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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 the 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 could 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. It --

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 thing --

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 --

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 was 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 they 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: 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 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.

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 Do 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 --

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.

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

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

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 court, the Federal  
13 -- the State defendant could remove it to Federal court.

14 JUSTICE BREYER: What's the --

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

23 MS. UNDERWOOD: That's correct. But that's  
24 if the Court is open to the case. The Fender cases --  
25 the line of cases that Petitioner has been pointing to,

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

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

9 MS. UNDERWOOD: Well, I have three.

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

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

24 JUSTICE BREYER: But that -- but Testa and  
25 Katt was a case in which the Court found that the State

1 allows some State actions that are analogous to the  
2 Federal action and you can't discriminate against a  
3 Federal action.

4 MS. UNDERWOOD: That's correct.

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

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



1 it's all the vast forms of litigation, principally but  
2 not exclusively prisoner complaints, that arise out of  
3 prisons.

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

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

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

25 I only was suggesting that there exists such

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

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

15 MS. UNDERWOOD: Well, I think --

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

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

24 The -- the question would be, does that  
25 procedural rule -- there are two questions: Is it

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

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

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

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

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

24                   Now, you may -- we may argue that if the  
25 State responds in damages, the prisoner is better off,

1 but Congress has not made that judgment. Congress has  
2 made the judgment that the correctional officer himself  
3 or herself should be responsible.

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

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

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

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

16 MS. UNDERWOOD: Yes.

17 JUSTICE SCALIA: He's still responsible.

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

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

23 MS. UNDERWOOD: He is responsible to exactly  
24 the same degree as he would be, were he sued personally,  
25 because New York indemnifies him and there is no

1 requirement -- Congress has never shown any objection to  
2 indemnification.

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

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

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

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

16 JUSTICE STEVENS: Let me just ask --

17 MS. UNDERWOOD: Yes.

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

24 MS. UNDERWOOD: No, I don't think so, for  
25 the same reason that I don't think -- that is, if you

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

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

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

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

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

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

23 MS. UNDERWOOD: Well, I don't think they  
24 could put the damage requirement on, because then they  
25 would be opening the --

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

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

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

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

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

24 Similarly, in McKnett and Testa, in each  
25 case this Court struck down a limitation on the

1 ground not that the State had an absolute obligation to  
2 hear the Federal claim, but that it had an obligation,  
3 if it was going to exclude jurisdiction, to exclude it  
4 evenhandedly.

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

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

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

22 JUSTICE BREYER: So what you have now is you  
23 have one reason, I think, would be clearly wrong, I  
24 think -- I assume that. But if the State closed their  
25 doors to this kind of suit because they said, we think



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

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

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

17 JUSTICE BREYER: You don't offer them a  
18 court of claims, because what you offer in the court of  
19 claims is an action against the State.

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

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

25 Okay. So if I treat that as neutral, I have

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

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

10 JUSTICE BREYER: Well, 1983 actions, but  
11 maybe they bring them mostly in Federal court.

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

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

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

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

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

25 MS. UNDERWOOD: Well, there are two things

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

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

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

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

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

22 MS. UNDERWOOD: Well --

23 JUSTICE SOUTER: Which -- which makes it a  
24 little tough to say that in the less egregious cases  
25 there's a -- that the exclusion of the less egregious

1 cases is a jurisdictional exclusion as distinct from an  
2 exclusion based upon policy about how less egregious  
3 cases ought to be handled.

4 MS. UNDERWOOD: Well, it's -- it is a  
5 jurisdiction -- it is framed as jurisdictional. It is  
6 treated as jurisdictional. The New York courts say --

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

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

24 JUSTICE SOUTER: What if the New York  
25 Legislature passed a statute saying the -- the State

1 supreme court will not have jurisdiction over 1983  
2 actions for -- for harm committed on Wednesday? Would  
3 you say that that was a jurisdictional rule?

4 MS. UNDERWOOD: I think --

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

7 (Laughter.)

8 MS. UNDERWOOD: I think it would be hard  
9 to --

10 JUSTICE SOUTER: You wouldn't have.

11 MS. UNDERWOOD: -- to find a rationale for  
12 it, but --

13 JUSTICE SCALIA: Even if it were, it would  
14 be discriminatory and invalid, right?

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

18 JUSTICE SCALIA: Or discriminatory. It's  
19 picking on --

20 MS. UNDERWOOD: Or discriminatory as between  
21 -- as between plaintiffs, yes. But --

22 JUSTICE SOUTER: Would you say it was  
23 jurisdictional so long as the supreme court said -- so  
24 long as the State legislature said, no State or Federal  
25 actions for -- for -- for Wednesday damages? Would you

1 call that jurisdictional? No, you would call it --

2 MS. UNDERWOOD: I would call it very strange  
3 jurisdiction.

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

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

12 MS. UNDERWOOD: Well, it --

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

22 MS. UNDERWOOD: Well, unlike the Wednesday  
23 case, our statute is rational because it takes out of  
24 the courts of general jurisdiction the cases that are  
25 most numerous and that are most appropriately

1 indemnified --

2 JUSTICE KENNEDY: What are the --

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

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

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

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

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 that do not -- by  
22 corrections officers, that do not in any way further the  
23 -- the objective. They are simply excesses.

24 JUSTICE KENNEDY: Well, I think that's a  
25 rather routine defense.



1 JUSTICE SOUTER: But why are they -- why are  
2 they left in the supreme court?

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

10 JUSTICE SCALIA: General Underwood, when --  
11 when was this statute first enacted?

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

14 JUSTICE SCALIA: And you say there were not  
15 -- 1983 was on the books, but, gee, it wasn't -- it  
16 wasn't --

17 MS. UNDERWOOD: It was not aimed at -- it  
18 wasn't --

19 JUSTICE SCALIA: It pretty clearly was not  
20 aimed --

21 MS. UNDERWOOD: Correct.

22 JUSTICE SCALIA: -- at defeating Federal  
23 actions.

24 MS. UNDERWOOD: Correct. It was not aimed  
25 at defeating Federal actions. It was aimed at -- at

1 managing the high volume of State law --

2 JUSTICE STEVENS: In fact, it had not even  
3 been held then that State Farm was available for 1983  
4 actions.

5 MS. UNDERWOOD: That's correct.

6 JUSTICE STEVENS: Yes.

7 MS. UNDERWOOD: That's correct.

8 JUSTICE SCALIA: Can I --

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

11 JUSTICE SCALIA: That's an important factor,  
12 I would think.

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

19 MS. UNDERWOOD: I don't know the answer to  
20 that.

21 JUSTICE SCALIA: I don't either.

22 (Laughter.)

23 JUSTICE SCALIA: I think it can't. I think  
24 it can't, probably.

25 And my next question was going to be: Why

1 aren't punitive damages penal laws as well? And if  
2 that's the same principle, maybe there's no big deal  
3 about New York excluding penal damages --

4 MS. UNDERWOOD: There may be, but there's no  
5 --

6 JUSTICE KENNEDY: Well, 1983 does not --  
7 correct me if I am wrong -- does not allow punitive  
8 damages against a State, does it?

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

12 JUSTICE KENNEDY: Not -- not if -- if I got  
13 it right -- not if Monell --

14 MS. UNDERWOOD: The State -- that's Monell  
15 and --

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

21 MS. UNDERWOOD: No --

22 JUSTICE KENNEDY: -- because the prisoner  
23 can get punitive damages against the correctional  
24 officer but not against the State in either court.

25 MS. UNDERWOOD: Where he can get -- where he

1 can bring his 1983 action, he can get punitive damages.  
2 The State has closed its door to damage actions, 1983 or  
3 otherwise.

4 JUSTICE KENNEDY: In neither court can you  
5 get -- correct me if I am wrong -- punitive damages  
6 against the State. You can never have that.

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

9 JUSTICE KENNEDY: You can under Monell.

10 MS. UNDERWOOD: Not against -- no, not --  
11 not against the State.

12 JUSTICE STEVENS: They don't sue Illinois;  
13 they sue Cook County --

14 MS. UNDERWOOD: Yes. In fact, what I was  
15 going to say is that one of the things that shows that  
16 there's no congressional policy focused only on  
17 individuals is that municipalities and other government  
18 entities are proper defendants. The State is not.  
19 Likely, the government -- the Federal policy was --  
20 policy found by this Court in construing 1983 for not  
21 making the State a defendant was not that that would  
22 undermine deterrence and that it was preferable to sue  
23 individuals, but that there was some reluctance --  
24 concern about power or wisdom of imposing liability on  
25 the States.

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

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

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

12           CHIEF JUSTICE ROBERTS: Thank you, General.

13           Mr. Murtagh, you have four minutes.

14           REBUTTAL ARGUMENT OF JASON E. MURTAGH

15           ON BEHALF OF THE PETITIONER

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

24           What the State cannot do is come in and  
25 interpose its policy judgment over and above what

1 Congress has decided with respect to Federal claims.

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

14           JUSTICE KENNEDY: In that same act, they  
15 might rescind the -- the law allowing the State to  
16 respond in damages, in which case you won't have gained  
17 very much.

18           MR. MURTAGH: Well -- well, Your Honor, my  
19 client can't bring his section 1983 claim in any State  
20 court because he can't bring it against the employees,  
21 because Correctional Law section 24 keeps him out of  
22 supreme court, and he can't sue the State in the court  
23 of claims because in *Will v. Michigan* this Court said  
24 the State is not a person. So he simply cannot bring  
25 his Federal action in any State court if he wants money

1 damages.

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

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

12 JUSTICE GINSBURG: Was there any substantive  
13 change from what the original enactment to the amendment  
14 -- from the one that's currently enforced?

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

20 This is a statute, though, that the -- that  
21 the New York Legislature has -- has dealt with over the  
22 years.

23 One of the important things is that in the  
24 1970s -- and I apologize for not having the exact date  
25 -- the New York Legislature said that the purpose of

1 this was to provide immunity to corrections officials.  
2 And as we pointed out in our briefing, there is a bill  
3 currently pending before the New York Legislature that  
4 says, we want to extend the same immunity that we  
5 provide to prison officials to employees of the Office  
6 of Mental Health --

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

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

21 Now, people would like to bring 1983 actions  
22 still in State or Federal court. It may be more  
23 convenient. They get attorneys' fees, and the  
24 attorneys' fees you don't get under the State law. So  
25 why isn't -- or why is -- or I guess that's the question



1 for me: Is this an adequate, neutral, administrative  
2 reason or not?

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

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

18 MR. MURTAGH: And I'm sorry, Justice Breyer.  
19 The reason?

20 JUSTICE BREYER: The reason is, you see,  
21 there are so many cases in which the person is suing --  
22 the prisoner is suing the prison officials that our  
23 courts are clogged. So what we are going to do is:  
24 One, give the prisoners a good remedy under State law in  
25 a different court; and, two, close our doors to the

1 comparable Federal cases.

2 MR. MURTAGH: Justice Breyer, the answer is  
3 that the State can certainly do that with respect to the  
4 State-law claims.

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

8 Your Honors, thank you for your time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
10 The case is submitted.

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

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