No. 07- 10374

In the Supreme Court of the United States

KEITH HAYWOOD,
Petitioner,

v.

CURTIS DROWN, ET AL.
Respondents.

On Petition for Writ of Certiorari
To the New York Court of Appeals

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

Prisoners' Legal Services of New York (PLS), a not-for-profit organization providing civil legal services to indigent inmates in New York State prisons, has been providing legal assistance to inmates for thirty-one years. PLS receives over 10,000 requests for assistance annually and serves as legal counsel to inmates on a variety of claims in the state and federal courts, including claims of excessive force, deliberate indifference and violations of due process. There are approximately 63,000 individuals in New York State prisons. PLS has a significant interest in insuring that they have the same opportunity to have their claims of constitutional wrongs adjudicated by state or federal courts, as other individuals in New York State.

The Legal Aid Society, a private, non-profit organization, has provided free legal assistance to indigent persons in New York City for over 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of their legal rights. The Society advocates on behalf of prisoners in New York state prisons and New York City jails, and where necessary, conducts class action litigation relating to prison conditions and mistreatment of, and violence against, prisoners.

The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1,500 public defenders, legal aid attorneys, 18-B counsel, private practitioners and others throughout the state. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center, offering legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York. Many of the clients of the public defense attorneys that are supported by NYSDA have been sentenced to incarceration in state prison. These individuals should have recourse to litigate federal civil rights claims in state supreme court when they have been victimized in prison.

Claudia Angelos is Professor of Clinical Law at New York University School of Law and Director of the law school's Civil Rights Clinic. Together with students who act as attorneys under her supervision, she has litigated dozens of civil rights cases involving misconduct by New York State correction officers. She teaches in the area of prisoners' rights.

[1]The parties' letter of consent to the filing of this brief has been lodged with the Clerk. Under Rule 37.6 of the Rules of the Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation and submission of the brief.

The Center for Community Alternatives ("CCA") is a private, non-profit organization that promotes reintegrative justice and a reduced reliance on incarceration through advocacy, services, and public policy development in the pursuit of civil and human rights. Many CCA clients are facing potential prison sentences, have been imprisoned, or are currently incarcerated in New York State prisons. Much of CCA's work focuses on helping individuals successfully reintegrate into the community after incarceration, and there is no question that the conditions of an individual's confinement are a factor that informs the individual's ability to successfully reintegrate. As an organization that works with those who have been incarcerated, CCA has an interest in ensuring that such individuals have a full opportunity to vindicate – in state or federal court – any violations of their civil rights that occurred while in prison.

The Uptown People's Law Center ("UPLC") is a not-for-profit legal services center serving poor and working people in Chicago, Illinois. In addition to its legal work for community residents, UPLC represents prisoners in challenges to prison conditions, the parole system, and a variety of other matters. UPLC receives over 5,000 requests for representation every year, and has one of the largest dockets of prison cases in Illinois. UPLC files cases, and provides advice to prisoners litigating their own cases, in both federal and state courts. UPLC has a

vital interest in ensuring that state courts remain available to prisoners seeking to challenge the unlawful conduct of prison officials.

Forty-two U.S.C. §1983 was enacted to provide a remedy to the victims of civil rights violations where state law offered them inadequate protection. New York State's Correction Law §24 creates a subcategory of civil rights victims who are prohibited from seeking damages in state court for wrongs done to them by employees of the New York State Department of Correctional Services (DOCS). Our principal concern as *amici curiae* is that the New York State Court of Appeals (Court of Appeals) has erroneously characterized Correction Law §24 as a subject matter jurisdiction statute in an attempt to salvage a statute that creates an unconstitutional barrier to the litigation of federal civil rights claims in state supreme court, a court of general jurisdiction. If upheld, the decision below paves the way for the enactment of other such statutes in New York State and elsewhere that have the effect of significantly limiting relief under 42 U.S.C. §1983 for unpopular populations of civil rights victims.

Each of the amici represents numerous prisoners who seek relief in state courts. All share a concern that allowing the Haywood decision to stand will result in a significant curtailment of prisoners' ability to obtain redress for serious injuries caused by unconstitutional conduct by corrections officials.

SUMMARY OF THE ARGUMENT

Correction Law §24 closes the door of *every* New York State Court to civil actions, including actions pursuant to 42 U.S.C. §1983, for money damages against prison employees. Although New York supreme courts have the jurisdiction over §1983 claims against all other state employees – and over such actions against DOCS employees for declaratory and injunctive relief – the New York Court of Appeals in this case held that Correction Law §24 carves out an exception for DOCS employees by prohibiting §1983 actions for damages against DOCS employees in state court. The lower court has denominated this exception a subject matter jurisdiction limitation when, in reality, Correction Law §24 is an impermissible attempt by the State to grant immunity to DOCS employees.

While the state Court of Claims is available to prisoners seeking compensation for certain injuries under state law, the court does *not* have jurisdiction over individual prison employees, does *not* have jurisdiction to award damages against prison employees, and does *not* have jurisdiction over claims alleging violations of federal constitutional rights. Section 24 thus effectively grants prison employees absolute immunity from suits for damages in ***any*** state court in New York.

This immunity extends to all DOCS employees, whether the plaintiff is a prisoner alleging that prison officials were deliberately indifferent to serious medical needs, a DOCS employee alleging that his supervisor discriminated against him, or a citizen alleging that he was subject to an unreasonable search and seizure.

In holding that Correction Law §24 is a permissible jurisdiction-limiting statute, the Court of Appeals misapplied the standard set by this Court for determining whether a state has demonstrated a valid excuse or neutral rationale for its refusal to hear a federal cause of action. In addition, the Court of Appeals erred in interpreting this Court's decisions barring discrimination against federal claims. This Court should grant the petition for certiorari because allowing Correction Law §24 to be deemed a neutral and valid jurisdictional statute permits New York State and other states to enact similar statutes, thereby eroding the protections conferred by the United States Constitution and the Supremacy Clause.

APPLICABLE STATUTES AND LAW

Forty-two U.S.C. §1983 provides a remedy for individuals who have been deprived of their civil rights by persons acting under color of state law. *Monell v. Department of Social Services of City of New York,* 436 U.S. 658 (1978). It states:

> 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. . . .

Article VI, clause 2 of the Constitution, the Supremacy Clause, states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

This Court stated in *Howlett v. Rose,* 496 U.S. 356 (1990):

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much the laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Howlett v. Rose, 496 U.S. 356 (1990), *citing Claflin v. Houseman,* 93 U.S. 130, 136-137 (1876). Consequently, state and federal courts have concurrent jurisdiction over §1983 actions and a commensurate duty to enforce federal law. *See Howlett,* 496 U.S. 356, *citing Claflin*, 93 U.S. 130, 136-137; *see also Maine v. Thiboutot*, 448 U.S. 1 (1980); *Martinez v. State of California*, 444 U.S. 277 (1980).

New York Correction Law §24 provides in pertinent part that:

> 1. No civil action shall be brought in any court of the state . . . against any officer or employee of [DOCS], 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 [such] claim . . . shall be brought and maintained in the court of claims as a claim against the state.

I. REASONS FOR GRANTING THE PETITION

A. This Court Should Grant the Petition for Certiorari Because The Clear Purpose of Correction Law §24 Is To Immunize Certain State Employees.

The decision below frames Correction Law §24 in terms of permissible limits on subject matter jurisdiction when, in reality, it grants absolute immunity to prison officials from suits for damages brought in New York's courts. As Judge Jones stated in his dissent in this case:

> [I]f you strip away the veneer of the majority's arguments, section 24, a statute which, on its face, precludes anyone, including other DOCS employees and prisoners, from bringing damages claims against DOCS personnel - - is not a *neutral* jurisdictional barrier to a particular type of claim.

> In reality, section 24 functions as an immunity statute that allows state courts to selectively exclude prisoner suits for damages against DOCS personnel.

Haywood v. Drown, 9 N.Y.3d 481, 851 N.Y.S.2d 84 (2008). *See* Plaintiff's Petition for Writ of Certiorari, Appendix pp. 24a-25a.

To uphold its constitutionality, the New York Court of Appeals characterized Correction Law §24 – an obvious immunity-granting statute – as a subject matter jurisdiction statute, allowing it to disregard this Court's holdings that state courts cannot use a state created immunity defense to shield state employees from liability under federal statutes. In *Martinez*, this Court reasoned:

> A construction of the federal statute which permitted a state immunity defense to have a controlling effect would transmute a basic guarantee into an illusory promise; and the Supremacy Clause of the Constitution insures that the proper construction may be enforced. . . . The immunity claim raises a question of federal law.

Martinez, 444 U.S. 277, 284 n.8 (1980), *quoting Hampton v. Chicago,* 484 F. 2d 602, 607 (7th Cir. 1973). Ten years later, this Court reaffirmed its

position, stating that "a State cannot immunize an official from liability for injuries compensable under federal law." *Howlett,* 496 U.S. at 377.

Unlike true jurisdictional provisions, which funnel certain types of cases to particular forums, the statute at issue here forecloses all §1983 cases for damages against DOCS employees in state court.

If the decision below is upheld, other states may adopt similar immunity statutes disguised as jurisdictional limitations. It is imperative that this Court grant the petition for certiorari to correct the Court of Appeals' error and to ensure that other states do not attempt an end-run around this Court's clear direction that a state's immunity defenses cannot be used to defeat rights created by federal statutes.

B. This Court Should Grant the Petition For Certiorari Because the Decision Below Ignores This Court's Precedent Limiting A State's Right to Foreclose Jurisdiction Over Federal Claims.

This Court has held that state legislation that purports to limit a state court's jurisdiction over federal claims otherwise within the state court's purview is unconstitutional unless justified by a valid excuse or neutral reason. *Howlett v. Rose,* 496 U.S. 356, 381 (1990). Such legislation must be narrowly construed. *Howlett,* 496 U.S. at 381. Merely calling a rule jurisdictional does not divest a state of its obligation to enforce federal law. *Id.* The

rule must address "concerns of power over the person and competence over the subject matter." *Howlett,* 496 U.S. at 381. State policies involving *forum non conveniens*, the jurisdiction of state courts of limited jurisdiction[2] and access to state courts by nonresidents are the only instances where this Court found that the state had a valid excuse or neutral rationale for its refusal to hear a federal cause of action. *Howlett,* 496 U.S. at 381. Although Correction Law §24 does not address any of these concerns, the lower court nonetheless held it to be a permissible limitation on the "jurisdiction" of New York's supreme courts.[3]

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[2]New York state supreme courts are courts of general jurisdiction. *McKinney's Const.,* Article VI, §7. That jurisdiction is "original, unlimited and unqualified." *Kagen v. Kagen,* 21 N.Y.2d 532, 537 (1968) (internal citations omitted). The jurisdiction and purpose of New York's supreme courts is so comprehensive that it encompasses every conceivable cause of action. *People v. Luce,* 204 N.Y. 478, 487-88 (1912).

[3]While the court in this case characterized Correction Law §24 as establishing a neutral jurisdictional rule, in an earlier case it characterized the purpose quite differently, identifying its purpose as one to limit frivolous lawsuits by state prisoners. *Arteaga v. State of New* York, 72 N.Y. 2d 212, 219 (1988). The rationale of discouraging frivolous lawsuits is only permissible where the challenged statute is not preempted by federal law. *See Howlett,* 496 U.S. at 380. ("A State may not however, relieve congestion in its courts by declaring a whole category of federal claims to be frivolous.")

In *McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 233-234 (1934), this Court held that a jurisdictional limitation will be deemed valid and neutral where it does not discriminate against federal claims in favor of analogous state claims. Here, based upon a very narrow interpretation of this language, the lower court concluded that Correction Law §24 is constitutional because it bars federal *and* state damage claims from being filed against DOCS employees in state court.

Such a narrow reading of *McKnett* is questionable in light of this Court's later decision in *Martinez v. California,* 444 U.S. at 283-284 n.7. In *Martinez*, this Court held that "where the same *type of claim*, arising under state law, would be enforced in state courts, the state courts are not free to refuse enforcement of the federal claim." *Martinez,* at 238 n.7 (*emphasis added*). In New York, the supreme courts exercise jurisdiction over the *same type* of

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The court's earlier interpretation is supported by an amendment expanding the scope of Correction Law §24, currently being considered by the NY legislature to add Office of Mental Health (OMH) employees to the list of those who are shielded from lawsuits that may arise during their employment in a New York State prison. The Purpose of Assembly Bill A04208 and Senate Bill 332 is to "ensure that employees of the Office of Mental Health (OMH) who work in prison mental health units, receive the same *immunity* from civil damage actions as all other State employees who work in the prisons." (Emphasis added).

state and federal claims as were raised in this case against state police officers and other state employees in their personal/individual capacities[4] "and [are] fully competent to provide the remedies the federal statute requires." *Howlett*, 496 U.S. at 378. By failing to provide a forum in state court for

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[4]In New York State, an individual subjected to excessive use of force by a New York State employee, other than a DOCS employee, can file a lawsuit in supreme court for damages and can have his claim decided by a jury. *Prior v. County of Saratoga,* 245 A.D.2d 658 (3d Dep't 1977) (arrestee found to be prevailing party in state court action filed in supreme court alleging battery and civil rights claims against county for excessive use of force by officers in sheriff's department); *see also McCummings v. New York City Transit Authority,* 177 A.D.2d 24 (1st Dep't 1992) (jury awarded robbery suspect over $4.3 million after determining officer used excessive force); *Ott v. Barash*, 109 A.D.2d 254 (2d Dep't 1985) (plaintiff allowed to pursue action against state employee tort-feasor for negligence and intentional tort in the supreme court "even where the employee's tortious conduct was committed in the course of his employment"); *Harvey v. Brandt,* 254 A.D.2d 718 (4th Dep't 1998) (arrestee filed §1983 action against police officer in supreme court, alleging excessive force); *Farley v. Town of Hamburg,* 34 A.D.3d 1294 (4th Dep't 2006) (plaintiff filed wrongful death action against police officer alleging assault and battery, negligence and violation of constitutional and civil rights); *Nelson v. Town of Glenville*, 220 A.D.2d 955 (3d Dep't 1995) (plaintiff, father of minor, sued town and individual police officers alleging false arrest and assault and battery).

this limited category of federal claims, New York discriminates against §1983 claims brought against DOCS employees thereby violating the dictates of *Howlett*.

Correction Law §24 limits subject matter jurisdiction on a basis not "valid and neutral" under this Court's decisions, and New York state courts hear both §1983 claims and similar state law claims against similar state actors. Thus, if this Court determines that Correction Law §24 is a subject matter jurisdiction statute, it must also find that §1983 preempts Correction Law §24 because the state has no neutral reason or "valid excuse" for refusing to hear this subset of §1983 cases. *Howlett,* 496 U.S. at 380. A state policy that permits §1983 actions against some state employees for constitutional torts, but prohibits jurisdiction over other state employees for the same actions, "can be based only on the rationale that such persons should not be held liable for §1983 violations in the courts of the State." *Id.* That result is precisely what *Howlett* and the Supremacy Clause forbid.

C. This Court Should Grant the Petition for Certiorari Because Allowing the Decision Below to Stand Will Undermine This Court's Prior Decisions Barring Discrimination Against Federal Claims.

1. The decision below upholds a state statute that significantly burdens a federal right.

In *Felder v. Casey*, 487 U.S. 131 (1988), this Court struck down a Wisconsin Notice of Claim statute, holding that §1983 preempted the state statute. The Court found that the notice requirement "burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts," a burden that "is inconsistent in both design and effect with the compensatory aims of the federal civil rights laws." 487 U.S. at 141.

In analyzing whether a state rule limiting the enforcement in state court of a federal right is permissible, *Felder* focused on whether the rule was the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule. In finding that it was not, the *Felder* court concluded that the notice of claim rule was "imposed only upon a specific class of plaintiffs – those who sue governmental defendants – and, as we have seen, is firmly rooted in policies very much related to, and to

a large extent directly contrary to, the substantive cause of action provided those plaintiffs." *Felder,* 487 U.S. at 145. Such a "burdening of a federal right," held the Court, could not stand. *Id.* In so ruling, the *Felder* Court explained:

> Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court.

Felder, 487 U.S. at 153.

Correction Law §24 is an even more drastic restriction than the Wisconsin notice statute; it completely bars individuals whose civil rights have been violated by DOCS employees from bringing

§1983 claims for damages against those employees in state court where the employees' actions were "within the scope of their employment." *Haywood*, 35 A.D.3d 1290, 826 N.Y.S.2d 522 (4th Dep't 2006) *aff'd*, 9 N.Y.3d 481, 851 N.Y.S.2d 854 (2007). Nor can those individuals bring §1983 actions in the State Court of Claims because the State of New York is not a person within the meaning of the statute, *see Brown v. State of New York*, 89 N.Y.2d 172, 185 (1996), and because the Court of Claims will not entertain federal claims.[5] *Cavanaugh v. Doherty*, 243 A.D.2d 92 (1998) (holding that the state supreme court, not the Court of Claims, is the proper forum for actions under 42 U.S.C. §1983).

Correction Law §24 imposes additional burdens on individuals seeking to litigate §1983 cases against DOCS employees in state court. First, to obtain from the state courts the full relief to which victims of civil rights violations are entitled, victims of civil rights violations by DOCS personnel must sue in two different courts; for damages, in the Court of Claims on a state law tort theory, and for injunctive or similar relief, in state court via an Article 78 proceeding (*see* McKinney's Civil Procedure Law & Rules §7801 et seq.) or a §1983 action. Second, Correction Law §24 permits civil

[5]Even if the conduct of DOCS employees could be the subject of a §1983 in the Court of Claims, the notice of claim requirement, set forth in McKinney's Court of Claims Act §10, significantly shortens the limitations period for cases filed in the Court of Claims, thereby violating the Supreme Court's decision in *Felder v. Casey*, 487 U.S. 131 (1988).

actions in state court for damages against DOCS employees but only if the conduct at issue was not within the scope of employment. Thus, uncounseled, and often uneducated, prisoners risk having their claims dismissed if they incorrectly assess whether the defendants' conduct was within the scope of their employment.

That litigants who do not wish to bear these burdens in state court may resort to federal court is not an answer; the supremacy clause *obliges* state courts to hear federal claims *without discrimination.*

2. The decision below upholds a state statute that discriminates against a federal right.

In *Testa v. Katt*, 330 U.S. 386 (1947), the Rhode Island Supreme Court refused to hear a treble damages claim under the Federal Emergency Price Control Act, finding that the statute was penal in nature and reasoning that the state's policy against enforcement of statutes of other states and the United States permitted the state to refuse enforcement. *Id.* at 388, 392. The *Testa* Court held that Rhode Island had violated the anti-discrimination principle on two grounds. First, the Court noted, because a *similar* type of claim would be enforced by the State court if it arose under Rhode Island Law, a refusal to hear the federal claim violated principles of anti-discrimination. *Id.* at 394. Second, the refusal of the Rhode Island courts to hear this federal claim violated the

principles of anti-discrimination because the same courts enforced other Federal claims including claims for double damages arising under of the Fair Labor Standards Act. *Id.* at 394.

Most recently, this Court struck down a Florida state court decision dismissing a §1983 action against a school board on the basis of sovereign immunity. *Howlett*, 496 U.S. 356. The *Howlett* Court equated §1983 actions to general tort claims that were allowed to be filed against state entities. Concluding that "the Florida court's refusal to entertain one discrete category of §1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause," *id.* at 372, the Court emphasized that the Florida court "exercises jurisdiction over tort claims by private citizens against state entities (including school boards), of the size and type of petitioner's claim here, and it can enter judgment against them." *Id.* at 378.

Correction Law §24 prohibits state courts from adjudicating a subset of §1983 claims while cognate state law claims are litigated in the Court of Claims[6] and generically similar state law claims and

[6]The New York Court of Claims exercises jurisdiction over state tort claims, including *state* constitutional claims, *see e.g., Brown v. State of New York*, 89 N.Y.2d 172, 185 (1996), but "lack[s] jurisdiction to impose damages for a violation of the Federal Constitution." *Safran v. State of New York*, 2006-018-553, Claim Nos. 112556, 112611, Motion No. M-72239, *citing Zagarella v. State of New York*, 149 A.D.2d 503(1989); *Ferrick v. State of New York*, 198 A.D.2d 822 (1993); *De LaRosa*

§1983 claims against other state employees are regularly decided by the state supreme courts. *See Testa,* 330 U.S. 386. Thus, New York has done exactly what *Howlett* and *Testa* forbid: "refus[ed] to entertain one discrete category of §1983 claims, when the court entertains similar state-law actions against state defendants," *Howlett*, 496 U.S. at 372, and other similar federal law actions, *Testa*, 330 U.S. at 394.[7]

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v. State of New York, 173 Misc. 2d 1007 (1997).

[7]In commenting on the application of *Howlett* to New York's Correction Law §24, Professor Steven Steinglass writes: "The most flagrant example of a state court system selectively excluding §1983 cases is the refusal of New York courts to entertain §1983 actions against state correctional officials. . . . The Supreme Court's decision in *Howlett* undercuts the New York policy of precluding suits against correctional officers. The state policy is based on a substantive judgment that the state, as contrasted to state employees, should be liable for certain wrongful acts; but this state policy is not a neutral rule of judicial administration. Moreover, the willingness of New York to entertain other §1983 suits against other state employees, implicates the suggestion in *Howlett* that a state that opens its courts to some §1983 suits may not bar other §1983 suits." Steven H. Steinglass, "An Introduction to State Court Section 1983 Litigation," p. 153, in *Sword and Shield: A Practical Approach to Section 1983 Litigation* (3d ed. ABA 2006); *see also,* Steven H. Steinglass, *Section 1983 Litigation in State Courts*, Ch. 15:15 n. 23 (Thomson West 2007).

a. *Correction Law §24 discriminates against a federal right by denying compensatory and punitive damages.*

Section 1983 says that "every person" who under color of state law subjects another person to a violation of federal rights "shall be liable to the party injured in an action at law." Imposing personal liability for such injury implements core values set forth in our Constitution and sends a clear and vital message to anyone who would offend, under color of state law, the Constitutional rights of another. A finding of liability against the culpable "person" is the irreducible *sine qua non* of federal law, for which the states may not substitute their own policy choices. This point is far from formalistic. A judicial finding that an identified individual has to pay damages for violating the constitutional rights of another person carries with it a stigma that highlights the reprehensibility of the wrongdoer's conduct as well as the significance of the rights involved. When a damage award is issued against an agency, that stigma is lost.[8]

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[8]Although there are cases where the state may chose to indemnify a DOCS employee after there is a finding of wrongdoing, the stigma of being found liable in a public forum and being ordered to pay damages is still present. The public focus is on the person who committed the wrong and the damages that must be paid to compensate the victim. Often the public is unaware of the indemnification.

Punitive damages also serve a recognized purpose in §1983 litigation. "[T]he purpose of punitive damages is to punish the defendant and to deter him and others from similar conduct in the future." *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir.1992).

By prohibiting a civil rights victim of a DOCS employee from obtaining compensatory or punitive damages in state court from the individual who has violated his federal constitutional rights while allowing an award of such damages in other similar state law claims, Correction Law §24 discriminates against "one discrete category of §1983 claims." *Howlett*, 496 U.S. at 372; *see also Testa*, 330 U.S. 386.

b. *Correction Law §24 discriminates against a federal right by denying individuals whose civil rights are violated by DOCS employees the right to a jury trial and an award of attorneys fees.*

In a §1983 action, in state or federal court, a plaintiff has a right to a jury trial.[9] Congress has also authorized the award of attorneys fees to the prevailing party in a §1983 action. 42 U.S.C.

[9]Plaintiffs in §1983 actions in state supreme court are, in fact, afforded a trial by jury. *Barone v. City of Mount Vernon*, 170 A.D. 2d 557 (2d Dep't 1991).

§1988(b). Correction Law §24 mandates that any damage claim against a DOCS employee be pursued in the Court of Claims where there are no juries and no right to an award of attorneys fees. *McKinney's Court of Claims Act* §12(3) and §27. By excluding civil rights victims of DOCS employees from suing in state supreme court where they could have a jury trial and, if successful, an award of attorneys fees, Correction Law §24 discriminates against a federal right.

c. *Correction Law §24 discriminates against a federal right by failing to provide certain civil rights victims the right to a choice of forum.*

State and federal courts have concurrent jurisdiction over §1983 claims. *Allen v. McCurry*, 449 U.S. 90, 99 (1980), *citing Monroe,* 365 U.S. at 183; *see also, Thiboutot*, 448 U.S. 1 (1980); *Martinez,* 444 U.S. 277 (1980). Concurrent jurisdiction affords litigants a choice of forum, which "inevitably affects the scope of the substantive right to be vindicated before the chosen forum." *U.S. Bulk Carriers v. Arguelles,* 400 U.S 351, 359-360 (1971). The choice of forum is based on considerations such as the composition of the respective jury pools, the plaintiff's geographic location, the cost of litigation, including filing fees, the complexities of the applicable rules of civil procedure, access to counsel, etc.

Most civil rights plaintiffs do have a choice of forum and can file their actions in either state or federal court. But the victim of a DOCS employee who seeks to litigate his entire civil rights claim in one court and to receive all the relief available under §1983 in one action, can only file his action in federal court.

In some cases, Correction Law §24 not only discriminates against a federal right but can also result in a complete denial of access to the courts. The three strikes provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. Section 1915(g), prohibits a prisoner from proceeding *in forma pauperis* in federal court unless he is "under imminent danger of serious physical injury" where the prisoner has brought three or more actions in federal court that have been dismissed because they were frivolous, malicious or failed to state a cause of action. *Id.* In upholding the provision's constitutionality, at least one court has relied in part on the availability of state courts to hear federal claims. In *Wilson v. Yaklich*, 148 F.3d 596, 605 (6th Cir. Ohio 1998), the court held:

> Both as written and as applied in this case, § 1915(g) does not infringe upon the fundamental right of access to the courts. The plaintiff, despite being barred from bringing his present § 1983 claims in federal court as an indigent, still had available to him at the time of the initial filing the opportunity to litigate his federal constitutional causes of action in forma pauperis in state court. *See Patsy v. Board of Regents of Florida, 457 U.S. 496, 506-07, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982).* As long as a judicial forum is available to a litigant, it cannot be said that the right of access to the courts has been denied. *Hampton, 106 F.3d at 1285.*

Conversely, Correction Law §24 denies a judicial forum to a New York prisoner who is indigent and has had the requisite three dismissals, thus denying him access to courts in the most literal sense.

D. This Court Should Grant the Petition for Certiorari Because Allowing the Lower Court's Decision To Stand Encourages the Passage of Other Statutes in New York and Across the Country That Undermine the Supremacy Clause and Principles of Federalism.

If the decision below is allowed to stand, nothing will stop other state agencies in New York and elsewhere from limiting their exposure to civil liability through statutes barring damage claims against their employees in state court. Although this Court has never held that states *must* entertain 42 U.S.C. §1983 actions, it has held that allowing states to pick and choose which state actors should be subject to §1983 liability effectively undermines the

very purpose for which the statute was enacted. *Howlett,* 496 U.S. at 372.

Our system of judicial federalism provides dual protection to citizens under both the Federal and state constitutions. The state courts play a vital role in interpreting and enforcing the Federal Constitution. As this Court stated in *Immuno AG v. Moor-Jankowski*:

> When the Court reviews a question of Federal constitutional law. . . . it acts as part of a larger judicial system embracing not only New York but the Nation as a whole. . . .[I]t is important that State courts participate in the Nation's court structure. They have much to contribute to the Supreme Court's determination of Federal law by addressing the issues thoroughly and persuasively and providing local perspectives for the development of constitutional rules.

Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 260 (1991).

Correction Law §24 violates the principles of federalism by largely preventing New York state courts from analyzing federal constitutional issues that arise from the operations of the state prison system. *Thiboutot*, 448 U.S. 1 (1980).

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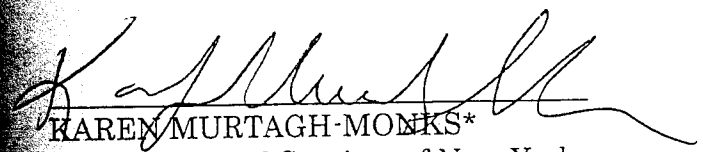
Respectfully submitted,



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