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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-10374, Haywood v. Drown.

Mr. Murtagh.

ORAL ARGUMENT OF JASON E. MURTAGH

ON BEHALF OF THE PETITIONER

MR. MURTAGH: Mr. Chief Justice, and may it please the Court:

In a 4-3 decision, the New York Court of Appeals affirmed Correction Law section 24, which prohibits Petitioner from bringing a section 1983 claim for money damages in any court of the State of New York.

Instead, that statute relegates Mr. Haywood and anyone else seeking money damages under section 1983 to either bring their case in Federal court or to accept what the New York legislature has deemed a State law alternative. That State law alternative does not allow Mr. Haywood to sue the prison guards who violated his civil rights; instead, he can only sue the State. It provides for no punitive damages. It provides for no attorneys' fees, a shortened 90-day notice of claim provision, 30 days shorter than what this Court found violative in Felder. It provides for no right to jury trial.

1 JUSTICE KENNEDY: It does provide for a
2 waiver of sovereign immunity and says that the State
3 will respond in damages. It might be -- I'm not sure --
4 that many prisoners would prefer this. They've got a
5 solvent -- I hope they're solvent -- defendant.

6 (Laughter.)

7 MR. MURTAGH: Your Honor, it is true that
8 the State has waived sovereign immunity for claims
9 brought in the court of claims under that State law.
10 But, Your Honor, they haven't waived sovereign immunity
11 for punitive damages or for attorneys' fees, both of
12 which are remedies that are specifically available to
13 Petitioners, to plaintiffs, in section 1983 actions.

14 This State law alternative, even if it
15 didn't independently violate the Supremacy Clause by
16 substituting New York's judgment for that of Congress,
17 would not actually be a real alternative for Mr. Haywood
18 or for anyone else who wanted to bring a suit against
19 prison officials.

20 JUSTICE KENNEDY: Well, we can just mark
21 that place in the record. It -- it does seem to me that
22 there is some real benefits to the prisoners under --
23 under the New York scheme. It's -- many counsel may
24 think it's preferable than to sue under 1983.

25 MR. MURTAGH: Your -- Your Honor, there may

1 be -- reasonable minds I think could differ about
2 whether it's preferable to have the State as a solvent
3 entity or the -- or the prison employee as a defendant.
4 But I think there's two important points on that.

5 Number one, in their briefing, the
6 Respondents have argued that they will indemnify State
7 employees regardless of where the case is brought. If
8 the State has already agreed to provide indemnification,
9 then you don't need the State as a defendant simply to
10 be solvent. The State has already --

11 CHIEF JUSTICE ROBERTS: Well, except -- they
12 said except in cases where the guards are acting outside
13 the scope of their employment.

14 MR. MURTAGH: Yes, Your Honor. Under
15 Correction Law section 24, if the guard is acting
16 outside the scope of the employment, then the case can
17 be brought in New York's courts of general jurisdiction.

18 The important point here, Your Honors, is
19 that there are two separate related reasons that this
20 law is unconstitutional. The first is because New
21 York's legislature has redefined the remedies available
22 under section 1983, they have, in effect, substituted
23 their judgment about what constitutes good policy for
24 Congress's judgment.

25 In this particular case, Mr. Haywood or any

1 other plaintiff in New York State could bring a section
2 1983 claim in State court, but only if he agrees to give
3 up his right to seek money damages.

4 Congress determined, in setting forth the
5 purpose and the effect of section 1983, that plaintiffs
6 ought to be entitled to both money damages and equitable
7 damages.

8 JUSTICE SCALIA: He can still get that in
9 Federal court, can't he?

10 MR. MURTAGH: Your Honor, it's --
11 Justice Scalia, it's absolutely true that Mr. Haywood
12 could bring his case in Federal court and would be
13 entitled to all the remedies available under section
14 1983, had he brought it in Federal court. But that
15 issue is not dispositive in this case. And the reason
16 it's not dispositive is that in the whole line of cases
17 that this Court has considered where it has required
18 States to hear actions as long as they hear similar or
19 analogous actions, a Federal forum was available in each
20 of those cases as well.

21 CHIEF JUSTICE ROBERTS: I guess there's a
22 difference. I mean, obviously Felder is a significant
23 help to you. But I suppose it's a difference to say
24 they've redefined the cause of action under Federal law
25 and said they are just not going to hear it at all. It

1 may seem paradoxical, but the latter may be from a
2 constitutional point of view the -- the sounder
3 characterization because it's obviously not the
4 responsibility or the authority of States to say, well,
5 this is how the Federal law is going to be applied.

6 But it might be their -- their -- within
7 their authority to say, look, this is what our State
8 court system provides, and if you don't like it for a
9 Federal claim, you've always got the Federal courts.

10 MR. MURTAGH: Your Honor, under this Court's
11 decisions not only in Felder but going back to Martinez,
12 this Court has said that -- that it hasn't decided
13 whether a State is required to create a court to hear
14 Federal claims. And I don't think the Court needs to
15 reach that issue in this case, because New York has
16 already established courts of general jurisdiction, its
17 supreme court, the trial level court, that are competent
18 to hear these cases.

19 These courts regularly hear common law tort
20 cases. They regularly hear section 1983 claims --

21 CHIEF JUSTICE ROBERTS: Yeah, but they're
22 not really -- or at least you can view it as they are
23 not discriminating against the Federal cause of action,
24 because they don't allow a State cause of action of
25 the sort you want to pursue either.

1 MR. MURTAGH: Your Honor, that seems to be
2 the crux of the Respondents' argument. And I think the
3 fundamental problem with that argument is that, although
4 New York specifically exempts prison -- cases against
5 prison officials, that's not enough. And the reason
6 it's not enough is that if you can merely invoke the
7 word "jurisdiction," as this Court pointed out in
8 Howlett, the mere -- the force of the Supremacy Clause
9 is not so weak that it can be evaded by the mere mention
10 of the word "jurisdiction."

11 CHIEF JUSTICE ROBERTS: Well, that's --
12 that's true. And Howlett does say that. But as we've
13 pointed out on many occasions, "jurisdiction" is a term
14 that covers a lot of different things. And at some
15 point something starts to look jurisdictional, which is,
16 look, we're not going to hear your case at all. In
17 other areas, even if they call it "jurisdictional," it
18 really doesn't seem that way, such as, well, you've got
19 to give this much notice or you've got to -- you know,
20 maybe those things aren't really jurisdictional. But
21 saying you can't bring the case at all strikes me as
22 really jurisdictional.

23 MR. MURTAGH: Well, Mr. Chief Justice, I
24 think there are a couple of points on that. The first
25 is that in the cases where this Court has found that

1 there was a neutral jurisdictional rule, Herb v.
2 Pitcairn, Douglas, Mayfield, and then later in
3 Johnson v. Fankell, in every single one of those cases
4 the underlying rule of jurisdiction did not speak to the
5 identity of the parties and did not address the
6 underlying substance of the claim. Those were rules
7 that simply talked about how a case could move through
8 the courts.

9 For example, in Douglas neither party was a
10 resident of the State of New York, and the New York
11 court said: If you're not residents, you can't come in
12 and use our courts --

13 JUSTICE GINSBURG: That's not how it moves
14 through the courts. That is, you don't have a forum.
15 That sounds to me like a jurisdictional ruling. Those
16 cases that say, our courts don't sit to hear cases where
17 the parties are nonresidents, both sides; our courts
18 don't sit to hear cases about accidents that happened in
19 Timbuktu -- those sound like we don't offer a forum for
20 that type of case, as distinguished from here, where New
21 York does have a forum; it just won't give one kind of
22 relief.

23 MR. MURTAGH: Justice Ginsburg, I think -- I
24 think that that's exactly right. The point here is that
25 in -- in -- in Douglas, where the court did not -- where

1 the New York courts did not allow any party -- where
2 both parties were nonresidents of New York, they
3 wouldn't hear the case -- that applied regardless of the
4 identity of the employee. It didn't matter whether the
5 defendant was an employee of the State of New York or
6 not.

7 And it also applied regardless of what the
8 underlying substantive claim was. It didn't matter
9 whether it was a tort action or a contract action or
10 anything else. If you weren't in New York, if you
11 weren't a resident of New York, you couldn't take
12 advantage of its -- of its courts.

13 And in -- in *Herb v. Pitcairn*, where you had
14 the situation where there was a -- there was a railroad
15 accident brought in one county court in Illinois -- it
16 should have been brought in a different county court --
17 the Court went -- went out of its way to say the State
18 of Illinois has provided other forums, other State
19 courts where you could have brought this case.

20 And if the State, for example, in the
21 present case had said, Mr. Haywood, you filed this case
22 in Wyoming County Supreme Court and it really should
23 have been brought down in Syracuse, that would be a
24 neutral rule of jurisdiction. It just dictates where
25 the case ought to be brought.

1 By contrast, what New York has done here is
2 that they have absolutely forbidden anyone to seek money
3 damages against a prison official. And the reason that
4 they did that, as conceded in the Respondents' briefing,
5 is because they don't want prison officials to be
6 distracted from their duties. They don't want prison
7 officials to have to face the fear of vexatious
8 lawsuits.

9 JUSTICE KENNEDY: Suppose the -- the New
10 York legislature said, you have a choice, you can bring
11 a 1983 suit or you can bring this sort of suit against
12 the State, and the State will respond to damages, but
13 you can't do both. Could they do that?

14 MR. MURTAGH: No, Your Honor, I don't think
15 they could. Once the State -- this Court's
16 jurisprudence teaches us that once a court -- once a
17 State opens its courts to hear analogous State law
18 claims, it cannot then close its doors selectively to
19 Federal claims.

20 JUSTICE GINSBURG: What Justice Kennedy has
21 asked you: Say, you can have this Federal claim, but
22 we are going to offer you a substitute under New York
23 law, which the Federal authority could not force us to
24 do, because it's a State waiving its sovereign immunity.

25 MR. MURTAGH: I'm sorry, Justice Ginsburg;

1 certainly the State of New York could offer a State law
2 alternative in addition to section 1983.

3 JUSTICE KENNEDY: No, no. I said in the
4 alternative.

5 MR. MURTAGH: Okay. I don't believe,
6 Justice Kennedy, that -- that New York could force a
7 plaintiff to give up the right to sue section -- sue
8 under section 1983 if the -- if the courts are otherwise
9 open to tort actions in similar circumstances.

10 JUSTICE KENNEDY: All right. Now, suppose
11 they do it -- they say: We are just talking about the
12 State courts. You can't bring both types in State
13 courts. You can still have your Federal cause of action
14 in the Federal court, and we will also give our cause of
15 action where the State's law is violated, but not both
16 in the New York courts.

17 MR. MURTAGH: No, Justice Kennedy. Once --
18 once New York establishes courts of general jurisdiction
19 that are competent to hear these kinds of cases, it
20 can't close its doors to section 1983 claims for money
21 damages.

22 JUSTICE SCALIA: But it's okay for the State
23 to say, we don't want any tort actions in our courts?
24 That would be all right?

25 MR. MURTAGH: Yes, Justice Scalia. If --

1 JUSTICE SCALIA: That's strange. Why -- but
2 it can't do the lesser thing of saying, we don't want
3 this particular type of tort action. The one is
4 jurisdictional -- you would say it's jurisdictional,
5 right? And this one is not jurisdictional, just because
6 it's narrower? It's still directed to the type of
7 action.

8 MR. MURTAGH: Justice Scalia, I think that
9 the distinction is -- relates to the relative power of
10 Congress and the States. Once Congress has spoken and
11 has provided a Federal cause of action, that becomes New
12 York law. And New York, as long as it has a court, is
13 required to enforce that.

14 JUSTICE SCALIA: But -- but not if New York
15 says, we don't want any tort actions. What about if New
16 York says, we don't want any personal injury tort
17 actions? Would that be enough, or is that too narrow?
18 And I'm going to narrow it down after that until I get
19 down to your case.

20 (Laughter.)

21 MR. MURTAGH: Justice Scalia, I -- I'm not
22 sure exactly where the line is in terms of the analogy.
23 I think this case is very far on the other side. In
24 other words, because New York State here -- even here, a
25 section 1983 claim, this isn't a situation where they

1 say, we have a court that's not competent to hear
2 section 1983 claims. They simply say: We're not going
3 to allow them to hear section 1983 claims for money
4 damages where there is a prison official who's -- who's
5 the defendant.

6 If the defendant here, Justice Scalia, were
7 a police officer who had engaged in the same conduct,
8 New York State courts would have to hear that case. So
9 this is not the sort of situation --

10 JUSTICE SCALIA: I understand that. I just
11 don't understand -- you acknowledge it's okay if it's
12 jurisdictional, and you acknowledge that it is
13 jurisdictional if you don't allow any tort actions. I
14 just don't know what makes this to be
15 non-jurisdictional. What -- I don't know.

16 MR. MURTAGH: I think it -- intellectually,
17 Justice Scalia, it seems to me that the distinction is
18 that -- that there has to be a point at which you do
19 respect the relative authority of the State and the
20 Federal Governments. By saying that a State may -- we
21 are not going to require that a State establish a court
22 to hear a whole kind of action that they otherwise
23 wouldn't hear. That's providing some deference to the
24 authority of the State, as the Respondents point out,
25 part of the core sovereignty of the State, to establish

1 their courts and to run their courts.

2 By contrast, once they have done that, once
3 they have provided that court system, then the power
4 balance shifts.

5 CHIEF JUSTICE ROBERTS: So if this were at
6 the -- the beginning of whenever New York was
7 establishing a court system, and they said from the
8 outset, look, we are not going to hear these types of
9 cases against -- then this would be okay?

10 MR. MURTAGH: Your Honor, I think under this
11 Court's jurisprudence that would -- if the State of New
12 York said, we are not going to hear any kind of tort
13 action regardless of whether it's Federal or State, and
14 it doesn't matter --

15 CHIEF JUSTICE ROBERTS: No, no. That's
16 mixing the two points. Your point, I understand it --

17 MR. MURTAGH: Okay.

18 CHIEF JUSTICE ROBERTS: -- is once the court
19 has opened it up to a particular type of claim, they
20 can't say -- say no more. So if they are setting up --
21 obviously we are not going to go back to whenever the
22 New York State courts were established. But if they
23 suddenly said, we are going to revise our court system
24 or -- or modernize it, and from now on we are not going
25 to do this, is that --

1 MR. MURTAGH: As long as -- as long as the
2 withdrawal of jurisdiction was across all analogous
3 State law claims as well as the Federal claim, then,
4 yes. I mean, we could discuss whether that would be a
5 good idea or not, but I think --

6 JUSTICE SCALIA: No, we would discuss what
7 is analogous.

8 MR. MURTAGH: Yes, and that's -- that's a
9 very good point, Justice Scalia. And this Court has
10 told us as litigants what it thinks are analogous
11 claims. In *Felder*, this Court said an analogous claim
12 for purposes of section 1983 is a common law tort.
13 That's the thing that's most like a section 1983 claim.
14 So the real question here, is does New York State
15 provide courts that can hear common law tort claims?
16 There is no dispute in this case that they do.

17 JUSTICE GINSBURG: Now, why can't New York
18 take the position, we want to be realistic about these
19 suits? New York has provided that it is going to --
20 it's going to pick up the tab. If you sue a
21 correctional officer, New York is going to pick up the
22 tab.

23 Now -- so we are going to channel this suit
24 to the court, the one court in the State that deals with
25 the State, the sovereign, paying money, the court of

1 claims. And so all we are doing is recognizing the
2 reality that this is a suit against New York, not the
3 correctional officer because it won't cost the
4 correctional officer a dime; New York is going to
5 provide counsel and is going to pay any judgment.

6 So that really where this case belongs is in
7 the court that hears claims against the State of New
8 York.

9 MR. MURTAGH: Justice Ginsburg, the -- the
10 problem with that analysis, I think, is that in the
11 court of claims, there are all sorts of other
12 limitations.

13 This -- this notion that this is simply a
14 substitute claim and that it's just as good enough, I
15 think really is a red herring in this case because what
16 has happened here is not that New York has created a
17 separate court with specialized expertise that knows how
18 to try these cases, which it probably could do under
19 this Court's jurisprudence. Rather, what it has done is
20 it's required you to sue the State instead of the
21 individual, and then put a whole host of limitations on
22 the sort of relief that you can seek and on the way that
23 you can bring your case.

24 CHIEF JUSTICE ROBERTS: So it's done exactly
25 what the Federal system has done. So that if you have a

1 money claim against -- that is going to be against the
2 Federal Government, here's what you do: You go to the
3 court of claims, you have to go to the court of claims;
4 and in that court all sorts of special rules apply about
5 notice and other things.

6 MR. MURTAGH: And that's absolutely true,
7 Justice Roberts, if the claim initially were a claim
8 against the State. But of course section 1983 doesn't
9 provide for a claim against the State. In *Will v.*
10 *Michigan* this Court held that the State is not a person
11 for purposes of section 1983, and so the only way you
12 can have a section 1983 claim --

13 CHIEF JUSTICE ROBERTS: Well, but in the
14 Federal system, if you sue a Federal official or a
15 postman and in fact, in reality it's going to be a claim
16 against the United States, that has to go to the court
17 of claims, too.

18 MR. MURTAGH: And Your Honor, that is
19 absolutely something that Congress can decide to do with
20 respect to Federal law, and New York can decide with
21 respect to State law to do whatever it wants in terms of
22 setting up where those claims can go.

23 What New York cannot do is to impose that
24 policy judgment on the Federal claim, because Congress
25 has already determined --

1 CHIEF JUSTICE ROBERTS: Yes, I guess my
2 point is that there's nothing fishy about what New York
3 has done here, which leads me to think, well, maybe it's
4 not really discrimination against the Federal claim;
5 it's a rational way to handle claims against the State
6 treasury, just as the Federal system is a rational way
7 to handle claims against the Federal treasury.

8 MR. MURTAGH: Regardless of how rational an
9 idea this is or how good an idea this is, for this Court
10 to adopt a rule that says that once a State disagrees
11 with Congress about how people ought to be liable under
12 a Federal remedy would require this Court in essence to
13 say that the rationale of several of your previous cases
14 could be undone. And I think this Court pointed out in
15 Howlett that if all you had to do was say, our courts
16 won't have jurisdiction over a certain category of
17 claims, that the Wisconsin legislature in Felder could
18 have said: Our courts shall have no jurisdiction unless
19 there is 120-day notice of claim provided.

20 The courts in Martinez in California -- the
21 California legislature could have said, our State courts
22 will have no jurisdiction --

23 CHIEF JUSTICE ROBERTS: Well, that just gets
24 back to our previous colloquy about what jurisdiction is
25 and what it means. I mean, are you saying that if we

1 look at this and we decide, yes, this does really look
2 like jurisdiction in the real sense, rather than just a
3 jurisdictional label -- if we do that, then you lose?

4 MR. MURTAGH: I think that if this Court
5 found that this were a jurisdiction -- a neutral rule of
6 jurisdiction that constituted a valid excuse, that, yes,
7 that would probably -- that would probably undermine my
8 argument significantly.

9 I think to get there, Chief Justice, you
10 would have to -- you would have to sort of engage in
11 some interesting thinking which I haven't gotten my mind
12 around, to be quite honest. The -- what this Court said
13 in Howlett is, when we talk about jurisdiction, when we
14 talk about what constitutes jurisdiction, we are talking
15 about whether there is power over -- over the subject
16 matter and power over the parties involved. And I don't
17 think the Respondents in this case even argue that the
18 New York supreme courts don't have the power over the
19 parties here or don't have competence over this kind of
20 subject matter.

21 This case doesn't have any of the
22 attributes, this rule, this correctional law section 24,
23 doesn't have any of the attributes of a neutral
24 procedural rule --

25 JUSTICE ALITO: Isn't jurisdiction whatever

1 the legislature says it is? Do you think there is some
2 sort of -- you know, a Platonic ideal of jurisdiction
3 versus nonjurisdiction, and that's what we apply here?

4 MR. MURTAGH: Justice Alito, I think that
5 jurisdiction -- that to determine whether a rule is
6 jurisdictional requires that this Court look at the
7 purpose and the effect of the underlying statute. And
8 if all a State has to do is say it's jurisdictional and
9 if jurisdiction is whatever the State says it is, then
10 that means that, going back to Felder and Martinez and
11 some of those cases, a State could -- could evade this
12 Court's rulings merely by reframing the statute in the
13 words of jurisdiction.

14 JUSTICE ALITO: So what is the -- what is
15 the standard for determining whether it's jurisdictional
16 or not?

17 MR. MURTAGH: Well, Justice Alito, the --
18 the important points, I think, come out of -- out of
19 Felder: That it is a neutral rule that is applicable to
20 all cases and that is not concerned with the underlying
21 substance of the claim. So, for example, when we go
22 back to the old cases, Douglas, Mayfield, Herb v.
23 Pitcairn, this Court was looking at situations where
24 there were rules that applied everywhere.

25 JUSTICE SCALIA: But you -- you've

1 acknowledged that it would be okay and would be a
2 jurisdictional rule if the court -- if the State courts
3 did not entertain tort actions. That's a rule that goes
4 to the substance of the claim, isn't it?

5 MR. MURTAGH: Well, Your Honor, it goes to
6 the substance of the claim, but it applies generally
7 across all claims. It's not -- it's not picking and
8 choosing. It's not targeted towards a specific --

9 JUSTICE SCALIA: Yes, it's picking and
10 choosing tort claims.

11 MR. MURTAGH: Well, it's picking and
12 choosing tort claims as opposed, I suppose, to contract
13 claims.

14 JUSTICE SCALIA: Yes.

15 MR. MURTAGH: But it's not, Your Honor,
16 saying: We're going to accept this kind of tort claim
17 but not that kind of tort claim. We're going to allow
18 to you sue a police officer who beats you up, but you
19 can't sue a corrections officer who beats you up.
20 That's the real difference, I think.

21 JUSTICE BREYER: Is there something you add
22 -- you add to your statement of your rule? A neutral
23 rule not related to substance, but related to the
24 administration of the courts?

25 MR. MURTAGH: Yes, Justice Breyer. I think

1 that if I --

2 JUSTICE BREYER: Don't just be agreeable to
3 be agreeable. Do cases actually say that?

4 MR. MURTAGH: I think, Your Honor -- I'd
5 have to get the exact language from Felder, but I think
6 that it is a neutral rule regarding the administration
7 of the courts that is unrelated to the underlying
8 substance of the matter or the nature of the parties.

9 Your Honors, the most recent -- going on a
10 little bit about this jurisdictional issue -- the most
11 recent case that held that there was a neutral rule of
12 judicial administration, a neutral procedural rule, was
13 Johnson v. Fankell. And this Court will recall that, in
14 that case, Idaho had a rule that required that there be
15 a final judgment before an intermediate -- before an
16 appeal could be taken from that.

17 This Court allowed Idaho to impose that rule
18 on a section 1983 claim because the defendants there had
19 argued that they were entitled to qualified immunity.
20 They lost at the trial level. They then sought an
21 interlocutory appeal. And this Court said certainly
22 Idaho can set forth the ways in which you take appeal
23 from any kind of a case, and, more importantly, this is
24 not a rule that's targeted at civil rights claims and in
25 fact may lead to over-enforcement of civil rights claims

1 because it prevents a defendant from getting out of the
2 case very early.

3 That's the kind of case where there's a
4 neutral rule. That's not what we have here.

5 JUSTICE KENNEDY: You are being generous
6 when you said that we would recall -- at least that I
7 would recall the case. Is it Idaho, did you say, or
8 Johnson?

9 MR. MURTAGH: In Johnson v. Fankell, I
10 believe --

11 JUSTICE KENNEDY: It was Johnson. I thought
12 you said Idaho. Thank you.

13 MR. MURTAGH: Yes. I'm sorry, Your Honor.
14 It was that the Idaho courts were involved in that one.

15 Your Honor, the approach that's urged by the
16 Respondents in this -- in this case really would dictate
17 different results, as I mentioned. You'd wind up -- in
18 Felder and in Martinez, the courts could just use the
19 word "jurisdiction." And actually, even if you go back
20 to three of this Court's earlier cases, Mondou in 1912,
21 McKnett in 1934, Testa v. Katt in 1947 -- in Testa v.
22 Katt, this Court required Connecticut to hear an
23 Emergency Price Control Act even though Connecticut
24 regularly refused to hear cases that they thought were
25 penal in nature. And what this Court said was: You

1 hear analogous claims; you have to hear the Emergency
2 Price Control Act.

3 Now, if this Court were to adopt a rule that
4 the State could simply say, we have no jurisdiction over
5 certain categories of claims, then in Testa, Connecticut
6 could simply have said: We are not going to have
7 jurisdiction over any case seeking penal or punitive
8 types of damages. That would require that we really
9 undo a lot of this Court's jurisprudence.

10 If there are no further questions at this
11 point, I would reserve my time, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Murtagh.

14 Ms. Underwood.

15 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

16 ON BEHALF OF THE RESPONDENTS

17 MS. UNDERWOOD: Thank you,
18 Mr. Chief Justice, and may it please the Court:

19 The Federal Constitution permits State
20 courts to hear Federal claims, but it does not require a
21 State to hear them so long as the State does not
22 discriminate against Federal claims in comparison with
23 similar State claims.

24 New York's statute fully satisfies that
25 requirement. New York courts cannot hear damage actions

1 against prison officials for conduct in the scope of
2 their employment. And it doesn't matter whether State
3 or Federal law is the basis for the claim.

4 JUSTICE SOUTER: Ms. Underwood, if that's
5 going to be the criterion, that they exclude a State
6 cause of action as readily as they exclude a Federal
7 cause of action, then isn't the State always going to
8 win every case in which there is an issue like this one?
9 Because unless the State is -- is so blatantly
10 discriminatory or so blatantly inadvertent as to leave a
11 cause of action of its own making on the books, when it
12 says we won't hear the Federal one, what you posit is
13 always going to be the case. And if that's -- if the
14 rule is that as long as there is no State action
15 comparable to the Federal action that is disallowed, the
16 State wins. In practical terms, the State always wins.

17 MS. UNDERWOOD: Well, that's not so. This
18 Court has in fact invalidated statutes and found
19 discrimination. There were -- three of the early FELA
20 -- two FELA cases and the Testa case itself. In Testa,
21 contrary to what was just suggested, the Court -- this
22 Court found discrimination. When Rhode Island said that
23 it wasn't going to hear the emergency price control
24 penal statute --

25 JUSTICE ALITO: Well, suppose a State

1 extends --

2 MS. UNDERWOOD: -- the Court --

3 JUSTICE ALITO: Suppose a State extends
4 sovereign immunity to a broad class of State employees
5 with reference to State law claims. Would that mean
6 that the State could close its courts to all 1983
7 actions --

8 MS. UNDERWOOD: No. Immunity --

9 JUSTICE ALITO: -- against those same
10 defendants?

11 MS. UNDERWOOD: No. Immunity and
12 jurisdiction are really quite different. They both have
13 the result that the defendant loses.

14 JUSTICE ALITO: Well, what if they phrase it
15 in terms of jurisdiction? There is no jurisdiction in
16 courts of New York to hear any intentional tort action
17 against a correctional official for action taken during
18 the performance of the correctional officer's duties.
19 Could they then close the New York courts completely to
20 1983 actions against correctional officials?

21 MS. UNDERWOOD: If -- if they not only used
22 the word "jurisdiction" but gave the rule jurisdictional
23 effect -- that is to say, a jurisdictional bar is one
24 that can't be waived by the defendants; whereas,
25 immunity can be waived. So it protects courts, not

1 defendants. The --

2 JUSTICE GINSBURG: Ms. Underwood, there's a
3 feature of this case, even assuming that you were right
4 about -- New York has not withdrawn jurisdiction from
5 its courts over a 1983 claim; it has simply limited,
6 taken away, one mode of relief. That is, you can sue a
7 correctional official for declaratory relief, you could
8 sue for injunctive relief. All New York has taken away
9 is one mode of relief. That's not jurisdictional unless
10 you say that every element of damages is jurisdictional.

11 New York allows this type of claim in their
12 courts. We are talking about jurisdiction over the
13 person? Yes, they have jurisdiction over the
14 correctional official's person. Subject matter --
15 subject matter is a 1983 case? Yes. All they are
16 cutting off is one form of relief.

17 MS. UNDERWOOD: Well, it's not just any form
18 of relief. It's not just, for instance, the type of
19 damages. The difference between law and equity has a
20 long tradition in this country. They are really two
21 different actions, an action for injunctive relief or an
22 action for damages. The courts now hear them together.
23 But what New York has said is it has no jurisdiction --
24 its courts have no jurisdiction against -- over damage
25 actions against corrections officials.

1 And as I was saying earlier, jurisdiction is
2 different from immunity, both because it can't be waived
3 -- so it's about the courts, not the defendants, because
4 it -- because a dismissal won't bar litigating the
5 matter in Federal court. A dismissal -- an immunity
6 would result in a judgment --

7 JUSTICE GINSBURG: Practically --
8 practically, hasn't what New York has done is to confer
9 on its correctional officers absolute immunity, not
10 merely qualified immunity? So if you want to be
11 realistic about what is the effect of New York's law, it
12 says: You are going to be subject to equitable relief,
13 declaratory relief, but as far as money is concerned,
14 you are absolutely immune.

15 MS. UNDERWOOD: I don't think it's immunity.
16 I think it's a refusal to hear the case and what --

17 JUSTICE GINSBURG: What's the difference
18 of -- practically?

19 MS. UNDERWOOD: The practical difference --

20 JUSTICE GINSBURG: Isn't the -- isn't the
21 practical effect -- if you tried to explain to
22 correctional officers what is your exposure, you would
23 say: You have absolute immunity from anything that's
24 going to try to reach into your pocket.

25 MS. UNDERWOOD: Not at all. This is like a

1 forced removal, is what it really is. Because they are
2 --

3 JUSTICE SCALIA: They're -- they are liable
4 in Federal court.

5 MS. UNDERWOOD: Yes, that's exactly -- yes.

6 JUSTICE SCALIA: They're certainly not
7 immune in Federal court.

8 MS. UNDERWOOD: They are fully liable in
9 Federal court. That's where these cases are being
10 brought right now. Congress has never expressed any
11 policy for mandating that they be brought in State
12 court, because even if these cases could have been
13 brought in the first place in State court, the Federal
14 -- the State defendant could remove it to Federal court.

15 JUSTICE BREYER: What's the --

16 JUSTICE GINSBURG: I thought the theory was
17 that in our Federal system, Federal law is State law,
18 too? That is the highest law for a State. Federal law
19 by virtue of the Supremacy Clause is State law, and
20 sometimes Congress creates an exclusive Federal
21 jurisdiction over certain types of claims. But if
22 Congress doesn't do that, the assumption is there's
23 concurrent jurisdiction.

24 MS. UNDERWOOD: That's correct. But that's
25 if the Court is open to the case. The Fender cases --

1 the line of cases that Petitioner has been pointing to,
2 is simply not applicable here where the State opens its
3 courts to the cases. If the State were hearing damage
4 actions against corrections officers, it couldn't give
5 them immunity.

6 JUSTICE BREYER: But what is the neutral
7 reason related to the administration of courts that
8 leads the State to close its door to a damage suit under
9 1983 against correctional officers --

10 MS. UNDERWOOD: Well, I have two.

11 JUSTICE BREYER: -- taking as the assumption
12 exactly what Justice Ginsburg said? I mean, I can't
13 find any reason that's neutral and administrative other
14 than what Justice Ginsburg said, which is neither:
15 namely, New York does not like 1983 actions for damages
16 against correctional officers. What other reason is
17 there?

18 MS. UNDERWOOD: First of all, these -- this
19 -- I would like to correct an observation. This is --
20 this is not aimed only or even principally at 1983
21 actions. This law does predate the -- not the enactment
22 of 1983, but the proliferation, the use -- the
23 widespread use of 1983; and in fact it affects a great
24 many State cases. It's not only --

25 JUSTICE BREYER: But that -- but Testa and

1 Katt was a case in which the Court found that the State
2 allows some State actions that are analogous to the
3 Federal action and you can't discriminate against a
4 Federal action.

5 MS. UNDERWOOD: That's correct.

6 JUSTICE BREYER: This is not that case.
7 This is a case where the State doesn't allow -- doesn't
8 allow -- damage actions like the Federal action. And
9 this Court has not decided to my knowledge how we apply
10 the basic rule in such a situation. So I would think
11 that the way we would apply it is take the standard and
12 ask the State, what is the neutral
13 administrative-related reason? Because what they are
14 saying is, if you look at this, from an administrative
15 point of view, it is that red-haired, one-eyed man with
16 a limp.

17 MS. UNDERWOOD: Prisons are large
18 institutions in rural counties that generate a vast
19 amount of litigation. This particular prisoner was in a
20 prison in a rural county like Wyoming County that had I
21 think 3,000 or so prisoners in it, and the litigation
22 generated by the prisons isn't just actions by
23 prisoners. This statute doesn't apply only to actions
24 against -- by prisoners. It also applies to actions by
25 prison employees against other prison employees --

1 actions by anybody against a corrections official. So
2 it's all the vast forms of litigation, principally but
3 not exclusively prisoner complaints, that arise out of
4 prisons.

5 That is a very large and burdensome amount
6 of litigation, unlike litigation against the State
7 police, which some have said is comparable, which is
8 dispersed all over the State. This is concentrated
9 where the large prisons are, and it is a reasonable
10 decision -- a neutral reason, if you will -- for the
11 State to decide to take those actions out of the courts
12 of general jurisdiction, to take actions -- damage
13 actions arising out of the prisons out of the courts of
14 general jurisdiction, where it would be concentrated in
15 a few counties where the large prisons are.

16 JUSTICE SCALIA: General Underwood, your
17 friend on the other side acknowledges that if New York
18 State closed its courts to tort actions, that would be
19 okay. But I don't see how closing your courts to tort
20 actions has any administrative -- particular
21 administrative rationale behind it, do you?

22 MS. UNDERWOOD: No, and I don't believe that
23 this Court's cases about jurisdiction, as distinguished
24 from its cases about case handling rules, require that
25 kind of neutral administrative feature.

1 I only was suggesting that there exists such
2 an explanation for this rule, but in fact this Court has
3 treated quite differently cases about case handling, and
4 that makes sense. Because if you hear a claim -- if the
5 State courts hear a claim and then impose even a
6 nondiscriminatory -- but it's certainly a discriminatory
7 rule that tends to defeat the claim, the State might
8 induce plaintiffs to bring their claims in State court
9 and then lose them under disadvantageous procedures.

10 JUSTICE KENNEDY: Suppose that the State of
11 New York said that in suits against corrections --
12 against the corrections department, against the State,
13 there should be no damages awarded to a prisoner in
14 excess of \$3,000, and then -- and then -- and then the
15 prisoner tries to bring a 1983 suit in State court.

16 MS. UNDERWOOD: No, I think that would be --

17 JUSTICE KENNEDY: Would the case -- would
18 the analysis be just the same?

19 MS. UNDERWOOD: No, I don't think the
20 analysis would be the same. I think once the State
21 opens its doors to a damage action against corrections
22 officials, the question would be -- the answer might or
23 might not come out the same way, but I think it probably
24 would come out differently.

25 The -- the question would be, does that

1 procedural rule -- there are two questions: Is it
2 discriminatory? You're saying -- your hypothetical is
3 that it's not discriminatory as between State and
4 Federal. And the second question would be, does it
5 undermine -- is it pre-emptive? Does it undermine the
6 -- the Federal claim?

7 And so in Martinez, when this Court said
8 State immunities can't apply to Federal 1983 actions,
9 only Federal immunities can apply, the Court was careful
10 to observe that California had opened its courts to this
11 case and had an immunity; whereas --

12 JUSTICE KENNEDY: In my hypothetical, do you
13 think it undermines the Federal claim?

14 MS. UNDERWOOD: Well, I think it could be
15 argued -- I think it would be argued that limiting
16 damages undermines a Federal action that is meant to
17 provide --

18 JUSTICE KENNEDY: But why can't it be argued
19 here that Congress has an important mechanism in holding
20 prison officials -- prison correctional officers --
21 personally liable, so that they are themselves aware
22 that they have a constitutional obligation that is
23 enforceable against them, and New York has taken this
24 away?

25 Now, you may -- we may argue that if the

1 State responds in damages, the prisoner is better off,
2 but Congress has not made that judgment. Congress has
3 made the judgment that the correctional officer himself
4 or herself should be responsible.

5 MS. UNDERWOOD: Well, I don't believe
6 Congress has made that judgment. So that I -- and
7 that's my answer to why I don't think this undermines a
8 Federal cause --

9 JUSTICE KENNEDY: No, it has made that
10 judgment. That's the whole purpose of 1983.

11 MS. UNDERWOOD: No, the purpose of 1983 is
12 to -- actually was two things: It was to provide a
13 Federal forum, and it was to provide compensation for
14 these torts. And I believe that these --

15 JUSTICE SCALIA: He's still responsible,
16 right? I mean --

17 MS. UNDERWOOD: Yes.

18 JUSTICE SCALIA: He's still responsible.

19 MS. UNDERWOOD: I think there's no Federal
20 policy that, for instance --

21 JUSTICE KENNEDY: No, the correctional
22 officer, under the scheme we are talking about, is not
23 responsible in damages.

24 MS. UNDERWOOD: He is responsible to exactly
25 the same degree as he would be, were he sued personally,

1 because New York indemnifies him and there is no
2 requirement -- Congress has never shown any objection to
3 indemnification.

4 JUSTICE KENNEDY: But -- does your case turn
5 on whether or not there is an indemnification agreement?

6 MS. UNDERWOOD: I don't know that our case
7 turns on whether there's an indemnification agreement.

8 JUSTICE KENNEDY: I shouldn't think so.
9 That hasn't been your argument so far.

10 MS. UNDERWOOD: Well, what I'm saying is to
11 the extent -- I don't believe we need to -- if you think
12 that we need to -- that there may be a conflict with a
13 Federal policy -- I think the statute stands because
14 it's nondiscriminatory and jurisdictional. But if there
15 is a question -- a further question of whether it
16 defeats --

17 JUSTICE STEVENS: Let me just ask --

18 MS. UNDERWOOD: Yes.

19 JUSTICE STEVENS: Just to ask you an
20 offshoot of Justice Kennedy's question. Supposing you
21 had a statute that said in railroad cases there shall be
22 no damage -- in railroad tort cases brought by employees
23 of railroads, there shall be no damage judgment in
24 excess of \$10,000 in State court. Would that be okay?

25 MS. UNDERWOOD: No, I don't think so, for

1 the same reason that I don't think -- that is, if you
2 have a tort remedy that the State is hearing, then a
3 limit on recovery that goes -- that is inconsistent with
4 congressional policy is not permitted. But if the State
5 were to say, we won't hear any tort cases or we won't
6 hear any tort cases involving railroads or we won't hear
7 any tort cases --

8 JUSTICE STEVENS: So you think --
9 consistently with our FELA cases, it could have a rule
10 that no tort -- no tort cases may be brought by railroad
11 employees against the railroad in State court?

12 MS. UNDERWOOD: State or Federal. There's
13 nothing in your FELA cases that says that as long as the
14 State is closing its doors equally. And there are, of
15 course, political reasons --

16 JUSTICE STEVENS: Well, they couldn't close
17 the Federal doors under the FELA. They surely could
18 bring the suit in the Federal --

19 MS. UNDERWOOD: Yes. No, but -- but --

20 JUSTICE STEVENS: But you're saying they
21 could shut the State -- close the State courts to suits
22 against railroads where the damage -- for cases over
23 \$10,000?

24 MS. UNDERWOOD: No, I don't think they
25 could put the damage requirement on, because then they

1 would be opening the --

2 JUSTICE STEVENS: But they could totally
3 close it?

4 MS. UNDERWOOD: They could totally close the
5 doors, and I think that's different. That is not
6 hearing a case, and imposing -- closing the doors of
7 the court evenhandedly to State and Federal cases, that
8 equality --

9 JUSTICE STEVENS: But you leave the door
10 open to suits against every other possible defendant
11 except railroads? I mean, it seems to me your hardest
12 case is really the FELA cases here.

13 MS. UNDERWOOD: I think the FELA cases, some
14 of which were -- some exclusions were upheld and some of
15 which were struck down, support our position because
16 they only strike down exclusions of jurisdiction where
17 there is a discrimination, where the Court finds a
18 discrimination between the Federal and State claim.

19 In Mondou, Connecticut was hearing suits
20 against railroads under State law. It was even hearing
21 suits against railroads under other States' law that
22 imposed fellow-servant liability, but it was refusing to
23 hear only suits under Federal law. And that's why the
24 Court struck it down.

25 Similarly, in McKnett and Testa, in each

1 case this Court struck down a limitation on the
2 ground not that the State had an absolute obligation to
3 hear the Federal claim, but that it had an obligation,
4 if it was going to exclude jurisdiction, to exclude it
5 evenhandedly.

6 JUSTICE GINSBURG: I thought that in Testa
7 the State said: We are evenhanded; we don't bring -- we
8 don't allow penal actions to be -- to be brought on the
9 civil side of our court.

10 MS. UNDERWOOD: But what -- but what this
11 Court pointed to in Testa was that while they said that,
12 they did, in fact, hear double damage actions, which is
13 what this was. It was penal in the sense not of being
14 criminal, but of being a double damage -- a multiple
15 damage action.

16 And what the Court said was, because Rhode
17 Island does hear double damage actions arising under its
18 own law and under the Federal Fair Labor Standards Act,
19 essentially the rationale they gave for excluding the
20 Emergency Price Control Act had been proven false and
21 must -- and left as the only explanation unwillingness
22 to enforce the Emergency Price Control Act.

23 JUSTICE BREYER: So what you have now is you
24 have one reason, I think, would be clearly wrong, I
25 think -- I assume that. But if the State closed their

1 doors to this kind of suit because they said, we think
2 our correctional officers should be immune from damages,
3 now we know they can get money under the Federal law,
4 but we want nothing to do with this. That, I think,
5 would be discrimination against the suit if that were
6 their reason.

7 Now, there's a neutral reason, an
8 administrative, and it is, well, you see, there are just
9 too many -- there are just too many lawsuits by
10 prisoners against prison officials. And we don't want
11 all that business in that court, and here's how we deal
12 with it: One, we take away their cause of action,
13 that's what we do under State law, and then we -- the
14 Feds -- we throw them back to Fed court. Now, that
15 might --

16 MS. UNDERWOOD: Or -- or we offer them a
17 court of claims. That --

18 JUSTICE BREYER: No, you don't offer them a
19 court of claims, because what you offer in the court of
20 claims is an action against the State.

21 MS. UNDERWOOD: It's a different action.

22 JUSTICE BREYER: And you can say that isn't
23 a big deal because, after all, most of these really are
24 actions against the State anyway because they get
25 compensated.

1 Okay. So if I treat that as neutral, I have
2 one bad reason and one good reason. And how do I know
3 which is which? That is, is it really true that there
4 are a lot of suits brought in State courts in places
5 with prisons under 1983 for damages rather than Federal
6 courts? I don't know what the numbers are. Have you
7 looked them up at all?

8 MS. UNDERWOOD: Well, they aren't -- this is
9 what I can tell you. I think -- 1983, they aren't
10 brought -- I mean, suits against --

11 JUSTICE BREYER: Well, not 1983 actions, but
12 maybe they bring them mostly in Federal court.

13 MS. UNDERWOOD: They do bring them only in
14 Federal court.

15 JUSTICE BREYER: Okay. So -- so one way to
16 test this out would be the following: If we had numbers
17 and knew, you know, about how many State -- how many
18 damage actions against prisoners were being brought in
19 State courts in districts that have prisons there, and
20 then we saw how much New York was really hurt, and then
21 we asked another question, maybe there is some Federal
22 security actions, you see, where there's no State
23 comparable action, and we found out, well, the State
24 lets them bring these actions in State court. So, there
25 are ways of dealing with this empirically. Have you any

1 sense of it?

2 MS. UNDERWOOD: Well, what I can tell you is
3 that there are a great many State law -- I can't tell
4 you numbers. There are a great many State law actions
5 against corrections officers. They are either in the
6 court of claims or they are in Federal court because
7 this statute says that the courts have no jurisdiction
8 over the damage actions, and it doesn't matter whether
9 they are 1983 or State law.

10 But there are a great many -- I mean, it
11 stands to reason: The State law actions -- there are
12 many State law actions that can't be constitutionally
13 characterized. There's all kinds of, you know, damage
14 and loss to property, medical malpractice, negligence,
15 failure to protect from harm, things that -- many things
16 that the prisoners bring suits against that are not
17 constitutional. They aren't in the supreme court. They
18 would be if you struck this statute down.

19 JUSTICE SOUTER: It's not merely that they
20 are not the supreme court, but the -- the damages are
21 limited, aren't they? Because in the court of claims,
22 as I understand it or under the statute, there can't be
23 any punitive damages; whereas, if it were a straight
24 1983 action in the State supreme court, punitive damages
25 would -- would be a possibility.

1 MS. UNDERWOOD: Well, there are two things
2 to say about punitive damages: One is that, yes --
3 there are three things: There are no punitive damages
4 in the court of claims. Punitive damages, of course,
5 are available in Federal court, which is fully available
6 to these plaintiffs and is where they normally are,
7 particularly if they think they have a punitive damage
8 claim.

9 It is also the case that actions outside the
10 scope of employment are not covered by this statute.

11 JUSTICE SOUTER: Well, they could be brought
12 in the State supreme court --

13 MS. UNDERWOOD: They could be brought in the
14 State supreme court.

15 JUSTICE SOUTER: -- which is a -- which is
16 one of your jurisdictional problems because the --
17 the -- in effect, New York is saying the most -- the
18 most egregious class of cases, the cases in which the
19 correctional officers are not only doing something
20 actionable but something that's even outside the scope
21 of their duty, well, we will hear them; they are fine.
22 And we will provide punitive damages for them.

23 MS. UNDERWOOD: Well, of course the
24 rationale for that is --

25 JUSTICE SOUTER: Which -- which makes it a

1 little tough to say that in the less egregious cases
2 there's a -- that the exclusion of the less egregious
3 cases is a jurisdictional exclusion as distinct from an
4 exclusion based upon policy about how less egregious
5 cases ought to be handled.

6 MS. UNDERWOOD: Well, it's -- it is a
7 jurisdiction -- it is framed as jurisdictional. It is
8 treated as jurisdictional. The New York courts say not
9 only --

10 JUSTICE SOUTER: No, but aren't you simply
11 saying, look, we go around calling it "jurisdictional."
12 And -- and my point was that isn't it difficult, isn't
13 it, in fact, inappropriate to call it "jurisdictional"
14 when you have a class of the most egregious cases under
15 1983 which the State supreme courts hear, and there is,
16 nonetheless, a second class of cases, also 1983 -- they
17 simply happen to be less egregious -- that they won't
18 hear? Isn't it difficult, using "jurisdictional" in the
19 normal sense of the term, to say that is a
20 jurisdictional distinction?

21 MS. UNDERWOOD: No, because what the
22 jurisdictional bar is for damage actions against
23 corrections officers for actions in the scope of their
24 employment -- and the New York courts don't just say
25 it's jurisdictional. They give it the effect of a

1 jurisdictional bar.

2 JUSTICE SOUTER: What if the New York
3 Legislature passed a statute saying the -- the State
4 supreme court will not have jurisdiction over 1983
5 actions for -- for harm committed on Wednesday? Would
6 you say that that was a jurisdictional rule?

7 MS. UNDERWOOD: I think --

8 JUSTICE SOUTER: Well, I'll answer -- I'll
9 answer the question for you, if you want.

10 (Laughter.)

11 MS. UNDERWOOD: I think it would be hard
12 to --

13 JUSTICE SOUTER: You wouldn't have.

14 MS. UNDERWOOD: -- to find a rationale for
15 it, but --

16 JUSTICE SCALIA: Even if it were, it would
17 be discriminatory and invalid, right?

18 MS. UNDERWOOD: I was going to say, I don't
19 think its flaw is that it's not jurisdictional. Its
20 flaw is that it's irrational.

21 JUSTICE SCALIA: Or discriminatory. It's
22 picking on --

23 MS. UNDERWOOD: Or discriminatory as between
24 -- as between plaintiffs, yes. But --

25 JUSTICE SOUTER: Would you say it was

1 jurisdictional so long as the supreme court said -- so
2 long as the State legislature said, no State or Federal
3 actions for -- for -- for Wednesday damages? Would you
4 call that jurisdictional? No, you would call it --

5 MS. UNDERWOOD: I would call it very strange
6 jurisdiction.

7 JUSTICE SOUTER: You might call it crazy
8 outside of court, but the one thing you wouldn't do is
9 walk into court and say it's jurisdictional.

10 And the -- my -- the point that I am getting
11 at is the finer the comb that -- that -- that keeps a
12 certain class of case out, the less plausible it is to
13 say that this is a jurisdictional kind of criterion at
14 work here.

15 MS. UNDERWOOD: Well, it --

16 JUSTICE SOUTER: And that's what I -- that's
17 why I keep getting at the point that when -- when you
18 let in some 1983 actions, the worst ones, the ones with
19 the highest potential damages, but you say, well, the
20 less awful ones, the ones that may be within the scope
21 of employment, they can't come in, it seems to me that
22 the -- that the teeth on the comb are getting rather
23 fine, and in terms of our normal usage in -- in applying
24 this criterion, it is not plausibly jurisdictional.

25 MS. UNDERWOOD: Well, unlike the Wednesday

1 case, our statute is rational because it takes out of
2 the courts of general jurisdiction the cases that are
3 most numerous and that are most appropriately
4 indemnified and paid for --

5 JUSTICE KENNEDY: What are the --

6 MS. UNDERWOOD: -- by the State, but it
7 leaves in the courts of general jurisdiction the ones
8 that are less numerous and that are not appropriately
9 indemnified or turned into actions against the State.
10 So it's rational unlike the Wednesday cases.

11 JUSTICE KENNEDY: But one -- one of the
12 concerns I have in this case is scope of employment is
13 often litigated, and it would seem to me that the State
14 of New York might routinely say, oh, this is not within
15 the scope of employment.

16 MS. UNDERWOOD: Well, there's a body of
17 cases that is quite generous in --

18 JUSTICE KENNEDY: Which -- which means that
19 this is a very difficult distinction to work with and is
20 a further burden on the 1983 right.

21 MS. UNDERWOOD: The law of the State of New
22 York is relatively clear on this. The kinds of cases
23 that are outside the scope of employment are prisoner
24 rapes and things that are done that do not -- by
25 corrections officers, that do not in any way further the

1 -- the objective. They are simply excesses.

2 JUSTICE KENNEDY: Well, I think that's a
3 rather routine defense.

4 JUSTICE SOUTER: But why are they -- why are
5 they left in the supreme court?

6 MS. UNDERWOOD: Because they are not
7 appropriately -- because the State doesn't want to take
8 responsibility -- when the same statute that takes them
9 out the supreme court says actions for such matters can
10 be brought against the State in the court of claims, and
11 the State is not taking responsibility for those cases
12 and will not indemnify them.

13 JUSTICE SCALIA: General Underwood, when --
14 when was this statute first enacted?

15 MS. UNDERWOOD: Well, the statute was first
16 enacted in -- in about 1947 or so.

17 JUSTICE SCALIA: And you say there were not
18 -- 1983 was on the books, but, gee, it wasn't -- it
19 wasn't --

20 MS. UNDERWOOD: It was not aimed at -- it
21 wasn't --

22 JUSTICE SCALIA: It pretty clearly was not
23 aimed --

24 MS. UNDERWOOD: Correct.

25 JUSTICE SCALIA: -- at defeating Federal

1 actions.

2 MS. UNDERWOOD: Correct. It was not aimed
3 at defeating Federal actions. It was aimed at -- at
4 managing the high volume of State law --

5 JUSTICE STEVENS: In fact, it had not even
6 been held then that State Farm was available for 1983
7 actions.

8 MS. UNDERWOOD: That's correct.

9 JUSTICE STEVENS: Yes.

10 MS. UNDERWOOD: That's correct.

11 JUSTICE SCALIA: Can I --

12 MS. UNDERWOOD: The rise of Federal 1983
13 actions came subsequently, and they then --

14 JUSTICE SCALIA: That's an important factor,
15 I would think.

16 Let me ask another question. It -- it's a
17 standard rule of international law that no State will
18 enforce the penal laws of another State. I assume the
19 Federal Government could not -- maybe I'm wrong to
20 assume. Could the Federal Government require New York
21 to prosecute Federal crimes?

22 MS. UNDERWOOD: I don't know the answer to
23 that.

24 JUSTICE SCALIA: I don't either.

25 (Laughter.)

1 JUSTICE SCALIA: I think it can't. I think
2 it can't, probably.

3 And my next question was going to be: Why
4 aren't punitive damages penal laws as well? And if
5 that's the same principle, maybe there's no big deal
6 about New York excluding penal damages --

7 MS. UNDERWOOD: There may be, but there's no
8 --

9 JUSTICE KENNEDY: Well, 1983 does not --
10 correct me if I am wrong -- does not allow punitive
11 damages against a State, does it?

12 MS. UNDERWOOD: 1983 does not allow any
13 liability. 1983 has been construed not -- the State
14 isn't a person; it can't be a defendant.

15 JUSTICE KENNEDY: Not -- not if -- if I got
16 it right -- not if Monell --

17 MS. UNDERWOOD: The State -- that's Monell
18 and --

19 JUSTICE KENNEDY: But even if Monell -- even
20 if Monell, there's no -- there's no punitive damages
21 against the State, which is another reason in which
22 you're discriminating against the employee here --
23 against the prisoner --

24 MS. UNDERWOOD: No, the prisoner can get his
25 --

1 JUSTICE KENNEDY: -- because the prisoner
2 can get punitive damages against the correctional
3 officer but not against the State in either court.

4 MS. UNDERWOOD: Where he can get -- where he
5 can bring his 1983 action, he can get punitive damages.
6 The State has closed its door to damage actions, 1983 or
7 otherwise.

8 JUSTICE KENNEDY: In neither court can you
9 get -- correct me if I am wrong -- punitive damages
10 against the State. We've never held that.

11 MS. UNDERWOOD: Or any damages the State.
12 Under 1983, you can get damages against --

13 JUSTICE KENNEDY: You can under Monell.

14 MS. UNDERWOOD: Not against -- no, not --
15 not against the State.

16 JUSTICE STEVENS: They didn't sue Illinois;
17 they sued Cook County --

18 MS. UNDERWOOD: Yes. In fact, what I was
19 going to say is that one of the things that shows that
20 there's no congressional policy focused only on
21 individuals is that municipalities and other government
22 entities are proper defendants. The State is not.
23 Likely, the government -- the Federal policy was --
24 or the policy found by this Court in construing 1983 for
25 not making the State a defendant was not that that would

1 undermine deterrence and that it was preferable to sue
2 individuals, but that there was some reluctance --
3 concern about power or wisdom of imposing liability on
4 the States.

5 And, in fact, that is what this Court said
6 in Monell and Will about why the State is not a person.

7 So I don't think 1983 is fairly read as
8 embracing a congressional judgment that it's better to
9 have liability against individuals, better from the
10 plaintiffs' point of view, than against the State.

11 But the way this works is it is, in effect,
12 a -- a mandatory removal. And since Congress has no
13 objection, has not prohibited removal the way it did in
14 FELA cases, it's hard to see how the congressional
15 policy is frustrated by this mandatory removal.

16 CHIEF JUSTICE ROBERTS: Thank you, General.

17 Mr. Murtagh, you have four minutes.

18 REBUTTAL ARGUMENT OF JASON E. MURTAGH

19 ON BEHALF OF THE PETITIONER

20 MR. MURTAGH: Mr. Chief Justice, just very
21 briefly, General Underwood just mentioned that -- that
22 this could be analyzed as a mandatory removal statute.
23 The distinction, Your Honors, is that what New York
24 State does when it removes these cases to Federal court
25 is it uses an avenue that's provided by Congress. And,

1 certainly, if Congress wants to provide for removal to
2 Federal court, Congress can do that.

3 What the State cannot do is come in and
4 interpose its policy judgment over and above what
5 Congress has decided with respect to Federal claims.

6 Very quickly, I would like to address a
7 second point. General Underwood pointed out that there
8 are a lot of large prisons in rural counties in New York
9 State; and, therefore, there are a lot of cases that
10 might be brought in those courts. There is no dispute
11 in this case, Your Honors, that if New York wanted to
12 have a statute that said those cases will be transferred
13 to the less busy courts of our State, that would be
14 okay. That would be a neutral rule of judicial
15 administration related to the operation of the courts
16 that's unrelated to the substance or the identity of the
17 parties.

18 JUSTICE KENNEDY: In that same act, they
19 might rescind the -- the law allowing the State to
20 respond in damages, in which case you won't have gained
21 very much.

22 MR. MURTAGH: Well -- well, Your Honor, my
23 client can't bring his section 1983 claim in any State
24 court because he can't bring it against the employees,
25 because Correctional Law section 24 keeps him out of

1 supreme court, and he can't sue the State in the court
2 of claims because in Will v. Michigan this Court said
3 the State is not a person. So he simply cannot bring
4 his Federal action in any State court if he wants money
5 damages.

6 JUSTICE SCALIA: I find it hard to regard
7 this as a non-neutral law when it was put on the books
8 before there were any of these 1983 actions.

9 MR. MURTAGH: Well, Justice Scalia, the --
10 the very first iteration of this law was in 1947. The
11 law was actually amended -- and it's discussed in the
12 joint appendix and there's some in the beginning of our
13 brief -- in the early 1970s after there were a
14 significant number of -- of section 1983 claims that had
15 begun to be filed.

16 JUSTICE GINSBURG: Was there any substantive
17 change from what the original enactment to the amendment
18 -- from the one that's currently enforced?

19 MR. MURTAGH: Justice Ginsburg, I don't
20 recall whether there were any. We actually researched
21 the legislative history and had a bit of difficulty
22 going back that far. I don't recall whether there were
23 a lot of substantive changes or not, quite honestly.

24 This is a statute, though, that the -- that
25 the New York Legislature has -- has dealt with over the

1 years.

2 One of the important things is that in the
3 1970s -- and I apologize for not having the exact date
4 -- the New York Legislature said that the purpose of
5 this was to provide immunity to corrections officials.
6 And as we pointed out in our briefing, there is a bill
7 currently pending before the New York Legislature that
8 says, we want to extend the same immunity that we
9 provide to prison officials to employees of the Office
10 of Mental Health --

11 JUSTICE BREYER: They're saying -- they're
12 also saying there's a -- there's a neutral reason. The
13 neutral reason is the State sees there are just too many
14 cases in which prisoners are suing correctional
15 officials.

16 So then they say: Here's what we are going
17 to do about it. First, under State law, we'll wipe out
18 all the suits and give them instead an action against
19 the State. But we know there are still some Federal
20 cases about the same thing. So what we're going to do
21 is we're going to say bring them in Federal court. Why
22 bring them in State court? So now we've dealt with our
23 administrative problem. So that's their neutral
24 administrative reasons.

25 Now, people would like to bring 1983 actions

1 still in State or Federal court. It may be more
2 convenient. They get attorneys' fees, and the
3 attorneys' fees you don't get under the State law. So
4 why isn't -- or why is -- or I guess that's the question
5 for me: Is this an adequate, neutral, administrative
6 reason or not?

7 MR. MURTAGH: No, Justice Breyer. The --
8 the reason that is given in this particular case, if you
9 -- if you go through the Respondents' briefing, the
10 reason that's given is that there -- is that this
11 statute exists because there are lots of frivolous,
12 vexatious lawsuits.

13 JUSTICE BREYER: Well, forget all of the
14 characterizations. If we could look into the motives,
15 maybe we'd have a different view, but all we have is the
16 statute on the books. And, as in many cases, the people
17 who are charged with defending those statutes think of
18 very good reasons which are very plausible that could
19 have motivated the people involved, and they've come up
20 with the one that you have heard. Now, what's -- what's
21 wrong with that one?

22 MR. MURTAGH: And I'm sorry, Justice Breyer.
23 The reason?

24 JUSTICE BREYER: The reason is, you see,
25 there are so many cases in which the person is suing --

1 the prisoner is suing the prison officials that our
2 courts are clogged. So what we are going to do is:
3 One, give the prisoners a good remedy under State law in
4 a different court; and, two, close our doors to the
5 comparable Federal cases.

6 MR. MURTAGH: Justice Breyer, the answer is
7 that the State can certainly do that with respect to the
8 State-law claims.

9 What it can't do is try to shuttle Federal
10 claims off to the Federal courts and close its doors
11 where it hears similar State claims.

12 Your Honors, thank you for your time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 12:05 p.m., the case in the
16 above-entitled matter was submitted.)

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