No. 07-10374

In the Supreme Court of the United States

KEITH HAYWOOD,
Petitioner,
v.
CURTIS DROWN, *ET AL.*
Respondents.

On Writ of *Certiorari*
to the New York Court of Appeals

BRIEF FOR PETITIONER

Of Counsel
Nory Miller

DECHERT LLP
Cira Centre
2929 Arch St.
Philadelphia, PA 19104
(215) 994-4000

Jason Murtagh*
Gary Mennitt
Jennifer Rellis

DECHERT LLP
Cira Centre
2929 Arch St.
Philadelphia, PA 19104
(215) 994-4000

*Counsel of Record

August 14, 2008

QUESTION PRESENTED

Whether a state's withdrawal of jurisdiction over certain damages claims against state corrections employees – from state courts of general jurisdiction – may be constitutionally applied to exclude federal claims under Section 1983, especially when, as here, the state legislature withdrew jurisdiction because it concluded that permitting such lawsuits is bad policy?

PARTIES

Petitioner Keith Haywood is an individual incarcerated in a state prison in New York. Respondents Curtis Drown, Pat Smith, Steve Jennett, M. Coryer, P. Devlin, and D. Bouvier are New York State Department of Corrections employees.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

Miscellaneous

BRIEF FOR PETITIONER

OPINIONS BELOW

The litigation below involves two separate actions, which were consolidated for briefing and argument by New York's Appellate Division, and decided together by New York's Court of Appeals. The majority and dissenting opinions of the New York Court of Appeals, JA 55,[1] are reported at 9 N.Y.3d 481 (N.Y. 2007). The judgments of the New York Supreme Court, Appellate Division, 4th Department, JA 42 & JA 44, are reported at 826 N.Y.S.2d 542 (N.Y. App. Div. 2006) and 825 N.Y.S.2d 417 (N.Y. App. Div. 2006). The judgments of the New York Supreme Court, County of Wyoming, JA 34 & JA 36, are unreported.

JURISDICTION

The New York Court of Appeals issued its decision on November 27, 2007. On January 30, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of *certiorari* to and including April 25, 2008. The petition was filed within that time, on April 9, 2008, along with a motion to proceed *in forma pauperis*. The petition for a writ of *certiorari* and the motion to proceed *in forma pauperis* were granted on June 16, 2008. This Court has jurisdiction under 28 U.S.C. §1257.

---

[1] References to the Joint Appendix are indicated by "JA _."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause of the United States Constitution, art. VI, cl. 2; Section 1 of the Civil Rights Act of 1871, *codified at* 42 U.S.C. §1983; and Article 2, Section 24, of Chapter 43 of Consolidated Laws of New York.

The Supremacy Clause provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI, cl. 2.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

> injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

New York Corrections Law §24 provides:

> 1. No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department [of corrections], in his personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee.
>
> 2. Any claim for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties of any officer or employee of the department shall be brought and maintained in the court of claims as a claim against the state.

STATEMENT OF THE CASE

New York has closed its courts, including its courts of general jurisdiction, to many damages actions against state prison employees because the state legislature views them as bad policy. The decision below settled, for the first time, that the state statute that closes the state's courts also applies to federal claims within its purview – *i.e.*, if the defendants are state prison employees, the suits request damages, and certain misconduct is alleged. The decision below further ruled that applying the state statute to federal claims is fully consistent with the Supremacy Clause.

Thus, the question is whether states may constitutionally cherry-pick which specific federal actions to permit in their courts, so long as they impose the same filter on precisely identical state law actions – and whether states may do so because they disagree with Congress about the value of permitting such actions against state employees.

New York's withdrawal of jurisdiction. The challenged statute crafts a narrow exception to the jurisdiction of every state court, including those with general jurisdiction. It is codified as part of the state's substantive corrections laws and is intended to protect state prison employees and state prison operations.

The statute removes jurisdiction from all state courts over any private civil action against New York Department of Corrections (DOCs) employees in

their personal capacities, if the action seeks damages and alleges conduct adjudged, under New York law, to be within their scope of employment and undertaken or omitted in the discharge of their duties. *See* N.Y. Correct. Law §24(1).

New York law does not, however, incorporate federal standards for determining which conduct is outside the scope of employment and which is not. Thus, allegedly unlawful conduct undertaken under color of state law is regularly treated as within the scope of employment and undertaken in the discharge of official state duties, as a matter of state law. As a result, lawsuits that would be actionable under federal law are often denied access to New York's courts. *See, e.g., Woodward v. New York*, 805 N.Y.S.2d 670 (N.Y. App. Div. 2005) (barring DOCs employee's Section 1983 claims against his supervisors for employment decisions in violation of his First, Fifth and Fourteenth Amendment rights because the conduct arose out of the discharge of the supervisors' duties and was within the scope of their employment); *Cedepa v. Coughlin*, 513 N.Y.S.2d 528 (N.Y. App. Div. 1987) (barring prisoner's Section 1983 suit alleging excessive force in violation of his due process and Eighth Amendment rights on the ground that the use of force *may be* within the scope of employment – without reaching whether the specific conduct at issue was within the scope of employment or even lawful).

The legislative purpose is to provide state prison employees with immunity from damages suits because the state views such suits as bad policy. The

original statute expressly granted these employees qualified immunity. *See* N.Y. Correct. Law §6-b (McKinney 1946). The statute was amended several times, at one point expressly providing for holding state prison employees harmless and indemnifying them. *See* N.Y. Correct. Law §24 (McKinney 1972). The current version was enacted in 1978, and precludes state court jurisdiction over most damages suits against state prison employees altogether.

New York's legislature still refers to the statute as providing state prison employees with "immunity from civil damages." J.A. 84; *see also* J.A. 89, 91.

Judge Jones below noted that the state's highest court had recognized "that the purpose of *section 24* is to ensure that DOCs employees . . . freely perform their dangerous duties of maintaining safety and security within correctional facilities without fear of being subjected to voluminous, vexatious and, in many cases, meritless suits brought by prisoners and being held personally liable should a prisoner prevail." JA 69. (Jones, J., dissenting) (referencing *Arteaga v. New York*, 527 N.E.2d 1194 (N.Y. 1988)) (internal citation omitted). The majority recognized that the statute effected "an absence of jurisdiction in state courts to entertain claims of civil rights violations against those employees directly." J.A. 65.

New York's Attorney General described the state statute to this Court as "further[ing] New York's legitimate interest in minimizing the disruptive effect of prisoner damages claims against correction employees, many of which are frivolous and

vexatious." NYAG Cert. Opp'n 10. He explained in detail below how the statute furthers the state's legislative goal: the person who allegedly violated federal law "is not named as a defendant . . . is not served with process . . . does not need to retain counsel or seek representation by the Attorney General [and] does not have to answer the complaint." If damages are awarded, the person who violated federal law also does not face "threat of attachments or liens on [his] personal assets" or "have to seek indemnification by the State." NYAG Court of Appeals Br. 12.

Although this case arises in the context of a Section 1983 suit brought by a prisoner, the state statutory exclusion applies equally to suits brought by state prison employees against their supervisors under Section 1983. *See, e.g., Woodward*, 805 N.Y.S.2d at 673; J.A. 64 & n.6. By its terms, the exclusion would also apply to suits brought by visitors to the prison who were subjected to unlawful conduct by prison employee. As the court below confirmed, "*Section 24* operates without regard to the identity of the plaintiff," J.A. 64 n.6, so long as the plaintiff has brought a private damages action.

New York courts' jurisdiction over similar disputes. New York's courts of general jurisdiction, its supreme courts, *do* have jurisdiction to hear actions for damages against state prison employees – including the very claims Haywood asserted – *if* the action is brought by the state's attorney general on behalf of the state. N.Y. Correct. Law §24(1). These courts also have jurisdiction to hear private civil

actions against state prison employees, including Section 1983 claims, *if* the plaintiff seeks *only* declaratory or injunctive relief. *Id.* Likewise, these courts may hear even private *damages* actions against a state corrections employee if the conduct alleged is outside the scope of the defendant's employment or the discharge of his duties – as determined under state law. *Id.*

New York's courts of general jurisdiction also may hear private civil actions for damages, including Section 1983 claims, against any state employee who does *not* work for the state's Department of Corrections. *See, e.g., Farley v. Town of Hamburg,* 824 N.Y.S.2d 549 (N.Y. App. Div. 2006) (permitting §1983 action against a police officer for damages); *McCummings v. New York City Transit Auth.,* 580 N.Y.S.2d 931 (N.Y. App. Div. 1992) (permitting §1983 action against transit authority employee for damages).

In addition, these courts have jurisdiction over tort claims. *See* N.Y. Const., art. VI, §7(a) (conferring jurisdiction to the state's supreme courts over cases in law and equity); *Pollicina v. Misericordia Hosp. Medical Ctr.*, 624 N.E.2d 974, 977 (N.Y. 1993) (noting the supreme courts' "inviolate authority to hear and resolve all causes in law and equity"); *Kagen v. Kagen*, 236 N.E.2d 475, 478 (N.Y. 1968) ("the Supreme Court is a court of original, unlimited and unqualified jurisdiction").

New York's substitute claim. The statute does permit compensation claims for unlawful

conduct by state prison employees that may not be brought against the employees themselves. But such claims may only be brought against the State of New York, not against those who violated the law and caused the harm. Like all claims the State has permitted to be brought against it, such claims are subject to special rules and must be brought in its specialized Court of Claims. *See* N.Y. Correct. Law §24(2).

Together, the provisions of New York's Correction Law §24 furthers the *state's* policy choices in favor of some limited compensation to victims but against imposing any reputational, emotional and/or financial toll on state prison employees – regardless of their conduct. As a result, *no* New York state court – including New York's Court of Claims – has jurisdiction to hear Section 1983 claims complaining of unlawful conduct by state prison employees, because the right of action Congress provided in Section 1983 is a right to sue state *employees*.[2]

Thus, New York has not determined *which* of its courts will hear these federal claims. New York has excluded *all* such federal claims from its courts. At the same time, it has provided a court to hear a different *state law* claim that better suits its policies.

This state law alternative is significantly different from the federal right Congress provided in Section 1983. In addition to precluding damages

---

[2] *See, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) (Section 1983 suits may not be brought against a state).

suits against those who allegedly committed the violations, it imposes a very short notice of intent prerequisite that effectively shortens the limitations period to 90 days. *See* N.Y. Ct. Cl. Act §10(3). In contrast, the statute of limitations for a Section 1983 claim in New York is three years. *See Wallace v. Kato*, 127 S. Ct. 1091, 1094 (2007) (statute of limitations supplied by state statute of limitations for personal injury); N.Y. C.P.L.R. §214(5) (providing three-year limitations period for personal injury suits); *Jaghory v. N.Y. Dep't of Ed.*, 131 F.3d 326, 331-32 (2d Cir. 1997) (recognizing three-year statute of limitations for Section 1983 suits in New York).

The state law alternative also does not include any opportunity to seek an award of attorney fees, in contrast to federal law governing Section 1983 claims, which expressly provides for fee awards in order to facilitate broad access to justice. *Compare* 42 U.S.C. §1988 (in a §1983 action, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs") *with* N.Y. Ct. Cl. Act §27 ("nor shall counsel or attorney's fees be allowed by the court to any party"). Thus, the state law alternative does not provide attorney fees, regardless of a claim's merit.

In addition, the state law alternative precludes any award of punitive damages, in contrast to Section 1983 which permits all forms of redress available at law or equity. *Compare Sharapata v. Islip,* 437 N.E.2d 1104, 1105 (N.Y. 1982) ("the waiver of sovereign immunity effected by section 8 of the Court of Claims Act does not permit punitive

damages to be assessed against the State or its political subdivisions") and *Wheeler v. State*, 479 N.Y.S.2d 244, 247 (N.Y. App. Div. 1984) (punitive damages may not be assessed against the State) *with Smith v. Wade*, 461 U.S. 30, 56 (1983) ("We hold that a jury may be permitted to assess punitive damages in an action under §1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.").

The state law alternative does not permit jury trial, N.Y. Ct. Cl. Act §12(3), which is otherwise available in the state's courts that hear tort claims and Section 1983 claims against other defendants. Finally, the state law alternative imposes the burden of bringing separate actions in different courts if the claimant seeks both compensation and declaratory or injunctive relief. *Compare* N.Y. Ct. Cl. Act §9; *Silverman v. Comptroller,* 339 N.Y.S.2d 149, 150 (N.Y. App. Div. 1972) (the Court of Claims' jurisdiction is "limited to awarding money damages against the State and is without power to grant strictly equitable relief"); *Wikarski v. New York,* 459 N.Y.S.2d 143 (N.Y. App. Div. 1983) (the Court of Claims does not have authority to render a declaratory judgment) *with* 42 U.S.C. §1983 (permitting actions at law, suits in equity and any other proceeding for redress).

The course of proceedings below. Keith Haywood, a prisoner in New York's Attica Correctional Facility, initiated this suit by filing two

actions *pro se* in New York's Wyoming County Supreme Court in 2005, seeking damages under Section 1983 and state law against different Department of Corrections' employees for separate violations of his civil rights. J.A. 5-15, 16-22.

Both his initial and amended complaints alleged that the court had jurisdiction under Section 1983 and the Supremacy Clause; that states do not have the power to confer immunity from federal claims; and that New York's supreme courts are fully competent to provide the remedies permitted under Section 1983. J.A. 5-6, 16, 30-33. They directed the trial court's attention to this Court's decisions in *Felder v. Casey*, 487 U.S. 131 (1988) and *Howlett v. Rose*, 496 U.S. 356 (1990). *Id*.

New York's Attorney General, representing the state prison employees, moved to dismiss each case on the ground that New York Correction Law §24 deprived the court of jurisdiction. Haywood submitted a sworn affidavit on December 19, 2005, arguing that New York Correction Law §24's jurisdictional bar conflicted and interfered with Section 1983, and therefore could not apply under the Supremacy Clause. J.A. 23-29.

The trial court dismissed both actions for lack of jurisdiction under New York Correction Law §24. J.A. 34-35, 36-37. Haywood, again *pro se*, timely appealed the orders to the Appellate Division, asserting that the Supremacy Clause permitted his federal claims to proceed notwithstanding the state statute. J.A. 38, 39. He also moved to consolidate

the appeals for briefing and argument, which was granted. J.A. 40-41. The Appellate Division affirmed both orders of dismissal and expressly rejected Haywood's Supremacy Clause argument, without further explanation. J.A. 42-43, 44.

Haywood timely appealed to the Court of Appeals, citing New York C.P.L.R. §5601, a rule that permits such appeals as of right when the appellate division's final judgment involves interpreting the state or federal constitution, or the constitutionality of a statute is the only issue. J.A. 45-46. Haywood's notice of appeal challenged N.Y. Correction Law §24 on the ground that it conflicted with 42 U.S.C. §1983. At the request of the Court, the undersigned counsel undertook Haywood's representation.

The New York Court of Appeals affirmed in a closely split decision, four to three. J.A. 55-83. The majority ruled that New York's statute could withdraw jurisdiction over this subcategory of federal claims from all the state's courts without violating the Supremacy Clause. J.A. 61-64. It reasoned that the jurisdictional bar does not discriminate against federal rights because it also applies to state law private damage claims against state prison employees for conduct within their scope of employment and in the discharge of their duties. J.A. 62-63. *That*, the majority held, meant the state statute is a neutral jurisdictional barrier. J.A. 63-64.

The majority further noted that the statute reflected the state legislature's recognition that the State of New York "is, in effect, the real party in

interest when there is a challenge to a correction officer's alleged conduct arising from the discharge of official duties," and it ruled that the legislature is entitled to "exercise its prerogative to establish the subject matter jurisdiction of state courts in a manner consistent with New York's conditional waiver of sovereign immunity" and to require damages claims for such officers' misconduct to be brought against the state in New York's Court of Claims. J.A. 65, 66.

The majority recognized that Section 1983 provided a right to sue state employees, but not the State, and therefore no New York court would have jurisdiction over Section 1983 damages claims arising from the conduct of state prison employees within their scope of employment and in the discharge of their duties. J.A. 65 ("states are excluded from *section 1983* liability"). But it found that "New York does not discriminate against *section 1983* claims by allowing state, but not federal, actions involving DOCS employees to be adjudicated in the Court of Claims," because "it was Congress that decided to exempt the states as responsible parties from the purview of the federal statute." J.A. 66.

The majority concluded that the state legislature had the power to require New York's courts to adjudicate only state claims brought against the state and to relegate federal claims brought against individuals to federal court. J.A. 66-67.

The dissent – representing the views of three of

the Court of Appeals' seven judges – argued that applying the state statute to a Section 1983 action is preempted because the state's interest in its own law and policy does not permit it to override federal law with which it is in conflict. J.A. 72-73. It viewed the state statute as conflicting here because it "functions as an immunity statute" that "frustrates the purpose of, and is inconsistent with, *section 1983*." J.A. 82, 67.

The dissent argued that the New York statute is not a neutral jurisdictional bar because the statute does not reflect concerns of power over the litigants and competence over subject matter. J.A. 76-77. The dissent explained that New York's supreme courts "have jurisdiction over the parties and the type of claim brought" because the "claims arose *within* the State's territorial jurisdiction" and these state courts "are courts of general (i.e., original, unlimited and unqualified) jurisdiction that already hear and adjudicate state law claims for damages and *all section 1983* claims against *other* state employees." J.A. 83, 79 (emphasis original). Therefore, they have "competence over the type of claim at bar." J.A. 83.

The dissent emphasized that, because "Congress decided that the threat of abuse of citizens by those acting under color of state law was real enough to justify creating the *section 1983* cause of action – even though many *section 1983* cases lack merit," the "State of New York is not free to decide that DOCS employees must be immune from such suits." J.A. 72.

The dissent concluded that the state statute "does not afford a valid excuse to selectively exclude *section 1983* damages suits against DOCs personnel and is, therefore, constitutionally infirm under the Supremacy Clause." J.A. 83.

SUMMARY OF THE ARGUMENT

New York's statute denies access to any of the state's courts for most private damages claims against state prison employees in order to protect them and state penal operations from such litigation. This statute cannot constitutionally be applied to federal claims, such as the Section 1983 claims at issue here, because it is directly contrary to Congress' policies and the express text of federal statutory provisions. The statute's creation of an alternative – and very different – right of action under state law is beside the point. The Supremacy Clause does not afford states the power to choose to disregard federal law when it is inconsistent with their own policies. Pt. I.

The neutral rule doctrine does not help New York's statute, because the statute is not a neutral rule in form, purpose, or function. New York's general power to determine the jurisdiction of its court system is not at issue here. New York has already made the choice to create courts with broad jurisdiction over similar and nearly identical actions. Having done so, New York may not now pick and choose among those actions Congress expressly provided and selectively close its courts to some of them. New York's determination to preclude state

law actions requesting one type of relief against a particular group of state employees because it views such actions as harmful or frivolous does not shelter a parallel attack on federal claims. Pt. II.

ARGUMENT

I. THE PURPOSE AND EFFECT OF NEW YORK'S CORRECTION LAW §24 ARE CONTRARY TO CONGRESS' GOALS.

New York's corrections statute is precisely what the Supremacy Clause does not permit. It is undisputed that the State's policy is to immunize its prison employees from damages suits, and to protect itself from certain remedies – even though Congress found it vital to affirmatively permit these. It is also undisputed that the statute has the effect of placing insuperable obstacles to vindication of these federal rights in the state's courts.

New York's general power to regulate its courts does not permit it to use that power to countermand Congress' judgment. As this Court confirmed only last Term, a state's differing policy judgment does not permit it to use its funds – or its courts – to indirectly further policies contrary to Congress'. *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2414-15 (2008) (ruling that California may not regulate noncoercive employer speech about unionization by restricting the use of state grants to further its view – contrary to Congress' – that such speech necessarily interferes with employee choice).

It is unavailing how strong the state's interest is or how reasonable its policies. Even if the state policy is "understandable or laudable," it cannot displace the "goals of the federal legislation." *Felder v. Casey*, 487 U.S. 131, 143 (1988). "[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content." *Howlett v. Rose*, 496 U.S. 356, 371 (1990).

Thus, the Court of Appeals erred in accepting New York's policy choices because it found them reasonable – *e.g.,* "the New York Legislature has recognized that the State of New York is, in effect, the real party in interest when there is a challenge to a correction officer's alleged conduct." J.A. 65. "The decision to subject certain state [defendants] to liability for violations of federal rights . . . was a choice that Congress, not the [state] Legislature, made, and it is a decision that the State has no authority to override." *Felder*, 487 U.S. at 143, *accord Howlett*, 496 U.S. at 377.

A. New York's Purpose Is to Prevent Suits and Remedies With Which It Disagrees.

New York has long viewed most damages suits against prison employees as bad policy. The statute at issue, and its predecessors, were aimed at limiting or precluding such suits. The original provision conferred qualified immunity on state prison employees. *See* N.Y. Correct. Law §6-b (McKinney 1946). It was replaced in the 1970s with a provision holding these employees harmless and indemnifying

them. *See* N.Y. Correct. Law §24 (McKinney 1972). The current provision precludes any state court from entertaining most damages suits against them.

The state legislature still describes the law as providing state prison employees with "immunity from civil damages," and is considering a bill to provide the same immunity to Office of Mental Health employees working in New York's prisons. *See, e.g.,* http://public.leginfo.state.ny.us/menuf.cgi; J.A. 84, 89, 91.

New York's highest court has recognized that the underlying state policy is to protect these employees in order to ensure that the state's prisons operate smoothly. *See, supra,* at 6. New York's Attorney General attributes the same legislative purpose, defending the State's policy and statute as a means of "minimizing the disruptive effect of prisoner damages claims against corrections employees" by protecting them from being named as defendants, having to seek counsel, being required to answer the complaint, risking personal assets, or undertaking the effort of seeking representation and/or indemnification from the State. NYAG Cert. Opp'n 10; NYAG Court of Appeals Br. 12 (relying on the view of New York's Court of Appeals in *Arteaga v. New York*, 527 N.E.2d 1194 (N.Y. 1988)).

Congress, however, determined – more than a century ago – that providing a right to private parties, including prisoners, to sue individuals who – under color of state law – deprived them of their federal constitutional or statutory rights is necessary

to protect people from unlawful, harmful conduct by those wielding state power. *See* 42 U.S.C. §1983; *Felder*, 487 U.S. at 153 ("In enacting §1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations.").

Indeed, Congress considered the risk of being sued an important deterrent for *preventing* such misconduct. *See, e.g., Owen v. City of Independence,* 445 U.S. 622, 651 (1980) ("§1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well"). *Accord Richardson v. McKnight*, 521 U.S. 399, 403 (1997) ("§1983 basically seeks to deter *state* actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide related relief") (quotation marks omitted, emphasis original); *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (same).

New York's policy judgment, therefore, "is the same policy judgment that . . . Congress renounced" in Section 1983. *Chamber of Commerce*, 128 S. Ct. at 2414 (finding a California statute preempted because it was founded in, and furthered, state policy at odds with federal labor policy).

New York's statutes also include provisions grounded in the view that the relief available to victims should be highly circumscribed, a policy also contrary to Congress'. New York's corrections law requires victims to resort to state-law claims against

the State in New York's Court of Claims. The New York Court of Claims Act precludes the State from being held liable for attorney fees, even if the plaintiff prevails, or for punitive damages, regardless of how wanton the misconduct. It also precludes the State from being subject to injunctive relief or any other equitable remedy. *See, e.g.,* N.Y. Ct. Cl. Act §§9, 27; *Sharapata*, 437 N.E.2d at 1105. In addition, the Act deters and precludes many suits by imposing a 90-day notice requirement. *See* N.Y. Ct. Cl. Act §10(3). These rules purport to apply to all suits against the state, even those under federal law.[3]

B. New York's Statute Furthers the State's Immunity Policy.

It is undisputed that New York's Correction Law §24 effectively furthers the State's policy to cloak its prison employees with absolute immunity from private damages suits for their official conduct, regardless of whether their conduct violates the law. Under the statute, no such suits may proceed. Every New York court must immediately dismiss such suits for lack of jurisdiction, regardless of merit. Under the ruling below, every New York court must immediately dismiss such suits even if they are brought under federal law.

---

[3] Although the Court of Appeals did not have the opportunity below to rule on the constitutionality of applying New York's statutes to federal claims against the State itself, the majority's reasoning dictates that New York's correction law and Court of Claims Act would be applied to suits brought, for example, by a state prison employee against the State under Title VII or the Family and Medical Leave Act. *See* J.A. 65 & n.8

Thus, the "real effect on federal rights" of New York's policy is to entirely preclude consideration in state courts of the Section 1983 suits brought by prisoners, prison employees and others against state prison employees, that Congress expressly provided. *Chamber of Commerce*, 128 S. Ct. at 2414 (quotation marks omitted).[4]

The Court of Appeals erred in concluding that, because "litigants like plaintiff can use the federal courts to pursue *section 1983* claims against individual defendants and seek all of the rights and remedies available under the federal act," the state could constitutionally bar such federal suits from its own courts based on the state's contrary policies. J.A. 66. That federal courts remain available for vindication of federal rights has never been found to justify a state's discrimination against them. This

---

[4] The reasoning of the decision below would also truncate or deny state court consideration of federal claims against the State. For example, a prison employee who was discriminated against because of his race, could not obtain the attorney fees Congress expressly made available, and could not obtain any relief if he failed to provide the requisite 90-day notice to the State. *Compare* N.Y. Ct. Cl. Act §§10(3) & 27 *with* Title VII, 42 U.S.C. §2000e *et seq*., 42 U.S.C. §1988(b) (expressly permitting attorney fee awards to prevailing party) and 42 U.S.C. §2000e-5(e)(1) (imposing different, and longer, notice requirement). Likewise, a prison employee who was denied rights under the Family and Medical Leave Act, would be denied some or all of its remedies. *Compare* N.Y. Ct. Cl. Act §§10(3) & 27 *with* FMLA, 29 U.S.C. §2601 *et seq*., 29 U.S.C. §2607(a)(3) (permitting attorney fees); 29 U.S.C. §2617(c)(1) (providing employees with three years to file suit for willful misconduct and two years for negligent violations).

Court has repeatedly considered, and often invalidated, the application of state restrictions to federal claims, even though – in every case – federal courts remained an available alternative forum. *See, e.g., Howlett*, 496 U.S. 356; *Felder*, 487 U.S. 131; *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988); *Martinez v. California*, 444 U.S. 277 (1980); *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950); *Testa v. Katt*, 330 U.S. 386 (1947); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 234 (1934).

Indeed, *Martinez* rejected the applicability of a state immunity statute to federal claims brought in state court, emphasizing: "It is clear that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts." 444 U.S. at 284. *Felder* confirmed this fundamental principle, noting "we have held that a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted" because "application of the state immunity law would thwart the congressional remedy," which itself establishes which immunities for state employees are consistent with Section 1983's purpose. 487 U.S. at 139. Two years later, *Howlett* unanimously re-confirmed that "a State cannot immunize an official from liability for injuries compensable under federal law." 496 U.S. at 360.

It is also unavailing that New York's current approach to providing immunity is by jiggering the jurisdiction of its courts rather than by means of a

substantive immunity statute. This Court recently reconfirmed that there is no constitutionally cognizable distinction between direct and indirect regulation to achieve a policy inconsistent with Congress'. *See Chamber of Commerce v. Brown*, 128 S. Ct. at 2415. Just as California could no more "indirectly regulate [noncoercive employer speech about unionization] by imposing spending restrictions on the use of state funds" than it could "directly regulate" such conduct "by means of an express prohibition," *id.*, New York cannot indirectly regulate its employees' liability under federal law by imposing tailored restrictions on the use of its courts than it could directly regulate such liability by enacting an express immunity law.

C. New York's Substitution of a State Law Alternative Cannot Save Its Exclusion of Rights and Remedies Congress Provided.

The Supremacy Clause, at the very least, means that states lack the power to override Congress' choice by forcing plaintiffs to resort to a different one. Regardless of the state interests the substitute serves, *Congress* provided for suits against state employees, including suits for compensatory and punitive damages, and further provided for attorney fee awards to enable victims to press their claims. The majority's reasoning below – and the New York Attorney General's argument – that the New York legislature preferred a different solution than the one Congress devised is necessarily unavailing. *Chamber of Commerce v. Brown*, 128 S. Ct. at 2414; *Howlett*, 496 U.S. at 371; *Felder*, 487 U.S. at 143;

Mondou v. New York, 223 U.S. 1, 57 (1912). "State courts simply are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right." *Felder*, 487 U.S. at 152.

Furthermore, and not surprisingly as the state's interests include protecting itself, New York's substitute for the rights Congress conferred provides little or none of the deterrence Congress intended and only a fraction of the relief *if successful* – while severely limiting the likelihood that such suits will be successful, or will be brought at all. *See, supra,* at 8-11. New York's absolution of its prison employees, who need not answer for their misconduct or even face up to it in court, eliminates the deterrence Congress intended.

The state's preclusion of punitive damages eliminates important relief available under federal law. The state's imposition of a very short notice requirement, its bar against attorney fee awards, and its assignment of decision making entirely to its own judges – instead of to the juries it entrusts with other compensation cases – considerably lessens the likelihood that those who are unlawfully harmed will be compensated *at all*. And the state's preclusion of equitable and compensatory relief in the same action imposes additional burdens on each individual victim reducing the probability that the full relief available under federal law will even be pursued. Moreover, because New York has ensured that its risks remain low, the likelihood that even the State will punish officials who abuse their power cannot be assumed.

At the very least, the state law is wholly insufficient to ensure the results Congress sought in enacting Section 1983 and other federal statutes.

Critically, however, the United States Constitution does not permit states to displace Congress' judgment about appropriate rights and remedies with substitutes of their own devise. A state rule that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of a federal law is preempted. *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (quotation marks omitted). The analysis required by the Supremacy Clause is *not* "an open-ended balancing act, simply weighing the federal interest against the intensity of local feeling," rather, it turns solely on *Congress'* purpose and actions. *Id.*

"When Congress, in the exertion of the power confided to it by the Constitution, adopted [Section 1983], it spoke for all the people and all the States, and thereby established a policy for all." *Howlett*, 496 U.S. at 371 (quoting *Mondou v. New York*, 223 U.S. 1, 57 (1912)). The policy Congress pursued in enacting that act, and the legislative choices it made, must "be respected . . . in the courts of the State" as well as in federal courts. *Id.*

New York's law stands as an obstacle to Congress' goal of adjusting the huge power imbalance between those acting "under color of state law" and those at risk of being victimized by their misconduct, because it wrests power back to state employees to act without legal consequence.

Moreover, it expressly precludes rights and remedies which Congress expressly conferred. The Court of Appeals' lauding of New York's "assumption of responsibility," J.A. 65, – albeit loaded with self-protection – is beside the point. The State of New York did not simply assume responsibility, it *displaced* the responsibility that Congress imposed and the remedy that Congress deliberately fashioned. *That* violates the Supremacy Clause.

II. NEW YORK'S GERRYMANDERING OF ITS JURISDICTION TO EXCLUDE SPECIFIC FEDERAL CLAIMS IS NOT PERMISSIBLE.

A. New York Has Provided Courts Adequate and Appropriate to Hear These Actions.

1. State power over the jurisdiction of its own courts is not boundless.

The State of New York – having created courts with jurisdiction over New York residents, over most Section 1983 cases and over tort claims generally – and the power to determine compensatory and punitive damages, attorney fee awards, and equitable relief in appropriate cases – may not constitutionally withdraw that jurisdiction from a subset of Section 1983 claims it views as bad policy.

"The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution." *McKnett*, 292 U.S. at 233.

The Supremacy Clause does not permit states to decline jurisdiction over federal claims because Congress' policy is "not in accord with the policy of the State." *Howlett*, 496 U.S. at 372-73 (quotation marks omitted).

This Court has consistently emphasized that states that have created courts that are "appropriate to the occasion" – *i.e.*, they have jurisdiction over similar issues and parties – must hear federal claims whether the state agrees they are good policy or not. *See, e.g., Mondou*, 223 U.S. at 57 (rejecting Connecticut's refusal to hear FELA actions because of contrary state policy on the ground that the state had courts of general jurisdiction); *Testa*, 330 U.S. at 394 (rejecting Rhode Island's refusal to hear treble damages claims under the Emergency Price Control Act because the state's courts heard similar claims for different relief for the same type of conduct and were therefore "adequate and appropriate" to adjudicate this claim).

Under the Supremacy Clause, states "cannot escape this constitutional obligation to enforce the rights and duties validly created . . . by the simple device of removing jurisdiction from courts otherwise competent." *Howlett*, 496 U.S. at 381 (quotation marks and citation omitted). Just as states may not evade the strictures of the Full Faith and Credit Clause or the Privileges and Immunities Clause, "the same is true with respect to a state court's obligations under the Supremacy Clause," because "[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word

'jurisdiction.'" *Id.* at 382-83.

States retain full power to bestow and withhold jurisdiction with respect to claims under their own law, but with respect to claims under federal law, only refusal of jurisdiction "because of a neutral state rule regarding the administration of the courts" is presumptively valid. *Id.* at 372, 373-75; *accord Johnson v. Frankell*, 520 U.S. 911 (1997) (upholding Idaho's interlocutory appeal rule because it was unrelated to any substantive judgment inconsistent with Congress' and was not outcome-determinative).

2. New York's courts have jurisdiction over the parties and similar claims.

New York has created courts appropriate to the occasion of hearing damages suits against state prison employees. New York, for example, has courts of general jurisdiction – New York's supreme courts – that hear similar claims and are empowered to provide all the types of relief Congress made available under Section 1983. *See* N.Y. Const., art. VI, §7(a) ("The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided."); *Pollicina v. Misericordia Hosp. Medical Ctr.*, 624 N.E.2d 974, 977 (N.Y. 1993) (noting New York's supreme courts' "inviolate authority to hear and resolve all causes in law and equity"); *Kagen v. Kagen*, 236 N.E.2d 475, 478 (N.Y. 1968) ("the Supreme Court is a court of original, unlimited and unqualified jurisdiction").

These courts have the power to hear lawsuits

alleging wrongdoing by state employees under both state and federal law, including virtually identical claims. For example, these courts have jurisdiction over the very claims Haywood asserted *if* the suit is brought by the state's attorney general on behalf of the state rather than by a private party. N.Y. Correct. Law §24.

They also have the power to hear damages actions brought by *anyone* against any *other* state employees, including Section 1983 actions. *See, e.g., Farley v. Town of Hamburg*, 824 N.Y.S.2d 549 (N.Y. App. Div. 2006) (permitting §1983 action against a police officer for damages); *McCummings*, 580 N.Y.S.2d 931 (permitting §1983 action against transit authority employee for damages).

These courts even have jurisdiction to hear private civil actions against state corrections department employees, *if* (1) the actions allege conduct judged to be outside the scope of their employment and discharge of their duties as a matter of state law, *or* (2) the actions seek declaratory or injunctive relief. N.Y. Correct. Law §24(1).

In addition, these courts regularly hear the class of actions – tort claims – that this Court has repeatedly identified as comparable to Section 1983 claims. *See Felder*, 487 U.S. at 141, 146 n.3 (Section 1983 constitutional injuries have "common-law tort analogues" and a state rule that treats Section 1983 suits differently than it treats intentional torts is not neutral); *Imbler v. Pachtman*, 424 U.S. 409, 417

(1976) (Section 1983 "creates a species of tort liability").

Finally, there is no dispute that New York's courts have personal jurisdiction over the parties in this action pursuant to the state's rules of civil procedure, as all parties to these cases are residents of the State of New York. Thus, New York has already created courts adequate and appropriate for hearing federal damages actions against its prison employees.

B. New York's Statute Is Not a Neutral Rule.

1. New York's correction law lacks any of the attributes of neutral rules.

New York's correction law bears no resemblance to a neutral rule. To constitute a neutral procedural rule, New York's correction law must be "a neutral and uniformly applicable rule of procedure," *Felder*, 487 U.S. at 141, "rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of the cause of action as applied to any given plaintiff," *id.* at 145 (quotations omitted).

New York's statute does not even arguably meet this neutrality standard. It does not apply uniformly; it applies only to damages claims against a particular group of the state's own employees. It is also very much rooted in polices that *are* related to a particular substantive cause of action. These policies are admittedly aimed at protecting a particular

group of state employees from damages claims.

Indeed, the statute only barely, in name only, even purports to be a procedural rule governing the courts, as New York's own statutory classification underscores. The statute is not codified with rules governing court procedures. It is codified with the state's substantive laws governing its Department of Corrections.

New York's rule, however, fares no better if it is evaluated as a substantive rule. Only last Term in *Chamber of Commerce v. Brown*, this Court confirmed the centrality of the neutral rule standard in the context of state substantive rules governing the use of their own funds. The majority found the California funding restriction at issue invalid because it viewed the state statute as "a targeted negative restriction on employer speech about unionization" rather than a "neutral affirmative requirement that funds be spent solely for the purposes of the relevant grant or program." 128 S. Ct. at 2415. The two Justices that dissented expressed no quarrel with the neutrality standard; they disagreed only that it had not been met. *Id.* at 2421 (Breyer, J., dissenting) (arguing that the statute's purpose was to maintain "neutrality on *contested* labor matters" and it had no demonstrated impact on "expenditure of *nonstate* funds").

Even if jurisdiction rules were considered an entirely different category, New York's statute cannot constitutionally be applied to federal claims as a neutral rule. *Howlett* specifically identified the

attributes of a neutral jurisdictional rule. A "neutral state rule regarding the administration of the courts" must "reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." 496 U.S. at 372, 381.

New York's statute has nothing to do with "concerns of power over the person and competence over the subject matter." New York's courts have power over the litigants here, and regularly hear almost identical cases. Correction Law §24 is not aimed at protecting New York's courts from being burdened with disputes that are unrelated to New York or with duplicative litigation. It is not aimed at avoiding inconsistent results, or ensuring that disputes are heard by courts familiar with their subject matter, or with any other goal "regarding the administration of the courts."

As New York's legislature, highest court, and Attorney General have repeatedly acknowledged, New York Correction Law §24 is intended to protect the state's corrections employees from private damages suits altogether and to offer an alternative, narrow state law right to victims (to obtain limited relief against the State under limited circumstances, by proceeding most often either *pro se* or with *pro bono* counsel).

Neutral jurisdictional rules are illustrated by the four state jurisdictional rules this Court has upheld as valid bases for declining to entertain a federal claim. *Howlett*, 496 U.S. at 374-75 (reviewing the

first three – the fourth had not yet been decided – and noting that "Each of them involved a neutral rule of judicial administration," *id.* at 374).

The first of these neutral rules uniformly declined jurisdiction over cases in which neither party was a resident of the state. *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929). The second uniformly declined jurisdiction outside the geographical purview of courts afforded limited territorial jurisdiction. *Herb*, 324 U.S. 117. The third applied the subject-matter-neutral doctrine of *forum non conveniens* – ruled valid so long as the state declined jurisdiction over federal claims brought by non-residents for out-of-state disputes if "in similar cases" it "denies resort to its courts and enforces its policy impartially"). *Missouri ex rel. Southern Ry. Co*, 340 U.S. at 4. The fourth limited the appellate jurisdiction of the state's courts to final judgments, with minor exceptions. *Johnson v. Frankell*, 520 U.S. 911.

Johnson v. Frankel found Idaho's appellate jurisdiction rule neutral because: (1) the rule reflected concern with the administration of the state's courts by avoiding piecemeal review; (2) it applied to the vast majority of interlocutory orders; (3) it was not outcome-determinative because it did not determine the ultimate disposition of the case, and (4) it did not target civil rights claims against the State, unlike the notice-of-claim rule at issue in *Felder v. Casey*. 520 U.S. at 918 & n.9, 919-21. Indeed, the Court noted that the rule subjected Idaho and its employees to possible "overenforcement of

federal rights" under Section 1983 because it postponed review of their qualified immunity defense until the trial court issued a final judgment. *Id*. at 919-20.

New York's correction law lacks every one of these key characteristics. It does not reflect concern for the administration of the courts, as explained above. It applies to only a tiny fraction of otherwise similar claims. It *does* determine the ultimate disposition of the case because it requires immediate, and permanent, dismissal. And it targets civil rights claims against the State *in the same way* that the notice-of-claim rule at issue in *Felder* did – by targeting claims against state employees.

2. Instead, the statute resembles those rules the Supremacy Clause does not permit to be applied to federal claims.

Unlike any of the state statutes upheld as neutral rules, New York's correction law is addressed to a limited subset of claims defined by the plaintiff, the defendant, the relief requested, and the specific allegations. It excises jurisdiction only if the plaintiff is a private party, the defendant is a state prison employee, the action seeks damages, and the conduct at issue is adjudged to be within the scope of the defendant's state employment and in the discharge of his state employment duties (as determined under state law). Further distinguishing New York's statute from any of the statutes upheld as neutral rules, the state legislature enacted the law to pursue a policy contrary to Congress'.

New York's correction law, therefore, has all the indicia of the state rules this Court has found inapplicable to federal claims under the Supremacy Clause "whether the question is framed in pre-emption terms" or "in the obligation to assume jurisdiction over a 'federal' cause of action." *Howlett*, 496 U.S. at 375.

For example, New York's statute has the same "defendant-specific focus" as the notice-of-claim requirement *Felder* decided could not be applied to Section 1983 claims, noting that this focus "serves to distinguish it, rather starkly, from rules uniformly applicable to all suits . . . ." 487 U.S. at 145. The New York "law's protection extends only to governmental defendants" and therefore shields "the very persons and entities Congress intended to subject to liability." *Id*. at 144-45. This "burdening of a federal right" is therefore "not the natural or permissible consequence of an otherwise neutral uniformly applicable state rule." *Id*. at 144.

Likewise, it "is imposed only upon a specific class of plaintiffs – those who sue governmental defendants," like the notice requirement *Felder* found preempted. *Id*. at 145. Moreover, here, New York permits its own Attorney General to sue such defendants for damages over such conduct, but not private parties.

New York's statute also "predictably produce[s] different outcomes in §1983 litigation based solely on whether the claim is asserted in state or federal court," because claims asserted in state court will

inevitably be dismissed at the outset, and claims asserted in federal court will be considered. *Id.* at 138. This Court ruled that even the rule at issue in *Felder* which only "frequently" would produce different outcomes, *id.* – compared to New York's which *necessarily* produces different outcomes – is impermissible because a "law that predictably alters the outcome of §1983 claims depending solely on whether they are brought in state or federal court within the same State is obviously inconsistent with th[e] federal interest in intra-state uniformity." *Id.* at 152.

"States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts." *Id.* at 141. *See also Johnson v. Frankell*, 520 U.S. at 920-21 (confirming *Felder*'s focus on the outcome-determinative nature of the state rule and explaining that the Idaho rule at issue was a permissible neutral rule because it would not "produce a final result different from what a federal ruling would produce.")

Most importantly, New York's statute is premised on the state's view that suits Congress expressly permits are bad policy. This Court has repeatedly ruled that such rules may not be applied to defeat federal claims.

Testa v. Katt, for example, found a Rhode Island withdrawal of jurisdiction premised in established state policy inapplicable to federal claims because "a state court cannot refuse to enforce the right arising from the law of the United States because of

conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." 330 U.S. at 393 (quotation marks omitted). As here, the Rhode Island courts had adequate and appropriate jurisdiction and could hear similar claims requesting different relief. *Id.* at 394.

The state law that *Felder* ruled inapplicable to federal claims was also "firmly rooted in policies very much related to, and to a large extent directly contrary to, the substantive cause of action provided those plaintiffs." 487 U.S. at 145. *Howlett* as well rejected a state rule that was said to be based on Florida's "ancient common-law heritage." 496 U.S. at 383 ("as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage"). The Court emphasized that state *policy* is no defense. *Id.* at 371 ("The suggestion . . . therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible").

Thus, the state rules analogous to the New York statute are those this Court has consistently ruled may not constitutionally be applied to federal claims.

3. The statute cannot be saved as a means of excluding frivolous actions.

Whether New York's Attorney General, and possibly the court below, are correct that the legislature's purpose is also to weed out meritless prisoner suits, *see* NYAG Cert. Opp'n 10 and J.A. 69,

the statute is not a neutral method of doing so. Nothing in the statute provides the state's courts with any power to sift through claims to determine whether they have merit or not. To the contrary, the statute requires dismissal of valid and important prisoner suits along with those that lack merit. It also requires dismissal of damages actions brought by visitors to prisons or by state corrections employees against their supervisors, regardless of the merits of each action.

This Court has addressed questions of states' power to protect their courts and employees from frivolous suits and has repeatedly explained that the neutral rule requirement applies with full force. *Howlett*, for example, rejected such a defense of the Florida rule at issue because a state's power to "adopt neutral procedural rules to discourage frivolous litigation of all kinds" does not permit a state to "declar[e] a whole category of federal claims to be frivolous." 496 U.S. at 380.

Burnett v. Grattan also specifically rejected such a defense of a state rule applicable solely to Section 1983 claims, because the contention that "some reasonable protection from the seemingly endless stream of unfounded . . . lawsuits" is needed "reflects in part a judgment that factors such as minimizing the diversion of state officials' attention from their duties outweigh the interest in providing [claimants] ready access to a forum to resolve valid claims." 468 U.S. 42, 54, 55 (1984). "That policy is manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes." *Id.* at 55,

accord Felder, 487 U.S. at 149-150.

Congress' more recent promulgation of special procedural rules for prisoner suits, designed to "filter out the bad claims and facilitate consideration of the good," does not change the impermissibility of New York's alleged approach. *Jones v. Bock*, 127 S. Ct. 910, 926 (2007) (reversing Sixth Circuit decision because that court had imposed rules to implement these provisions that were "different and more onerous" than those Congress chose). *Congress* determined which methods were consistent with its purposes, and New York's correction law bears no resemblance to the methods Congress permits. New York requires its courts to dismiss virtually every single prisoner damages action – without *any* review of the merits of the claim. In contrast, Congress provided for early judicial screening of the merits and dismissal *only* of those claims that are frivolous, malicious, fail to state a claim or are barred by immunity under federal law. New York has no authority to disregard the balance among deterrence, redress and early dismissal of frivolous suits that Congress carefully chose.

C. The Statute Is Not "Neutralized" By Its Application to Identical Subsets of State and Federal Claims.

The decision below erred in confining neutrality to a simple requirement that states must enforce the same substantive policy judgments with respect to both state and federal claims. This left New York with the power to resist federal law with which it

disagreed, by carefully excising a narrow sliver of claims from its courts' jurisdiction.

The decision turns the supreme law of the land into a menu from which states may freely pick and choose, depending on their own priorities and views. If they agree with Congress, their own laws will – or can easily be made to – impose the same rule on state claims. If they conclude that Congress has taken a foolish or dangerous path, they can insulate their resistance by avoiding the same path under state law.

This crabbed reading of neutrality is also wholly inconsistent with this Court's precedent. Although some of the state rules the Court has found inapplicable to federal claims under the Supremacy Clause have applied solely to federal or "foreign" claims; others have applied equally to both state and federal claims within their scope.

The California statute that *Martinez* ruled could not constitutionally be applied to §1983 claims was a statute the state applied identically to both state and federal claims against the same government officials. 444 U.S. at 279, 284 (explaining that the statute "is valid when applied to claims under state law," but "does not control [the §1983] claim even though the federal cause of action is being asserted in the state courts").

Likewise, the Pennsylvania rules that *Monessen Southwestern Railway Co.* concluded "were improperly applied to this FELA action" were rules

the state applied identically to both state and federal claims. 486 U.S. at 342.

The Wisconsin procedural rule that *Felder* ruled "must give way to vindication of the federal right when that right is asserted in state court" was also a rule the state applied identically to both state and federal claims. 487 U.S. at 153.

Furthermore, *Howlett* specifically confirmed that the result in *Felder* would have been exactly the same if the Wisconsin rule had been fashioned as a jurisdictional rule, like New York's. Indeed, the Court expressly noted that Wisconsin could not salvage the notice requirement at issue in *Felder* by amending it "to provide that no state court would have jurisdiction of an action in which the plaintiff failed to give the required notice." 496 U.S. at 383.

Howlett also clarified – with respect to the Florida rule before it – that the disparity between its application to state and federal claims was not the *sine qua non* of its ruling that the rule was invalid as to federal claims. As *Howlett* explained: "To the extent that the Florida law . . . reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law." 496 U.S. at 377-78.

New York's statute similarly reflects a substantive disagreement with the extent to which certain governmental employees should be held liable for their constitutional violations. It is not

neutral in form, effect, or purpose. That New York applies it to the identical sliver of state and federal claims, in pursuit of the same substantive goals, should not have saved it. "The Supremacy Clause requires more than that." *Howlett*, 496 U.S. at 383.

CONCLUSION

For the reasons stated above, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

Of Counsel
Nory Miller

DECHERT LLP
Cira Centre
2929 Arch St
Philadelphia, PA 19104
(215) 994-4000

Jason Murtagh*
Gary Mennitt
Jennifer Rellis
DECHERT LLP
Cira Centre
2929 Arch St.
Philadelphia, PA 19104
(215) 994-4000

**Counsel of Record*

August 14, 2008