdictional defect which goes to the
23 subject matter jurisdiction of the state courts.

24 I think that Petitioner does not take issue with
25 that proposition.

1 QUESTION: And you -- you mean it's subject
2 matter jurisdiction in the sense that even if they didn't
3 -- if they answered and they went to trial and they got a
4 judgment entered against them and then five years later
5 they could come in and set aside the judgment, it
6 (inaudible) that strict sense?

7 MR. ROTHFELD: That is my understanding of
8 the --

9 QUESTION: You think that's clear from the
10 Florida cases.

11 MR. ROTHFELD: Well, I think that -- as I say,
12 the latest authority in Florida establishes that
13 proposition.

14 QUESTION: But your -- your position is that it
15 wouldn't matter. It would still -- even if it were
16 jurisdictional in a lesser sense of jurisdiction, it could
17 be waived as Eleventh Amendment jurisdiction.

18 MR. ROTHFELD: That is absolutely -- is
19 absolutely right. I mean, our position -- I mean, the
20 question in this case, of course, is whether the state has
21 to entertain the claim in the first instance. And if it
22 does not entertain analogous state law claims, as it does
23 not, we think it shouldn't -- it isn't -- under no Federal
24 obligation, constitutional or statutory, to entertain the
25 claim here.

1 QUESTION: I'm still not quite clear on why the
2 jurisdictional argument makes a difference from Justice
3 Scalia's example of, say, a \$10,000 ceiling on recovery.
4 That would be equally nondiscriminatory. Now, why would
5 one raise a different Federal question than the other?

6 MR. ROTHFELD: Well, I -- I think that the
7 question is whether Congress has wanted to set aside a
8 limitation on the jurisdiction of the -- of the court
9 simply by enacting a cause of action and --

10 QUESTION: But, I mean, in his example was the
11 state statute purportedly says no state court shall have
12 jurisdiction to enter a judgment in excess of \$10,000.

13 MR. ROTHFELD: No. I -- I -- that -- that's
14 correct Justice Stevens. And my answer to Justice Scalia
15 ultimately was that although it was a closer question for
16 the reasons I stated, I think that that would be a valid
17 bar on the jurisdiction --

18 QUESTION: I guess the thing I don't understand
19 is why it's a closer question from your point of view.

20 MR. ROTHFELD: Well, a closer question I think
21 only because since the state court is entertaining the
22 action, the question of whether Congress would have wanted
23 to sweep away limitations on that action --

24 QUESTION: Well, would this be a different case
25 if in addition to the school board they also had the

1 police department so there were two defendants, so they
2 entertained the action but the question whether they can
3 bring it against a particular defendant. Why -- would
4 that make it different?

5 There would be subject matter jurisdiction of
6 the claim but no jurisdiction to enter judgment against
7 the school board.

8 MR. ROTHFELD: Well, I think that the Court
9 would be open to adjudicate the claim as it is against the
10 individual, but not against a party as to whom it lacks
11 jurisdiction -- as to whom a judgment cannot run because
12 of it lacks jurisdiction to enter a judgment against that
13 party. Because it --

14 QUESTION: I don't see --

15 MR. ROTHFELD: -- lacks jurisdiction to
16 entertain --

17 QUESTION: -- why that's different from lacking
18 jurisdiction to enter an \$11,000 judgment. I just don't
19 quite -- I just don't follow the argument. I guess maybe
20 I'm thick.

21 MR. ROTHFELD: Well, let me -- let me move away
22 from that hypothetical because I think the case here is a
23 clear one because, as I said, there is no doubt that
24 sovereign immunity not only is viewed in Florida as being
25 jurisdictional but that it is -- historically,

1 traditionally been viewed in all jurisdictions as going to
2 the jurisdiction of the court.

3 So that -- I mean, there is no question here,
4 again, of the states playing semantic games with its
5 statutes to frustrate Federal actions. This is a long-
6 standing -- long-standing immunity lack of authority in
7 the state courts, which is grounded in the Florida
8 constitution.

9 And it seems highly unlikely that -- well, I
10 should say answer -- make two points. It seems (a) highly
11 unlikely that Congress would have wanted to sweep away
12 such a jurisdictional limitation simply by enacting a
13 cause of action, as it did in 1983.

14 And, secondly, the supremacy clause clearly
15 under this Court's precedence of its own force does not
16 impose an obligation on the state courts to entertain
17 actions under those circumstances.

18 And let me address the meaning of 1983 in
19 particular because that's something that Petitioner I
20 think sort of runs away from and -- and for a very good
21 reason.

22 It is quite clear that when Congress enacted
23 1983, it was not intending to impose special burdens on
24 the state courts or force litigation into the state
25 courts. As Justice O'Connor pointed out in her opinion in

1 Felder, when the statute was originally enacted it vested
2 exclusive jurisdiction in the Federal courts.

3 And while that exclusivity has been stripped
4 away during the course of routine housekeeping revisions
5 of the judicial code in subsequent years, there is no
6 indication in the language of 1983, or any other Federal
7 statute or in any of the legislative history, that
8 Congress intended to force litigation into the state
9 courts.

10 To the contrary, I think it is established
11 beyond any dispute, the statute was enacted precisely
12 because Congress mistrusted the state courts, because
13 Congress wanted to create a Federal court remedy for
14 deprivations of constitutional rights. And the Court has
15 said over and over, it has become almost a truism that
16 Congress constituted the Federal courts the primary
17 vehicles for enforcing Section 1983.

18 It seems very hard to believe that a statute
19 written with that goal in mind was designed to impose a
20 special, unusual obligation on state courts to disregard
21 the neutral limitations on their jurisdiction.

22 QUESTION: Mr. Rothfeld, suppose -- suppose
23 Florida said our courts are closed to any kind of tort
24 suits against prison officials or guards. We just don't
25 want suits to be brought in our courts, and we close our

1 courts to those kinds of suits. But they don't close the
2 courts to suits against policeman.

3 MR. ROTHFELD: If -- if -- if the courts where
4 closed in actions against prison officials, based on state
5 law as well as on Federal law so that clearly analogous
6 claims were being excluded and there were no -- there was
7 no sign that the state meant to discriminate against
8 Federal claims, I would think that would be a valid
9 limitation on the jurisdiction.

10 QUESTION: Even though they entertain similar
11 suits against all other officials.

12 MR. ROTHFELD: I think that's right. And I
13 think that the purpose of the requirement that the state
14 not exclude analogous claims, as the Court has said in
15 cases like Testa and Mondou, the cases that Petitioner
16 relies upon, is to --

17 QUESTION: Do you think there might be an equal
18 protection issue?

19 MR. ROTHFELD: I would think not, Your Honor, if
20 the -- in the Martinez v. California case, there was a
21 similar limitation on state claims --

22 QUESTION: I think your view would say that they
23 could -- they could also immunize parole board officials,
24 too, from parole release decisions.

25 MR. ROTHFELD: I would think they could vest

1 their courts of jurisdiction.

2 QUESTION: Divest them of jurisdiction over the
3 kind of claim that was asserted in Martinez.

4 MR. ROTHFELD: If it is done evenhandedly, if it
5 applies to state law claims as well, I would think that it
6 -- they could.

7 QUESTION: Well, that case, of course, it did.
8 That was a state statute applied to state -- state cases
9 just like Federal cases. I think you're saying Martinez
10 is wrong.

11 MR. ROTHFELD: No. I am not, Your Honor, and
12 let me be clear on why I am not and this goes to my
13 response to Justice Scalia. Perhaps I didn't make that
14 clear. I think that when -- when the state court
15 entertains an action -- when it entertains a Federal
16 action as it did in Martinez, it had jurisdiction to do so
17 and there was no question about that, the state is
18 obligated to analyze the meaning of the Federal statute in
19 Federal terms.

20 The elements of the statute and the defenses to
21 statute are Federal questions. In Martinez itself, the
22 Court, while holding as you say, that the state immunity
23 rule was inapplicable in a 1983 action, also expressly
24 reserved the question whether states could exclude 1983
25 claims altogether --

1 QUESTION: Altogether.

2 MR. ROTHFELD: And suggested in -- in its
3 discussion that the test there was whether analogous
4 claims based on state law were excluded, citing to Testa
5 v. Katt. And I think --

6 QUESTION: Yes, but it also quoted from a
7 Seventh Circuit opinion which is somewhat inconsistent
8 with your argument.

9 (Laughter.)

10 MR. ROTHFELD: To that point, I can't speak,
11 Your Honor. But I think that the Seventh Circuit citation
12 went directly to the question of whether or not a defense
13 in an action entertained in state court would be a Federal
14 question or a state question. And again, I think that is
15 analyzed in standard preemptions terms of congressional
16 intent.

17 Since it is a Federal question, what the Federal
18 statute needs, the question of whether any defense or any
19 modification of the cause of action or procedural
20 exhaustion requirement or whatever is valid must be a
21 Federal question, and it turns on what Congress meant when
22 it wrote the statute.

23 The precedent question of whether or not the
24 case can get into state court in the first place is a
25 different question. If Congress had wanted in 1983, not

1 only to create a cause of action, open to the same extent
2 that state court causes of action are, but had also wanted
3 to override limitations on state court jurisdiction, it
4 would in terms have said so.

5 It would have said state courts must entertain
6 these actions, notwithstanding limitations on your
7 jurisdiction. But it plainly -- plainly didn't do any
8 such thing, in fact, as I said when I wrote the statute,
9 it vested exclusive jurisdiction in the Federal court.

10 So Petitioner, I think, is forced to fall back
11 on some much more general proposition that jurisdictional
12 barriers to Federal claims are never valid when they are
13 served in the state court. The Court has already rejected
14 that proposition.

15 QUESTION: Mr. Rothfeld, just out of curiosity,
16 why would a plaintiff want to get into state courts rather
17 than Federal courts, outside of docket problems, you know,
18 backlog problems?

19 MR. ROTHFELD: I would think outside of those
20 problems, it is not clear to me, Your Honor, since as I
21 have been stating the elements of the claim are entirely
22 identical whether in state or Federal court. I mean,
23 there are always an element of the forum shopping when
24 there are -- when there's concurrent jurisdiction and two
25 courts are open. But beyond that I can't -- Mr. Beckett

1 will have to give you a response to that.

2 I should add, finally, that the fact that
3 Congress did not vest jurisdiction in the state courts
4 suggests the balance of interest that the Court should
5 bear in mind when it decides this case. It would be an
6 extraordinarily intrusive thing for Congress to require
7 state courts to entertain claims when they lack
8 jurisdiction to do so.

9 It has been a fundamental prerogative of the
10 sovereign to determine what courts are -- what claims are
11 heard in the sovereign's own courts and for Congress to
12 set that aside would be a rather surprising thing. And I
13 think the court would look for a clear express that
14 Congress had that in mind in writing the statute like
15 1983.

16 On the other side of the balance of interest,
17 there is not much -- the Federal -- Federal interest here
18 is relatively unsubstantial. Federal courts are open to
19 entertain actions like this. Under 1983 in particular,
20 the Federal courts were made the primary vehicles for
21 entertaining actions like this, and it should not be the
22 law, I think, that a statute like 1983 overrides neutral
23 limitation on the jurisdiction of state courts.

24 And that is not the law. Just two months ago in
25 its Tafflin decision the Court said that state courts have

1 concurrent jurisdiction over Federal claims whenever by
2 their own constitution they have power to do so.

3 QUESTION: Thank you, Mr. Rothfeld.

4 Mr. Beckett, do you have rebuttal? You have
5 four minutes remaining.

6 REBUTTAL ARGUMENT OF GARDNER W. BECKETT, JR.

7 ON BEHALF OF THE PETITIONER

8 MR. BECKETT: Thank you, Your Honor.

9 The fourth case that I would have cited in this
10 Court's line of what we call intermediate cases where
11 there is an entertaining in the state court of a similar
12 cause of action is Testa. And Testa was a decision
13 written in 1947 by Justice Black and it, I think, contains
14 important language on the question on which we're
15 thrashing around here about jurisdiction.

16 In Testa, Justice Black said it doesn't make any
17 difference how you characterize the defense. Whether you
18 put it on jurisdictional grounds or was done in Testa, on
19 the ground that the Federal government was a foreign
20 sovereign and, therefore, the state of Rhode Island would
21 not enforce a foreign penal statute.

22 The -- Justice Black answered that by saying
23 from the Federal viewpoint how you characterize it is
24 immaterial. The question is do you have a Federal cause
25 of action which, had it not been Federal rather than

1 state, would have been enforced. And the answer was yes.
2 Rhode Island had a similar statute.

3 The other argument in that connection is a
4 slight misapplication of the idea of the neutral rule,
5 that if a -- this claim should be barred because the court
6 does not otherwise entertain this type of claim. The
7 question is whether it entertains the class of claims,
8 which it does. It entertains tort claims. Therefore,
9 under the authorities I cited, the fact that it wants to
10 eliminate the Federal claim means it's doing it only on a
11 Federal --

12 QUESTION: (Inaudible) example of Florida
13 attempting to immunize from suit only prison officials
14 just wouldn't work.

15 MR. BECKETT: It wouldn't work because once
16 Florida creates a class as the -- Justice Brandeis said,
17 the Alabama courts, the courts of general jurisdiction,
18 they can entertain these claims, it must entertain this
19 claim and not discriminate merely because it's Federal.

20 QUESTION: That just all depends upon how you
21 want to define the class.

22 MR. BECKETT: That's precisely correct, Your
23 Honor, and that's where --

24 QUESTION: Don't say it's precisely correct. It
25 means that your point doesn't mean anything.

1 MR. BECKETT: It's -- if we --

2 QUESTION: I mean -- you -- you -- you can
3 define the class as prison officials or you can define the
4 class as tort claims.

5 MR. BECKETT: You cannot define it simply as the
6 class which is excluded. It has to be defined as
7 membership in a class which is recognized and enforced.

8 QUESTION: What about membership in a class of
9 lawsuit defendants? You know, it really just depends of
10 what level of generality you're talking about.

11 MR. BECKETT: That's correct and we think that
12 there is guidance from this Court on that point. The
13 other argument that we have in our brief which this Court
14 I think would be interested in is the so-called half-loaf
15 argument.

16 It's quite clear from such cases as Maine
17 against Thiboutot and Felder that once the state courts
18 entertain a 1983 action, they may not give a half loaf.
19 And in effect, that's what they are doing in this case.

20 They say we will entertain it, but we won't
21 entertain it against the school board. The question is
22 when you entertain it, must you bring with the Federal
23 cause of action all of the baggage that it has. And that
24 answer to that is yes and in this case the liability of
25 the school board is established by this Court's decision

1 in Doyle against the Mt. Healthy School Board.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Beckett.

4 The case is submitted.

5 (Whereupon, at 11:04 a.m., the case in the
6 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 89-5383 - MARK HOWLETT, A MINOR, BY AND THROUGH ELIZABETH HOWLETT, HIS

MOTHER, NATURAL GUARDIAN AND NEXT FRIEND, Petitioner V.
SCOTT ROSE, AS SUPERINTENDENT OF SCHOOLS FOR PINELLAS

COUNTY, FLORIDA

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Lona M. May*

(REPORTER)

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