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1 P R O C E E D I N G S

2 (11:05 a.m.)

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

5 Mr. Murtagh.

6 ORAL ARGUMENT OF JASON E. MURTAGH

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

1 In this particular case, Mr. Haywood or any
2 other plaintiff in New York State, could bring a section
3 1983 claim in State court, but only if he agrees to give
4 up his right to seek money damages.

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

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

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

22 CHIEF JUSTICE ROBERTS: I guess there's a
23 difference. I mean, obviously Felder is significant
24 help to you. But I suppose it's a difference to say
25 they've redefined the cause of action under Federal law

1 and said they are just not going to hear it at all. It
2 may seem paradoxical, but the latter may be from a
3 constitutional point of view the sounder
4 characterization, because it's obviously not the
5 responsibility or the authority of States to say, well,
6 this is how the Federal law is going to be applied.

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

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

20 These courts regularly hear common law tort
21 cases, they regularly hear section 1983 --

22 CHIEF JUSTICE ROBERTS: Yeah, but `they are
23 not really or at least you can view it as they are not
24 discriminating against the Federal cause of action,
25 because they don't allow the State cause of action of

1 the sort you want to pursue either.

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

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

24 MR. MURTAGH: Well, Mr. Chief Justice, I
25 think there are a couple of points on that. The first

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

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

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

24 MR. MURTAGH: Justice Ginsburg, I think -- I
25 think that that is exactly right. The point here is

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

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

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

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

1 the case ought to be brought.

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

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

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

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

1 MR. MURTAGH: I'm sorry, Justice Ginsburg;
2 certainly the State of New York could offer a State law
3 alternative in addition to section 1983.

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

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

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

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

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

1 MR. MURTAGH: Yes, Justice Scalia. It
2 seems --

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

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

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

22 (Laughter.)

23 MR. MURTAGH: Justice Scalia, I -- I am not
24 sure exactly where the line is in terms of the analogy.
25 I think this case is very far on the other side. In

1 other words, because New York State here -- even here, a
2 section 1983 claim, this isn't a situation where they
3 say, we have a court that's not competent to hear
4 section 1983 claims. They simply say: We're not going
5 to allow them to hear section 1983 claims for money
6 damages where there is a prison official who's -- who is
7 the defendant.

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

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

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

1 authority of the State, as the Respondents point out,
2 part of the core sovereignty of the State, to establish
3 their courts and to run their courts.

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

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

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

17 CHIEF JUSTICE ROBERTS: No, no, that's
18 mixing the two points. Your point I understand it --

19 MR. MURTAGH: Okay.

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

1 or - or modernize it, and from now on we are not going
2 to do this?

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

8 JUSTICE SCALIA: No, we would discuss what
9 is analogous.

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

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

25 So -- so we are going to channel this suit

1 to the court, the one court in the State that deals with
2 the State, the sovereign, paying money, the court of
3 claims. So all they are doing is recognizing the
4 reality that this is a suit against New York, not the
5 correctional officer because it won't cost the
6 correctional officer a dime; New York is going to
7 provide counsel and is going to pay any judgment.

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

10 MR. MURTAGH: Justice Ginsburg, the problem
11 with that analysis, I think, is that in the court of
12 claims there are all sorts of other 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
23 that 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 is 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: I guess my point is
2 that there's nothing fishy about what New York has done
3 here. Which leads me to think, well, maybe it's not
4 really discrimination against the Federal claim, it's a
5 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 goes
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 the subject matter and
16 power over the parties involved. And I don't think the
17 Respondents in this case even argue that the New York
18 supreme courts don't have the power over the parties
19 here or don't have competence over this kind of subject
20 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 non-jurisdiction, 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 statutes 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 Felder: That
19 it is a neutral rule that is applicable to all cases and
20 that is not concerned with the underlying substance of
21 the claim. So, for example, when we go back to the old
22 cases, Douglas, Mayfield, Herb v. Pitcairn, this Court
23 was looking at situations where there were rules that
24 applied everywhere.

25 JUSTICE SCALIA: But you have acknowledged

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

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 is targeted at civil rights claims and
25 in fact may lead to over-enforcement of civil rights

1 claims because it prevents a defendant from getting out
2 of the 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.

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

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

1 penal in nature. And what this Court said was: You
2 hear analogous claims; you have to hear the Emergency
3 Price Control Act.

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

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

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

15 Ms. Underwood.

16 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

17 ON BEHALF OF THE RESPONDENTS

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

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

25 New York's statute fully satisfies that

1 requirement. New York courts cannot hear damage actions
2 against prison officials for conduct in the scope of
3 their employment. And it doesn't matter whether State
4 or Federal law is the basis for the claim.

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

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

1 JUSTICE ALITO: Well, suppose a State
2 extends --

3 MS. UNDERWOOD: -- the Court --

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

9 MS. UNDERWOOD: No. Immunity --

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

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

15 JUSTICE ALITO: Well, what if they phrase it
16 in terms of jurisdiction? There is no jurisdiction in
17 courts of New York to hear any intentional tort action
18 against a correctional official for action taken during
19 the performance of the correctional officer's duties.
20 Do they then close the New York courts completely to
21 1983 actions against correctional officials?

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

1 can be waived. So it protects courts, not defendants.

2 JUSTICE GINSBURG: Ms. Underwood, there is 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 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.

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

19 MS. UNDERWOOD: Practically --

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.

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

4 MS. UNDERWOOD: Yes, that's exactly correct.

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

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

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

22 MS. UNDERWOOD: That's correct. But that's
23 if the Court is open to the case. The Fender case, the
24 line of cases that Petitioner has been pointing to, is
25 simply not applicable here where the State opens its

1 courts to the cases. If the State were hearing damage
2 actions against corrections officers, it couldn't give
3 them immunity.

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

8 MS. UNDERWOOD: Well --

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

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

23 JUSTICE BREYER: But *Testa v Katt* was a case
24 in which the Court found that the State allows some
25 State action that are analogous to the Federal action

1 and you can't discriminate against a Federal action.

2 MS. UNDERWOOD: That's true.

3 JUSTICE BREYER: This is not that case.

4 This is a case where the State doesn't allow -- doesn't
5 allow -- damage actions like the Federal action --

6 MS. UNDERWOOD: If --

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

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

1 but not exclusively prisoner complaints, that arise out
2 of prisons.

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

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

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

24 I only was suggesting that there exists such
25 an explanation for this rule; but in fact, this Court

1 has treated quite differently cases about case handling,
2 and that makes sense. Because if you hear a claim -- if
3 the State hear a claim and then impose even a
4 nondiscriminatory -- but it's certainly a discriminatory
5 rule that tends to defeat the claim, the State might
6 induce plaintiffs to bring their claims in State court
7 and then lose them under disadvantageous procedures.

8 JUSTICE KENNEDY: Suppose that the State of
9 New York said that in suits against corrections --
10 against the corrections department, against the State,
11 there should be no damages awarded to a prisoner in
12 excess of \$3,000; and then the --

13 MS. UNDERWOOD: Well, I think --

14 JUSTICE KENNEDY: -- and then 1980 -- and
15 then the prisoner tries to bring a 1983 suit in State
16 court.

17 MS. UNDERWOOD: Well, I think --

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

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

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

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

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

15 MS. UNDERWOOD: No. I think it could be
16 argued, I think it would be argued that limiting damages
17 undermines a Federal action that is meant to bar courts
18 from interpretation --

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

1 Now you may -- we may argue that if the
2 State responds in damages, the prisoner is better off;
3 but Congress has not made that judgment. Congress has
4 made the judgment that the correctional officer himself
5 or herself should be responsible.

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

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

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

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

18 MS. UNDERWOOD: Yes.

19 JUSTICE SCALIA: He's still responsible.

20 MS. UNDERWOOD: I think there is no Federal
21 policy --

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

25 MS. UNDERWOOD: He is responsible to exactly

1 the same degree as he would be, were he sued personally,
2 because New York indemnifies him and there is no
3 requirement -- Congress has never shown any objection to
4 indemnification.

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

7 MS. UNDERWOOD: I don't know that our case
8 turns on whether --

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

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

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

23 MS. UNDERWOOD: No, I don't think so, for
24 the same reason I don't think -- that is, if you have a
25 tort remedy that the State is hearing than a limit on

1 recovering that goes -- that is inconsistent with
2 congressional policy is not permitted. But if the State
3 were to say we won't hear any tort cases or we won't
4 hear any tort cases involving railroads or we won't hear
5 any tort cases --

6 JUSTICE STEVENS: Do you think --
7 consistently with our FELA cases it could have a rule
8 that no tort -- no tort cases may be brought by railroad
9 employees against the railroad in a State court.

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

14 JUSTICE STEVENS: Well, they shouldn't have
15 closed the Federal doors under the FELA. They surely
16 could bring the suit under Federal.

17 MS. UNDERWOOD: No, but -- but --

18 JUSTICE STEVENS: But you are saying they
19 could -- as opposed to State courts, the suits against
20 railroads where the damage gets -- over \$10,000?

21 MS. UNDERWOOD: No, I don't think they could
22 put the damage requirement on, because then they would
23 be --

24 JUSTICE STEVENS: But they could totally
25 close it?

1 MS. UNDERWOOD: They could totally close the
2 doors, and I think that's different. That is not
3 hearing the case, and in closing -- closing the doors of
4 the court evenhandedly to State and Federal cases. That
5 is -- that is --

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

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

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

22 Similarly, in McKnett and in Testa, in each
23 case this Court struck down in limitation on the
24 ground -- not that the State had an absolute obligation
25 to hear the Federal claim, but that it had an

1 obligation, if it was going to exclude jurisdiction, to
2 exclude it evenhandedly.

3 JUSTICE GINSBURG: I thought that in Testa
4 the State said we are evenhanded, we don't bring -- we
5 don't allow penal actions to be -- to be brought on the
6 civil side of our court?

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

13 And what the Court said was because Rhode
14 Island does hear double damage actions arising under its
15 own law and under the Federal Fair Labor Standards Act,
16 essentially the rationale they gave for excluding the
17 Emergency Press Control Act had been proven false and
18 must -- unless as the only explanation unwillingness to
19 enforce the emergency press control.

20 JUSTICE BREYER: So what you have now is you
21 have one reason, I think, would be clearly wrong; I
22 think, I assume that. But if the State closed their
23 doors to this kind of suit because they say we think our
24 correctional officers should be immune from damages, now
25 we know they can get money under the Federal law, but we

1 want nothing to do with this. That, I think, would be
2 discrimination against the suit if that were their
3 reason.

4 Now, there is a neutral reason, and it's
5 demonstrated, and it is, well, you see, there are just
6 too many -- there are just too many lawsuits by
7 prisoners against prison officials. And we don't want
8 all that business in that court, and here's how we deal
9 with it.

10 One, we take away their cause of action,
11 that's what we do under State law, and then we -- the
12 feds -- we throw them back to Fed court? Without --

13 MS. UNDERWOOD: Or -- or we offer them a
14 court of claims.

15 JUSTICE BREYER: You don't offer them a
16 court of claims, because what you offer in the court of
17 claims is an action against the State. And you can say
18 that isn't a big deal because after all, most of these
19 really are actions against the State anyway, because
20 they get compensated.

21 Okay, so if I treat that as neutral, I have
22 one bad reason and one good reason. And how do I know
23 which is which? That is, is it really true that there
24 are a lot of suits brought in State courts in places
25 with prisons under 1983 for damages rather than Federal

1 courts? I don't know what the numbers are? Have you
2 looked them up at all?

3 MS. UNDERWOOD: Well, they aren't -- this is
4 what I can tell you. I think 1983, they are -- I mean,
5 suits against --

6 JUSTICE BREYER: -- 1983 actions, but maybe
7 they bring them mostly in Federal court.

8 MS. UNDERWOOD: They do bring them in
9 Federal court.

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

22 MS. UNDERWOOD: Well, what I can tell you is
23 that there are a great many State law -- I can't tell
24 you numbers -- a great many State law actions against
25 corrections officers. They are either in the court of

1 claims or they are in Federal court because this statute
2 says that the courts have no jurisdiction over the
3 damage actions, and it doesn't matter whether they are
4 1983 or state law. But there are a great many -- I
5 mean, it says to -- read them.

6 The State law actions -- there are many
7 state law actions that can't be constitutionally
8 characterized. There is all kinds of, you know,
9 damaging loss to property, medical malpractice,
10 negligence, failure to protect from harm, things that --
11 many things that the prisoners bring suits against that
12 are not constitutional. They aren't in the Supreme
13 Court. They would be if you struck this statute down.

14 JUSTICE SOUTER: It's not really that they
15 are not the Supreme Court, but the -- the damages are
16 limited, aren't they, because in the court of claims, as
17 I understand it or under the statute, there can't be any
18 punitive damages? Whereas if it were a straight 1983
19 action in the State supreme court, punitive damages
20 would -- would be a possibility.

21 MS. UNDERWOOD: Well, there are two things
22 to say about punitive damages. One is that, yes --
23 there are three things -- there are no punitive damages
24 in the court of claims. Punitive damages, of course,
25 are available in Federal court, which is fully available

1 to these plaintiffs and is where they normally are if
2 they think they have a punitive damage claim.

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

5 JUSTICE SOUTER: They could be brought into
6 the state supreme court --

7 MS. UNDERWOOD: They could be brought into
8 the state court.

9 JUSTICE SOUTER: -- which is a -- which is
10 one of your jurisdictional problems because the --
11 the -- in effect, New York is saying the most -- the
12 most egregious class of cases, the cases in which the
13 correctional officers are not only doing some actionable
14 but something outside the scope of their duty, well, we
15 will hear them, they are fine. And we will provide
16 punitive damages for them.

17 MS. UNDERWOOD: Well --

18 JUSTICE SOUTER: Which -- which makes it a
19 little tough to say that in the less egregious cases
20 there is a -- that the -- that the exclusion of the less
21 egregious cases is a jurisdictional exclusion as
22 distinct from an exclusion based upon policy about how
23 less egregious cases ought to be handled.

24 MS. UNDERWOOD: Well, it is a
25 jurisdiction -- it is framed as jurisdictional, it is

1 treated as jurisdictional. The New York courts say --

2 JUSTICE SOUTER: No, but aren't you simply

3 saying, look, we go around calling it jurisdictional.

4 And -- and my point was, that isn't it difficult, isn't

5 it, in fact, inappropriate to call it jurisdictional

6 when you have a class of the most egregious cases under

7 1983 which the State supreme courts hear, and there is,

8 nonetheless, a second class of cases, also 1983 -- they

9 simply happen to be less egregious -- that they don't

10 hear? Isn't it difficult, using jurisdictional in the

11 normal sense of the term, to say that is a

12 jurisdictional distinction?

13 MS. UNDERWOOD: No, because what the

14 jurisdictional bar is for damage actions against

15 correctional officers where actions is the scope of

16 their employment -- and the New York courts don't just

17 say it's jurisdictional. They give it the effect of a

18 jurisdictional bar.

19 JUSTICE SOUTER: What if the New York

20 legislature passed a statute saying the -- the State

21 court supreme court will not have jurisdiction over 1983

22 actions for -- for harm committed on Wednesday, would

23 you say that that was a jurisdictional rule?

24 MS. UNDERWOOD: I think --

25 JUSTICE SOUTER: I will answer the question

1 for you, if you want.

2 MS. UNDERWOOD: I think it would be hard
3 to --

4 JUSTICE SOUTER: You wouldn't have.

5 MS. UNDERWOOD: -- to find a rationale for
6 it.

7 JUSTICE SCALIA: Even if it were, it would
8 be discriminatory and invalid, right?

9 MS. UNDERWOOD: I was going to say, I don't
10 think that its flaw is that it's not juris -- it's
11 jurisdictional. The flaw is it's irrational.

12 JUSTICE SCALIA: Or discriminatory. It's
13 picking on --

14 MS. UNDERWOOD: Or as between -- as between
15 places, yes. But --

16 JUSTICE SOUTER: Would you say it was
17 jurisdictional so long as the Supreme Court said -- or
18 so long as the State legislature said, no State or
19 Federal actions for -- for -- for Wednesday damages?
20 Would you call that jurisdictional?

21 MS. UNDERWOOD: I would call it very
22 strange.

23 JUSTICE SOUTER: You might call it crazy
24 outside of court, but the one thing you wouldn't do is
25 walk in a court and say it's jurisdictional.

1 And the -- my -- the point I am getting at
2 is, the finer the comb that -- that -- that keeps the
3 certain class of case out, the less plausible it is to
4 say that this is a jurisdictional kind of criterion
5 sense of it?

6 MS. UNDERWOOD: Well, what I can tell you is
7 that there are a great many State-law -- I can't tell
8 you the numbers. There are a great many State-law
9 actions against corrections officers.

10 They are either in the Court of Claims, or
11 they are in Federal courts because this statute says
12 that the courts have no jurisdiction over the damage
13 actions. And it doesn't matter whether they are 1983 or
14 State law. But there are a great many -- I mean it
15 says, to read them, that State-law actions -- there are
16 many State-law actions that can't be constitutionally
17 characterized.

18 There is all kinds of, you know, damage and
19 loss to property, medical malpractice, negligence,
20 failure to protect from harm, things that -- many things
21 that the prisoners bring suits against that are not
22 constitutional. They aren't in the Supreme Court. They
23 would be if you struck the statute down.

24 JUSTICE SOUTER: It's not really that they
25 are in the Supreme Court, but the -- the damages are

1 limited, aren't they? Because in the Court of Claims,
2 as I understand it, or under the statute, there can't be
3 any punitive damages; whereas, if it were a straight
4 1983 action in the State supreme court, punitive damages
5 would -- would be a possibility.

6 MS. UNDERWOOD: Well, there are two things
7 to say about punitive damages: One is that, yes, that
8 -- there are three things. There are no punitive
9 damages in the Court of Claims. Punitive damages are,
10 of course, available in Federal court, which is fully
11 available to these plaintiffs and is where they normally
12 are, especially if they think they have a punitive-
13 damage claim.

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

16 JUSTICE SOUTER: Well, they could be brought
17 into the State supreme court.

18 MS. UNDERWOOD: They could be brought into
19 the State supreme court.

20 JUSTICE SOUTER: Which is one of your
21 jurisdictional problems because the -- the -- in effect,
22 New York is saying the -- the most -- the most egregious
23 class of cases, the cases in which the correctional
24 officers are not only doing something actionable but
25 something that is either outside the scope of their

1 duty, but we will hear them. They are fine, and we will
2 provide punitive damages for them.

3 MS. UNDERWOOD: Well, I think the rationale
4 for that --

5 JUSTICE SOUTER: Which makes it a little
6 tough to say that in the less egregious cases there is a
7 -- that the -- that the exclusion of the lesser cases is
8 a jurisdictional exclusion as -- as distinct from a --
9 an exclusion based upon policy about how less egregious
10 cases ought to be handled.

11 MS. UNDERWOOD: Well, it is a jurisdictional
12 -- it is framed as jurisdictional, and it is treated as
13 jurisdictional. The New York courts say --

14 JUSTICE SOUTER: Yes, but aren't you simply
15 saying: Look, we go around calling it jurisdictional.
16 And -- and my point was that isn't it difficult -- isn't
17 it, in fact, inappropriate to call it jurisdictional
18 when you have a class of the most egregious cases under
19 1983 which the State supreme courts hear. And there is,
20 nonetheless, a second class of cases, also 1983, that
21 simply happen to be less egregious that they won't hear.
22 Isn't it difficult, using "jurisdictional" in the normal
23 sense of the term, to say that is a jurisdictional
24 distinction?

25 MS. UNDERWOOD: No, because what the

1 jurisdictional bar is for damage actions against
2 corrections officers who are acting in the scope of
3 their employment. And the New York courts don't just
4 say it's jurisdictional. They give it the effect of the
5 jurisdictional bar.

6 JUSTICE SOUTER: When has the New York
7 legislature passed a statute saying that the -- the new
8 -- the State supreme court will not have jurisdiction
9 over 1983 actions for -- for harm committed on
10 Wednesday? Would you say that that was a jurisdictional
11 rule?

12 MS. UNDERWOOD: I think -- I think --

13 JUSTICE SOUTER: I will answer the question
14 for you, if you want. You -- you wouldn't have --

15 MS. UNDERWOOD: I am just trying to find a
16 rationale for it.

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

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

22 JUSTICE SCALIA: Or discriminatory.

23 MS. UNDERWOOD: Or discriminatory, yes.

24 JUSTICE SOUTER: Would you say it was
25 jurisdictional so long as the -- the Supreme Court said

1 -- so long as the State Legislature said no -- no state
2 or Federal actions for -- for Wednesday damages? Would
3 you call that "jurisdictional"?

4 MS. UNDERWOOD: I would call it very strange
5 jurisdictional --

6 JUSTICE SOUTER: You might call it crazy
7 outside of court, but the one thing you wouldn't do is
8 walk into a court and say it's jurisdictional. And my
9 -- the -- the point that I am getting at is: The finer
10 the comb that -- that keeps the certain class of case
11 out, the less plausible it is to say that this is a
12 jurisdictional kind of criterion at work here.

13 MS. UNDERWOOD: Well, in --

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

24 MS. UNDERWOOD: Well, unlike the Wednesday
25 case, our -- our statute is rational, because it takes

1 out of the courts of general jurisdiction the cases that
2 are most numerous and that are most appropriately
3 indemnified by the State. But it leaves in the courts
4 of general jurisdiction the ones that are less numerous
5 and that are not appropriately indemnified or turned
6 into actions against the State. So it's rational unlike
7 the Wednesday cases.

8 JUSTICE KENNEDY: One of the concerns I have
9 in this case is the scope of employment is often
10 litigated, and it would seem to me that the State of New
11 York might routinely say, oh, this is not within the
12 scope of employment.

13 MS. UNDERWOOD: Well, there is a body of
14 cases that are quite generous --

15 JUSTICE KENNEDY: Which -- which means that
16 this is a very difficult distinction and is a further
17 burden on the 1983 ride.

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

24 JUSTICE KENNEDY: I think that's a rather
25 routine defense. But why are they -- why are they left

1 in the supreme court?

2 MS. UNDERWOOD: Because they are not
3 appropriately -- because the State doesn't want to take
4 responsibility -- when the State statute takes them from
5 the supreme court, then actions on such matters can be
6 brought against the State in the court of claims. And
7 the state is not taking responsibility for those cases
8 and will not indemnify them.

9 JUSTICE KENNEDY: When was this statute
10 first enacted?

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

13 JUSTICE: And then you say they were not --
14 that 1982 is on the books, but, gee, it wasn't -- it
15 wasn't --

16 MS. UNDERWOOD: It was not -- it was nothing
17 --

18 JUSTICE: It pretty clearly was not aimed at
19 defeating Federal actions.

20 MS. UNDERWOOD: Correct. It was not aimed
21 at defeating Federal actions. It was aimed at just --
22 at -- at managing the --

23 JUSTICE: It had not even been held then
24 that State Farm was available for 1983 actions.

25 MS. UNDERWOOD: That's correct.

1 JUSTICE: Yes.

2 MS. UNDERWOOD: That's correct.

3 JUSTICE: Can I --

4 MS. UNDERWOOD: The rise of Federal 1983
5 actions came subsequently and -- and --

6 JUSTICE SCALIA: That -- that's an important
7 factor, I would think. Let me ask another question. It
8 -- it's a standard rule of international law that no
9 State will enforce the penal laws of another State. I
10 assume the Federal Government could not -- maybe I am
11 wrong to assert this, but could the Federal Government
12 require New York to prosecute federal crimes?

13 MS. UNDERWOOD: I don't know the answer to
14 that.

15 JUSTICE SCALIA: I don't, either, but I
16 think it can't. I think it can't, probably. Then my
17 next question is going to be: Why aren't punitive
18 damages penal laws as well? And if that's the same
19 principle, maybe there's no big deal about New York
20 excluding penal damages --

21 MS. UNDERWOOD: There may be, but there is
22 no --

23 JUSTICE KENNEDY: 1983 does not -- correct
24 me if I am wrong -- does not allow punitive damages
25 against a State, does it?

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

4 JUSTICE KENNEDY: Not -- if I got that
5 right, not in Monell.

6 MS. UNDERWOOD: The State in Monell --

7 JUSTICE KENNEDY: Even in Monell -- even in
8 Monell there is no punitive damages against the State,
9 which is another reason you -- you were discriminating
10 against the employee here -- against the prisoner.
11 Because the prisoner could get punitive damages against
12 the correctional officer but not against the State in
13 either court.

14 MS. UNDERWOOD: Where he can -- where he can
15 bring his 1983 action, he can get punitive damages. The
16 State has closed its door to damage actions, 1983 or
17 otherwise.

18 JUSTICE KENNEDY: In neither court can you
19 get -- and correct me if I am wrong -- punitive damages
20 against the State, which never --

21 MS. UNDERWOOD: He can get damages -- under
22 1983 he can get damages against --

23 JUSTICE KENNEDY: He can under Monell.

24 MS. UNDERWOOD: Not against -- no, not --
25 not against the State.

1 JUSTICE STEVENS: In county --

2 MS. UNDERWOOD: Yes. In fact, what I was
3 going to say is that one of the things that shows there
4 is no congressional policy focused only on individuals
5 is that municipalities and other government entities are
6 proper defendants. The State is not. Likely, the
7 government -- the Federal policy was -- found by this
8 Court in construing 1983 for not making the State a
9 defendant was not that that would undermine deterrent
10 and that it was preferable to sue individuals, but that
11 there was some reluctance -- concern about power or
12 wisdom of -- of imposing liability on the States.

13 And, in fact, that is what this Court said
14 in Monell and Will about why the State is not a person.
15 So I don't think 1983 is fairly read as embracing a
16 congressional judgment that it's better to have
17 liability against individuals, better from the
18 plaintiffs' point of view, than against the State.

19 But the way this works is it is, in effect,
20 a mandatory removal. And since Congress has no
21 objection and has not prohibited removal the way it did
22 in FELA cases, it's hard to see how the congressional
23 policy is frustrated by this mandatory removal.

24 CHIEF JUSTICE ROBERTS: Thank you, General.
25 Mr. Murtagh, you have four minutes.

1 REBUTTAL ARGUMENT OF JASON E. MURTAGH

2 ON BEHALF OF THE PETITIONER

3 MR. MURTAGH: Mr. Chief Justice, just very
4 briefly, General Underwood just mentioned that -- that
5 this could be analyzed as a mandatory removal statute.
6 But the distinction, Your Honors, is that what New York
7 State does when it removes these cases to Federal court
8 is it uses an avenue that is provided by Congress. And,
9 certainly, if Congress wants to provide for removal to
10 Federal court, Congress can do that.

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

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

1 JUSTICE KENNEDY: In that same act they
2 might rescind the -- the laws allowing the State to
3 respond in damages, in which case you won't obtain very
4 much.

5 MR. MURTAGH: Well -- well, Your Honor, my
6 client can't bring his Section 1983 claim in any State
7 court because he can't bring it against the employees,
8 because Correctional Law Section 24 keeps him out of the
9 supreme court. And he can't sue the you State in the
10 court of claims because in Will v. Michigan this Court
11 said the State is not a person. So he simply cannot
12 bring his Federal action in any State court if he wants
13 money damages.

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

17 MR. MURTAGH: Well, Justice Scalia, the --
18 the very first iteration of this law was in 1947. The
19 law was actually amended -- and it is discussed in -- in
20 the joint appendix and there is some in the beginning of
21 our brief -- in the early 1970's after there were a
22 significant number of -- of Section 1983 claims that had
23 begun to be filed.

24 JUSTICE GINSBURG: Was there any substantive
25 change from what the original enactment to the amendment

1 -- the one that's currently enforced?

2 MR. MURTAGH: Justice Ginsburg, I don't
3 recall whether there were any. We actually researched
4 the legislative history and had a bit of difficulty
5 going back that far. I don't recall whether there were
6 a lot of substantive changes or not, quite honestly.

7 This is a statute, though, that the -- that
8 the New York Legislature has -- has dealt with over the
9 years.

10 One of the important things is that in the
11 1970's -- and I apologize for not having the exact date
12 -- the New York Legislature said that the purpose of
13 this was to provide immunity to corrections officials.
14 And as we pointed out in our briefing, there is a bill
15 currently pending before the New York Legislature that
16 says we want to extend the same immunity that we provide
17 to prison officials to employees of the Office of --

18 JUSTICE BREYER: They are saying -- they are
19 also saying there is a neutral reason. The neutral
20 reason is the State sees there are just too many cases
21 in which prisoners are suing correctional officials.

22 So then they say: Here's what we are going
23 to do about it. First, under State law, we will wipe
24 out all the suits and give them instead an action
25 against the State. But we know there are still some

1 Federal cases about the same thing. So what we are
2 going to do is we are going to say bring them in Federal
3 court. Why bring them in State court? So now we've
4 dealt with our administrative problem.

5 So that's their neutral administrative
6 reason. Now, people would like to bring 1983 actions
7 still in State or Federal court. It may be more
8 convenient. They get attorneys' fees, and the
9 attorneys' fees you don't get under the State law. So
10 why isn't -- or why is -- I guess that's the question
11 for me: Is this an adequate, neutral, administrative
12 reason or not?

13 MR. MURTAGH: No, Justice Breyer. The --
14 the reason that is given in this particular case, if you
15 -- if you go through the Respondent's briefing, the
16 reason that is given is that there -- is that this
17 statute exists because there are lots of frivolous,
18 vexatious lawsuits.

19 JUSTICE BREYER: Well, forget all of the
20 characterizations. If we could look into the motive,
21 maybe we would have a different view. But all we have
22 is the statute on the books. And, as in many cases, the
23 people who are charged with defending those statutes
24 think of very good reasons which are very plausible that
25 could have motivated the people involved, and they have

1 come up with the one that you have heard. Now, what's
2 -- what's wrong with that one?

3 MR. MURTAGH: And I'm sorry, Justice Breyer.
4 The reason?

5 JUSTICE BREYER: The reason is, you see,
6 there are so many cases in which the person is suing --
7 the prisoner is suing the prison official that our
8 courts are clogged. So what we are going to do is:
9 One, give the prisoners a good remedy under State law in
10 a different court; and, two, close our doors to the
11 comparable Federal case.

12 MR. MURTAGH: Justice Breyer, the answer is
13 that the State can certainly do that with respect to the
14 State-law claims.

15 What it can't do is try to shuttle Federal
16 claims off to the Federal courts and close its doors for
17 a hearing on similar State claims.

18 Your Honors, thank you for your time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 12:06 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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