No. 07-___

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

PETITION FOR A WRIT OF *CERTIORARI*

Of Counsel
Nory Miller

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

Jason Murtagh*
Gary Mennitt

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

**Counsel of Record*

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?

RULE 14.1(b) STATEMENT

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

APPENDIX

Page

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

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, App. 1a, are reported at 9 N.Y.3d 481 (N.Y. 2007). The judgments of the New York Supreme Court, Appellate Division, 4th Department, App. 24a & App. 26a, 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, App. 28a & App. 29a, are unreported.

JURISDICTION

The New York Court of Appeals issued its decision on November 27, 2007. On January 30, 2008, this Court granted petitioner an extension for filing a petition for a writ of certiorari to and including April 25, 2008. App. 30a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

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 enacted a statute that precludes prisoners from bringing most Section 1983 actions for damages against state prison employees in its courts of general jurisdiction. The state defends its statute on the ground that such lawsuits are bad policy, that they are frivolous and may interfere with state operations and state officers. The question is whether the Supremacy Clause permits states to deny access to their courts of general jurisdiction because they disagree with Congress about the overall value of such litigation – especially in light of this

Court's teachings in *Howlett v. Rose*, 496 U.S. 356 (1990), *Felder v. Casey*, 487 U.S. 131 (1988), and *Martinez v. California*, 444 U.S. 277 (1980).

New York's statute is codified as part of the state's substantive corrections laws. It creates a narrow exception to the jurisdiction of the state's courts, including its courts of general jurisdiction, in order to protect the state's corrections officers and operations. Under its terms, no private civil action may be brought in the state's courts against New York Department of Corrections' employees in their personal capacities, if the action seeks damages and alleges conduct adjudged, under state law standards, to be within the scope of employment and undertaken or omitted in the discharge of an employee's duties. *See* N.Y. Correct. Law § 24 (1).[1]

Every manner of related and equivalent action, however, may be brought in a New York supreme court, a court of general jurisdiction. These trial courts may hear all types of intentional and other tort claims. *See* N.Y. Const., art. VI, §7(a) (conferring jurisdiction over cases in law and equity to the state's supreme courts); *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

---

[1] State law standards for scope of employment do not, however, automatically exclude conduct undertaken under color of state law that violates federal statutes or constitutional provisions. *See, e.g., Cepeda v. Coughlin*, 513 N.Y.S.2d 528 (N.Y. App. Div. 1987) (finding action alleging excessive force in violation of due process and the Eighth Amendment barred by §24 because the use of force can be within the scope of employment). Under state law, so long as the conduct occurs when the corrections officer is on duty, it is likely to be viewed as within the scope of employment and in the discharge of his duties. *See Riviello v. Waldron*, 391 N.E.2d 1278, 1281 (N.Y. 1979) ("the test has come to be whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions") (quotations omitted).

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 state trial courts may also hear private civil actions for damages against any other state employees, including Section 1983 claims. *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).

These courts may even hear private civil actions against employees of New York's Department of Corrections, *if* (1) the actions allege conduct judged to be outside the scope of employment or the 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). Finally, New York's supreme courts have jurisdiction over the very claims Haywood asserted – actions for damages, against corrections employees, alleging conduct found to be within the scope of employment – *if* the suit is brought by the state's attorney general on behalf of the state rather than by a private party. *Id.*

New York's statute does not apply solely to prisoners' §1983 claims. It withdraws jurisdiction over this precise type of claim against these specific state employees whether brought under state or federal law. Nonetheless, except under the precise circumstances proscribed by Correction Law §24(1), New York's supreme courts have jurisdiction over the subject matter of Section 1983 suits and over the parties here – all of whom are New York residents. They also have the power to

provide the relief at issue – damages – and regularly do so.

The second provision of New York Correction Law §24 offers an alternative to suing corrections employees for damages. It permits prisoners to sue the State of New York for damages in the state's court of claims. *See* N.Y. Correct. Law §24(2).[2] In that sense, the statute represents the state legislature's determination that providing compensation for serious violations is acceptable policy but imposing a reputational, emotional and/or financial toll on these state employees is not. New York's view, therefore, is in direct contrast to Congress' view, which for more than a century has been that the better policy is to permit private parties, including prisoners, to sue individuals who – under color of state law – deprive them of their federal constitutional or statutory rights. *See* 42 U.S.C. §1983.[3]

The New York Attorney General explained that the state interest that

---

[2] New York thereby offers a state law alternative in *lieu* of the federal right conferred by Congress because Section 1983 suits may not be brought against a state. *See, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989).

[3] New York's Court of Claims also imposes various procedural limitations that do not apply to actions in the state's courts of general jurisdiction. Claimants are subject to a notice of intent requirement that shortens the statute of limitations from three years to 90 days. They have no right to a jury trial. They have no opportunity to seek punitive damages or an award of attorney fees. *See* N.Y. Ct. Cl. Act §§ 10(3), 10(3-a), 10(3-b), 12(3), 27; *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"). The Court of Claims is also limited to damages claims, such that any prisoner seeking both compensation and declaratory or injunctive relief would need to bring separate actions in different courts. *See* 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).

Correction Law §24 furthers is to "to ensure that corrections employees, when acting within the scope of their employment, are not inhibited in performing their difficult duties by the threat of voluminous, vexatious and often meritless prisoner suits against them for damages." Attorney General's Court of Appeals Brief 11-12.

The Attorney General explained further that the state statute furthers this important legislative policy because:

> The [Department of Corrections] employee is not named as a defendant in the suit, with the publicity that may attach; the employee is not served with process; the employee does not need to retain counsel or seek representation by the Attorney General under Public Officers Law §17; the employee does not have to answer the complaint; the employee does not have to seek indemnification by the State under §17 if damages are ultimately awarded; and there is no threat of attachments or liens on the employee's personal assets. By minimizing the employee's involvement in the suit, the statute markedly diminishes the ways in which a prisoner can harass and inhibit a [Department of Corrections] employee by the threat of personal damages liability.

Id. at 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)).

The Attorney General did not comment on the impact of "minimizing the employee's involvement in the suit" on the deterrence of future violations, a goal that led Congress to permit Section 1983 suits against employees directly. *See, e.g., Wyatt v. Cole,* 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails"); *accord Richardson v. McKnight*, 521 U.S. 399, 403 (1997).

State court proceedings. Keith Haywood, a prisoner in New York's Attica

Correctional Facility, filed two actions *pro se* in the Wyoming County Supreme Court in 2005, seeking damages under §1983 and state law against different Department of Corrections' employees for violations of his civil rights. His complaints alleged that the court had jurisdiction under Section 1983 and the Supremacy Clause and directed the trial court's attention to this Court's decisions in *Felder* and *Howlett*. App. 31a & App. 32a. His complaints expressly asserted that states do not have the power to confer immunity from federal claims and that a New York supreme court has general jurisdiction and is fully competent to provide the remedies permitted under Section 1983. *Id.*

New York's Attorney General, on behalf of the state corrections employees, filed motions to dismiss each case in late 2005, on the ground that New York Correction Law §24, as interpreted by some of the state's intermediate appellate courts, deprived the court of jurisdiction. Haywood filed a sworn affidavit on December 19, 2005, arguing that New York Correction Law §24's jurisdictional bar conflicted and interfered with Section 1983, and was therefore preempted under the Supremacy Clause. App. 33a.

The trial court dismissed both actions, in reliance on precedent from the state's intermediate appellate court, the Appellate Division. These orders were entered February 1, 2006. App. 28a and 29a. Haywood appealed the orders to the Appellate Division, also *pro se*, challenging the intermediate appellate precedent the trial court had relied on and asserting that the Supremacy Clause permitted his federal claims to proceed. App. 38a & App. 39a. He also moved to consolidate the

appeals for briefing and argument, which was granted. App. 27a. On December 22, 2006, the Appellate Division affirmed both orders of dismissal and expressly rejected the argument that the Supremacy Clause precluded dismissal of the §1983 claims, but did not explain why it had reached this conclusion. App. 24a; App.26a.

Haywood appealed to the Court of Appeals under a New York rule which permits such appeals as of right when the Appellate Division issues a final judgment that involves interpreting the state or federal constitution or when the only issue is the constitutionality of a statute. App. 40a; New York C.P.L.R. §5601. Haywood's notice of appeal explained that he was challenging Correction Law §24 because it conflicts with federal law – Section 1983. At the request of the Court of Appeals, the undersigned counsel undertook Haywood's representation.

The New York Court of Appeals Decision. On November 27, 2007, the state's highest court affirmed in a closely split decision, four to three. App. 1a. The majority ruled that Correction Law §24's withdrawal of jurisdiction over §1983 claims against Department of Corrections employees from New York courts did not violate the Supremacy Clause. App. 1a. It reasoned that the state jurisdictional bar did not discriminate against the federal right because it applies to both state and federal damage claims against state corrections employees. It therefore concluded that the statute merely erects a neutral jurisdictional barrier, which is constitutionally permissible. App. 8a-9a.

The majority further noted 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 such claims to be brought against the state in New York's Court of Claims. App. 9a & 10a.

The dissent, representing the views of three of the Court's seven judges, argued that the state statute "frustrates the purpose of, and is inconsistent with, section 1983." App. 11a. It considered significant that New York's supreme courts "have jurisdiction over the parties and the type of claim brought" and that Correction Law §24 "immunizes a select group of state employees from section 1983 damages claims." App. 11a. The dissent argued that the legislature's concern about meritless suits from prisoners, although real, could not supplant Congress' decision "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." App. 14a.

The dissenting judges rejected the majority's characterization of the state statute as a neutral rule of judicial administration because it did not reflect any concern about power over the person or competence over the subject matter that jurisdictional rules are designed to protect, citing *Howlett v. Rose*, 496 U.S. 356 (1990). App. 18a. Rather, "New York State supreme 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*

state employees (except those employed by [the Department of Corrections])." App. 19a & 20a (quotations and citations omitted). The dissent concluded that New York "cannot selectively refuse to enforce the federal claim." App. 20a.

The dissent agreed with the majority's characterization of the state legislature's policy. It nonetheless considered that policy unavailing, because "neither the state's policy judgment nor the purpose underlying such judgment qualifies as a neutral rule of judicial administration" that could "fall under the category of what could be a 'valid excuse.'" App. 20a, 22a.

The dissent also argued that the state statute – "which by its plain terms immunizes [Department of Corrections] employees from liability for certain conduct actionable under section 1983" – is unconstitutional because it "functions as an immunity statute that allows state courts to selectively exclude prisoner suits for damages against [corrections] personnel." App. 21a, 22a. For both reasons, the dissent concluded, the state statute is "constitutionally infirm under the Supremacy Clause." App. 23a.

REASONS FOR GRANTING THE PETITION

The New York Court of Appeals' decision is in severe tension with several decisions of this Court, affects many current and future litigants, and – if unchecked – is likely to embolden other states to selectively close their courts to those federal rights with which they disagree or to impose other burdens simply by applying their substantive legislative policies to preclude or burden identical narrowly delineated state claims. This Court's review is necessary to ensure adherence to this Court's rulings and greater uniformity in the application of the

Supremacy Clause by state courts, to clarify the limits on such jurisdictional maneuvering for all state legislatures and courts, and to alleviate a significant burden that affects and will otherwise continue to affect many thousands of litigants indefinitely.

I. THIS COURT'S REVIEW IS NEEDED TO RESOLVE THE SERIOUS TENSION BETWEEN THE DECISION BELOW AND THIS COURT'S *HOWLETT*, *FELDER*, AND *MARTINEZ* DECISIONS.

Although this Court has not reviewed a case presenting the *precise* question at issue here, its reasoning and elucidation of the governing legal principles in closely related cases are in irreconcilable tension with the New York's Court of Appeals' decision that New York's statute may constitutionally be applied to Section 1983 claims.

A. The Court of Appeals Effectively Upheld an Immunity Statute.

New York Correction Law §24 is, in purpose and effect, an immunity statute. It immunizes state corrections employees from liability for damages. The state legislature even refers to the provision in this way. For example, a pending draft bill to amend the statute to apply to an additional group of state employees states as its purpose: "To ensure that employees of the Office of Mental Health . . . receive the same immunity from civil damages as all other State employees who work in the prisons." http://public.leginfo.state.ny.us/menuf.cgi (Bill No. S332); http://assembly.state.ny.us (Bill No. A04208); *see, infra,* pp. 27-28.

New York's Attorney General, in *this* litigation, explained that the legislature's purpose in enacting New York Correction Law §24 was to protect state corrections employees from being sued. The Attorney General further specified that

the statute is intended to protect these state employees from being named as defendants, being served with process, needing to seek counsel, or being at any risk of being held liable and ordered to pay damages. *See, supra,* pp. 5-6.

And even the Court of Appeals recognized that the statute's effect, and underlying purpose, is the state's "assumption of responsibility" for the official conduct of corrections employees, because "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 arising from the discharge of official duties." App. 9a.

This Court has, however, made very clear that state immunity statutes may not constitutionally be applied to Section 1983 claims. *Martinez v. California* explained, in a unanimous opinion, that: "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. 277, 284 (1980). *Martinez* did not need to reach whether such state employees might be immune "as a matter of federal law," *id.*, because the Court concluded that the claimants had not stated a claim under Section 1983. *Id.* at 285. The immunity statute at issue in *Martinez* undisputedly applied to state law claims that were equivalent to Section 1983 claims, and was therefore not a state statute aimed at placing federal rights at a disadvantage in comparison to rights granted under state law.

This Court has twice confirmed and clarified the rule. *Felder v. Casey* noted: "we have held that a state law that immunizes government conduct otherwise

subject to suit under §1983 is preempted . . . ." 487 U.S. 131, 139 (1988) (citing *Martinez*). *Felder* explained further that such laws were preempted because "application of the state immunity law would thwart the congressional remedy," which itself establishes which immunities for state officials are consistent with Section 1983's purpose. *Id.* Two years later, *Howlett v. Rose* characterized the Court's "holding in *Martinez*" as "a State cannot immunize an official from liability for injuries compensable under federal law." 496 U.S. 356, 360 (1990). States are not free "to nullify for their own people the legislative decisions that Congress has made on behalf of all the People." *Id.* at 383.

Here, it is undisputed that the purpose and effect of New York Correction Law §24 is to immunize certain state employees from damages suits based on their actions as employees. The Court of Appeals did not explain why it did not find this dispositive. It recognized the state legislature's goal of shifting this responsibility from these state employees to the State as well as the effectiveness of the statute in doing so. The argument – that the statute immunizes state employees contrary to Congress' purposes and may not be constitutionally applied to federal claims – was presented to the Court of Appeals, and the dissent expressly adopted it. App. 21a. Thus, the decision below that Correction Law §24 is constitutional is in significant tension with prior decisions of this Court, that make clear that states may not immunize their employees from §1983 actions.

B. The Tension With This Court's Decisions Is Not Resolved By Any Distinction Between Substantive and Jurisdictional Rules.

The decision below cannot be reconciled with this Court's prior decisions on

the ground that New York's statute regulates its courts' jurisdiction rather than conferring immunity in a substantive rule. This Court's decisions leave no room to find that distinction relevant for preemption purposes. Both *Howlett* and *Felder* found the preemption precept recognized in *Martinez* applicable to state procedural rules. *Howlett* applied it to find a state jurisdictional rule unconstitutional. *Felder* applied it to a state pre-filing notification requirement, finding it unconstitutional even though it applied equally to claims against government defendants under federal and state law. Both explained that the constitutional infirmity was the state's apparent policy that was contrary to Congress.' Although *Howlett* addressed a rule directed only to federal claims, it reasoned that state policy "whether presented in terms of direct disagreement with substantive federal law or simple refusal to take cognizance of the federal cause of action, flatly violates the Supremacy Clause." *Id.* at 380-81.

Thus, *Howlett* establishes that state jurisdictional rules are not immune from preemption. *Felder* establishes that state procedural rules that interfere with Congress' purposes may not be applied to federal claims brought in state courts, even if the rules apply equally to state and federal claims. And *Martinez* makes clear that states may not shield their employees from federal claims, even when brought in state courts. The only gap left into which New York's statute could conceivably fit is if this precedent could be read to leave open the possibility that states may constitutionally immunize their employees from federal claims brought in state courts by carving exceptions to the authority of their courts of general

jurisdiction applicable to both federal and identical state law claims, even though states could not constitutionally contravene Congress' purposes in this manner by applying any other type of procedural rule to federal claims.

There does not, however, appear to be a principled basis for such a rule. *Felder*, for example, did not rule that the notification requirement may not constitutionally be applied to federal claims because the requirement was different in kind than a jurisdictional bar. It found the requirement preempted because it operated *like* a jurisdictional bar. *Felder*, 487 U.S. at 144 ("States . . . may no more condition the federal right to recover for violations of civil rights than bar that right altogether, particularly where those conditions grow out of a waiver of immunity").

Felder expressly recognized Wisconsin's power to impose the same impediment on state law claims, which Wisconsin – like New York – had done, but found Wisconsin's limited waiver of sovereign immunity "entirely irrelevant insofar as the assertion of the federal right is concerned," especially where "the purpose and effect of" Wisconsin's rule – like New York's – when applied to §1983 actions, is to limit "the very litigation Congress has authorized." *Id.* Thus, the Court of Appeals' justification for the New York statute as a conditional waiver of sovereign immunity – conditioned on suing the state itself in the Court of Claims – relies on the precise justification *Felder* rejected. App. 9a n.8.

C. The Court of Appeals Upheld a Jurisdictional Statute As Neutral That Did Not Reflect Concerns of Power Over Persons Or Subject Matter.

The Court of Appeals' conclusion that states have *carte blanche* in establishing the rules governing litigation in their own courts, so long as they are

even-handed between identical state and federal claims, App. 7a, is not consistent with this Court's teachings. To the contrary, this Court has consistently held that federal substantive law imposes limits on such rules *as applied to federal claims*. *See, e.g., Felder*, 487 U.S. at 138 (noting that states "may establish the rules of procedure governing litigation in their own courts" but that "where state courts entertain a federally created cause of action, the federal right cannot be defeated by the forms of local practice.") (quotations omitted).

Thus, states may not impose rules that "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quotations omitted). *Howlett* unanimously confirmed this principle, explaining that the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." 496 U.S. at 371. And *Howlett* specifically confirms that this principle governs jurisdictional rules. "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible. . . ." *Id.*

The Court of Appeals did not discuss whether New York violated this core principle, but it clearly had. By Section 1983's express terms, Congress subjected individual state employees to suits for damages and other relief for the actions they take under color of state law and provided the immunities it deemed appropriate. New York Correction Law §24 enforces the state's contrary policy that corrections employees should *not* be subject to damages suits for what they do as corrections

employees. The Attorney General confirms that the law reflects the legislature's deliberate policy choice to shield these employees from such suits. The current state legislature refers to the provision as providing "immunity" to corrections employees. The provision unquestionably has that effect. And the Court of Appeals acknowledges both this purpose and effect.

Thus, New York's statute may not be constitutionally applied to Section 1983 claims for the same reason *Felder* relied on and *Howlett* expressly confirmed. "The decision to subject state [employees] 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." *Howlett*, 496 U.S. at 377 (quotations omitted).

Moreover, *Howlett* expressly explained, in finding the Florida rule before it invalid, that its decision was not dependent on the fact that Florida's rule applied differently to state and federal claims. Rather, *Howlett* clarified: "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." *Id.* at 377-78.

1. New York's statute does not meet this Court's definition of a neutral rule.

Howlett identified as neutral jurisdictional rules only those rules that "reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." *Howlett*, 496 U.S. at 381. These, not enforcement of a contrary state policy, constitute a "valid excuse" for denying jurisdiction to a federal claim in a particular case. *Id.*

Neutral rules are also "uniformly applicable rule[s] 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. Recognizing limited exceptions does not defeat a neutral rule, *see Johnson v. Fankell*, 520 U.S. 911 (1997), but targeting rules to impose contrary state policy does. *Felder*, 487 U.S. at 141.

Howlett further illustrates what is meant by a neutral jurisdictional rule by emphasizing that on "only three occasions" had the Court found a state law to be a valid excuse for refusing to entertain a federal claim and that "[e]ach of them involved a neutral rule of judicial administration." 496 U.S. at 374. The first involved a rule declining jurisdiction over cases in which neither party was a resident of the state. The second involved a rule uniformly limiting the territorial jurisdiction of courts that were *not* courts of general jurisdiction. The third involved the doctrine of *forum non conveniens*, which the Court held could be applied so long as it did not discriminate against the federal claim. *Id.* at 374-75.

This Court has identified one additional permissible neutral rule since *Howlett*: Idaho Appellate Rule 11(a)(1) limiting its judiciary's appellate jurisdiction to final judgments, with minor exceptions. *Johnson*, 520 U.S. 911. *Johnson* upheld application of the rule in cases involving federal claims because: (1) the rule reflected concern with the administration of the state's courts; (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 state entities or state employees. *Id.* at 918 & n.9, 919-20. Indeed, the Court noted that the rule subjected the state and its officials to possible "overenforcement of federal rights" because the effect of the general rule was that denials of their qualified immunity defenses were not reviewable until they appealed the trial court's final judgment. *Id.* at 919.

None of the state statutes upheld as neutral rules are addressed to specific types of claims or plaintiffs. None protect government defendants specifically. And none are motivated by legislative policy contrary to Congress'. Because New York's statute is addressed solely to damages claims brought by private plaintiffs against certain government employees, the Court of Appeals' conclusion that it is, nonetheless, a permissible neutral rule seems in irreconcilable tension with *Howlett* and *Felder*.

2. New York's statute falls within the category of rules identified as invalid in *Felder* and *Howlett*.

This Court has identified state rules – like New York's – that enforce policies contrary to Congress' by, for example, applying solely to actions against government defendants as *not* "neutral and uniformly applicable rule[s] of procedure" that may constitutionally be applied to federal claims. *Felder*, 487 U.S. at 141. Indeed, *Felder* found that the Wisconsin procedural statute's "defendant-specific focus . . . serves to distinguish it, rather starkly, from rules uniformly applicable to all suits, such as rules governing service of process or substitution of parties . . . ." *Id.* at 145.

The Court considered dispositive that the statute's "substantive burden [is] imposed only upon those who seek redress for injuries resulting from the use or

misuse of governmental authority," which "thus conditions the right to bring suit against the very persons and entities Congress intended to subject to liability," and that it 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" by Congress. *Id.* at 141, 144-45. This "burdening of a federal right" was therefore "not the natural or permissible consequence of an otherwise neutral uniformly applicable state rule." *Id.* at 144.

Howlett expressly confirms this point, noting that the Wisconsin statute at issue in *Felder* was invalid – even though it also applied to both federal and state law actions against government defendants – because it interfered with and frustrated the substantive right Congress created. *Howlett* further emphasized that, although states have great latitude to establish the jurisdiction of their own courts, that power is not unlimited. "States may apply their own *neutral* procedural rules to federal claims, *unless* those rules are pre-empted by federal law." 496 U.S. at 372 (emphasis added). "An excuse that is inconsistent with or violates federal law is not a valid excuse." *Id.* at 371.

Moreover, *Howlett* explained that the constitution does not permit state court jurisdiction to be gerrymandered at the expense of federal claims. "A State cannot escape this constitutional obligation to enforce the rights and duties validly created . . . by the simple device of removing jurisdiction from courts otherwise competent," whether the rights were created by a different state or the Congress. 496 U.S. at 381 (quotations and citation omitted), 382 ("the same is true with respect to a state

court's obligations under the Supremacy Clause"). "The 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.

Howlett's point was not limited to jurisdictional rules which withdraw jurisdiction from federal claims while permitting jurisdiction over identical state law claims. To the contrary, the Court expressly noted that Wisconsin could not salvage the notice requirement at issue in *Felder* – a requirement that applied equally to state and federal claims – 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." *Id.* at 383. "The Supremacy Clause requires more than that." *Id.*

Because the New York statute at issue here applies solely to suits against government defendants in order to shift responsibility from state corrections employees to the State of New York – which is directly contrary to the right of action Congress provided in Section 1983 – the Court of Appeals' ruling that the state statute could be lawfully applied to dismiss Section 1983 claims from the state's courts of general jurisdiction is in severe tension with this Court's decisions.

Moreover, because the statute does so by "removing jurisdiction from courts otherwise competent," 496 U.S. at 381, it is particularly in tension with *Howlett*. As discussed *supra*, under New York's Correction Law §24, the precise right of action Congress bestowed on private parties is denied them but equivalent claims under state law are permitted to be brought by the state's Attorney General in New York's supreme courts. *See* New York Correct. Law §24(1). Thus, these state courts of

general jurisdiction are clearly competent to hear the subject matter and provide the requested relief. These courts also have jurisdiction over the parties here, all of whom are New York residents.

In addition, these courts regularly hear the class of actions – tort claims – that this Court has repeatedly identified as comparable to §1983. *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"). Further, they have jurisdiction to hear *most* Section 1983 claims, including: (1) Section 1983 claims against any non-corrections state employee; (2) Section 1983 claims against corrections officers that seek injunctive or declaratory relief; and (3) Section 1983 claims against corrections officers if they arise from conduct outside the scope of their employment.

D. The Court of Appeals Upheld a Statute That Is Inconsistent With the Federal Interest in Intrastate Uniformity.

The distinction the Court of Appeals attempted to draw between *Felder* and this case does not hold. That court distinguished the Wisconsin statute *Felder* found preempted because it "predictably produces different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court" which "upset the equilibrium the Supremacy Clause was designed to maintain" by subjecting Section 1983 claims in state courts to a rule "that would not apply if the action had been initiated in federal court." App. 8a n.7.

However, New York's statute operates identically. "[E]nforcement of [New

York's statute] in §1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court." *Felder*, 487 U.S. at 141. Many Section 1983 actions brought in state court will be dismissed that would not have been dismissed if brought in federal court because, like Wisconsin's statute, New York's "statute confers on governmental defendants an affirmative defense" that is not available "when such an action is brought in federal court." *Id.* at 144.

If the plaintiff seeks damages and the state court determines that the alleged conduct is within the scope of employment and occurred in the discharge of the state corrections employee's duties, the statute requires the action to be dismissed. Such limitations are not placed on §1983 suits against state corrections employees in federal court. As result, "[m]any civil rights victims" will "be barred from asserting their federal right to recovery in state court," who would *not* be barred if they had sued in federal court, *id.* at 146, upsetting "the equilibrium the Supremacy Clause was designed to maintain." App 9a n.7.

New York's statute bars claimants on *different* grounds by imposing *different* limitations on the federal right than Wisconsin's statute, but that does not appear relevant to a Supremacy Clause inquiry. New York's statute limits the federal right to suits for declaratory or injunctive relief, or for damages solely for conduct outside a corrections employee's scope of employment. Although these are not pre-conditions like the notice requirement enacted by Wisconsin, these limitations also

subtract from the rights Congress conferred and "predictably alter[] the outcome of §1983 claims depending solely on whether they are brought in state or federal court within the same State" – therefore, undermining the "federal interest in intrastate uniformity." *Felder*, 487 U.S. at 153.

As *Felder* explained, "Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations." *Id.* New York's statute, like Wisconsin's, is inconsistent with that entitlement because it is "designed to minimize governmental liability." *Id.* Indeed, New York's statute protects "the governmental officials responsible" from liability completely. Moreover, the purpose of the New York law – valid as applied to state law claims – is to also protect the state from liability for punitive damages, from liability for attorney fees, from fact-finding by a jury rather than the state's own judiciary, and from any suit filed more than 90 days after the alleged conduct occurred. New York even imposes a notice requirement, much like Wisconsin's. *See, supra,* p. 5 & n.3.

That New York's statute applies equally to state and federal claims against state corrections employees also does not distinguish it from Wisconsin's. *Felder* expressly noted that Wisconsin's statute "does not discriminate between state and federal causes of action against local governments," but nonetheless found it unconstitutional as applied to federal claims because it "discriminates against the precise type of claim Congress has created." *Id.* at 144-145. The Court of Appeals conclusion that "Section 24, therefore, does not discriminate against section 1983

actions" because it does not discriminate "solely because the suit is brought under a federal law" seems in irreconcilable tension with *Felder*, and with *Howlett*'s confirmation of *Felder*'s analysis and ruling.

II. THIS COURT'S REVIEW IS NEEDED TO PROTECT THE FEDERAL RIGHTS OF MANY THOUSANDS IN NEW YORK ALONE.

The decision below will have a sweeping impact. It settles the question of whether New York's statute excludes these Section 1983 claims from all New York courts. Absent this Court's reversal, it also settles its constitutionality in doing so. This barrier, erected by the state legislature and upheld below by the state's highest court, potentially – and indefinitely – affects all prisoners currently in New York's prisons and the tens of thousands of prisoners in New York's prison system in the future. New York currently has 70 state prisons with more than 63,000 prisoners. *See* www.docs.state.ny.us (reporting 69 prisons holding 62,300 prisoners plus one court-ordered drug treatment facility holding 902).

Absent review by this Court, tens of thousands of prisoners are being, and will continue to be, deprived of any access to state courts to sue state prison employees for damages in state courts for any violation of the rights guaranteed them under the United States Constitution. Indeed, on the day the New York Court of Appeals issued the decision below, it also dismissed an appeal of another inmate *sua sponte* on the basis of its decision in this case. *See Koehl v. Mirza*, No. 1041 (N.Y. Nov. 27, 2007).

In addition, New York's statute also precludes many claims by New York Department of Corrections employees. *See, e.g., Woodward v. New York*, 805

N.Y.S.2d 670 (N.Y. App. Div. 2005) (relying on New York Correction Law §24 to affirm the dismissal of a correction counselor's §1983 damages claims against the department, his immediate supervisors, and department management, alleging unconstitutional retaliation in employment decisions). Because New York's statute applies to any suit for damages against any officer or employee of the Department of Corrections, it also precludes suits alleging that particular supervisors or management discriminated on the basis of race, disregarded the requirements of the Family and Medical Leave Act, punished outside, unrelated political speech, or denied any of the other rights conferred by federal statute or the United States Constitution.

The Department currently employs approximately 31,500 people, and has recently sought additional funding from the legislature for hundreds of additional staff members. *See* www.docs.state.ny.us (follow Commissioner's 2008-09 budget testimony on Feb. 7, 2008); *id.* (follow Commissioner's closure testimony on Jan. 30, 2008); DOCS' Public Information Office (3/18/08 telephone call with Linda Foglio). Absent review, thousands of New York Department of Corrections employees are being, and will continue to be, deprived of any access to state courts to sue state prison supervisors and higher management for damages – even for deliberately violating their rights under federal law.

III. THIS COURT'S REVIEW IS NEEDED TO CLARIFY THESE ISSUES FOR ALL THE STATES.

A. Section 24 Presents a Tempting Template for States to Exclude or Burden Rights When They Disagree With Congress' Policies.

New York's Correction Law §24 provides an ideal template for states that

disagree with Congress, or even parts of the United States Constitution. It shows them how to close their courts to any federal rights they believe were unwisely provided, and more specifically, how to do so to protect their own governmental entities and employees. Under the decision below, all that is necessary is for the state's legislature to refrain from permitting the same narrow subcategory of claims under state and federal law. Legislatures would be able to conform to this template without excluding anything they wished to include in the first place, because they would hardly be inclined to permit claims under their own law that they believe Congress was wrong-headed to permit.

The decision below also arguably provides a template for state legislatures to impose special procedural burdens on litigants attempting to vindicate federal rights when their policy conclusions are different from Congress'. Again, following the decision below, they would simply impose the special procedural burden in the same narrow subcategory of cases, whether brought under state or federal law.

The New York State Assembly already has, under consideration, legislation extending Correction Law §24 to protect an additional group of state employees from suits for damages for conduct within the scope of that employment. *See* assembly.state.ny.us/leg (follow A04208). Bill No. A04208 would amend Correction Law §24 to cover officers and employees of the Office of Mental Health. OMH employees work in prison mental health units. The legislature overtly refers to the bill as providing immunity to these state employees in the title of the bill:

> An act to amend the correction law, in relation to conforming civil immunity protection for officers or employees of the office of mental

> health, with the protections afforded to others who serve in correctional facilities operated by the department of correctional services.

Id. See also, supra, p. 11.

In another state, such legislation might protect government personnel from being sued in state court for racial discrimination in hiring. In some states, such legislation might protect employees of the state's election board from being sued in state court for intentionally preventing eligible people from voting. In others, it might protect sheriffs from being sued in state court for any reason. The only limiting principle, under the Court of Appeals' decision below, is that the same restriction must apply to both federal and state law claims.

That states may be interested in protecting their own employees and governmental entities and in imposing their own policies, even when Congress has provided otherwise, cannot be doubted. *Martinez* addressed an immunity rule enacted by the California legislature to protect state parole officers. *Felder* addressed a Wisconsin statute imposing a notification rule before any action could be filed against a state or local governmental entity or officer. *Howlett* addressed a Florida ruling that the state's courts lacked jurisdiction to hear §1983 actions against state governmental entities.

B. Clarification Is Needed To Achieve Greater Uniformity Among State Courts.

The appellate courts of the various states do not apply *Howlett*, *Felder*, *Martinez*, and *Johnson* consistently to state statutes that apply to both federal and state law claims, even when the statutes reflect state policies contrary to Congress'.

For example, Oregon's Supreme Court, in reviewing a state statute intended to protect state governmental entities and employees for conduct within the scope of their employment, reached the opposite conclusion from the court's below. Even though the statute did not purport to apply solely to federal claims, the Oregon Court ruled it could not constitutionally be applied to Section 1983 claims. *See Rogers v. Saylor*, 760 P.2d 232 (Or. 1988) (ruling that the Oregon Tort Claims Act, which limited the liability of any public body or employee acting within the scope of employment or duties to $100,000 per occurrence and precluded punitive damages altogether, could not limit liability under Section 1983).[4]

In contrast, Illinois' courts, like New York's, have repeatedly upheld an Illinois statute that withdrew jurisdiction over state and federal discrimination claims – from the state's courts of general jurisdiction – because the state favors determination of such claims by its own agency, rather than the federal EEOC or courts. *See Blount v. Stroud*, 877 N.E.2d 49 (Ill. App. Ct. 2007), *appeal denied without opinion*, 1008 Ill. LEXIS 106 (Ill. Jan. 30, 2008) (Section 1981 claim arising from alleged racial and sexual discrimination); *Meehan v. Ill. Power Co.*, 808 N.E.2d 555 (Ill. App. Ct. 2004) (ADEA claim); *Brewer v. Board of Trustees of Univ. Ill.*, 791

---

[4] States have also relied on this Court's decisions in limiting the reach of other state laws. *See, e.g., Sanchez v. DeGoria*, 733 So. 2d 1103 (Fla. Dist. Ct. App. 1999) (ruling that state statute requiring claimants in any civil action to show they had a reasonable evidentiary basis for recovering punitive damages before they could seek punitive damages and relevant discovery could not be applied to Section 1983 claims); *Patel v. Thomas*, 793 P.2d 632 (Ct. App. Colo. 1990) (ruling that state jurisdictional statute that required prior exhaustion of state administrative procedures could not constitutionally be applied to state employees' federal discrimination claims).

N.E.2d 657 (Ill. App. Ct. 2003) (Section 1983 claims alleging discrimination based on race and disability against Board and individuals in both their official and individual capacities); *Faulkner-King v. Wicks*, 590 N.E.2d 511 (Ill. App. Ct. 1992) (Sections 1983, 1985, and 1986 claims arising from alleged gender discrimination and retaliation).

Illinois' statute may not be quite as egregious as New York's in that Illinois did not act solely to protect its own employees, but it did selectively manipulate state court jurisdiction to impose state agency control over a wide range of claims that Congress intended to be determined by a federal agency and the courts. *See* 775 Ill. Comp. Stat. Ann. 5/2-102; 5/3-102; 5/4-102; 5/4-103; 5/5/-102; 5/5A-102; 5/6-101; 5/8-111 (requiring discrimination claims to be adjudicated by the state's Department of Human Rights followed by appellate review under a highly deferential standard); *Mein v. Masonite Corp.*, 485 N.E.2d 312, 315 (Ill. 1985) ("the legislature intended by the Act to avoid direct access to the courts for redress of civil rights violations"); *accord Blount*, 877 N.E.2d at 61 ("The legislature's intent was also to create one administrative body to adjudicate all types of civil rights claims, whether they arose under state or federal law.").

The state jurisdictional statute did not reflect concerns about power over persons or subject matter. Illinois' circuit courts remained competent to hear tort actions and to order the types of relief sought in discrimination cases. Indeed, they remained competent to enforce orders issued by the state's Department of Human Rights in discrimination cases. *See* 775 Ill. Comp. Stat. Ann. 5/8-111(C). And

Illinois' appellate courts remained competent to hear discrimination claim appeals. *Id.* at 5/8-111(B).

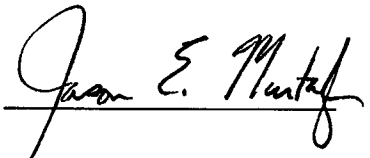
Like the New York Court of Appeals below, Illinois' courts have found the statute "neutral" because it treated federal and state discrimination claims alike and reflected the clear public policy of the state legislature. *See, e.g., Blount*, 877 N.E.2d at 61-62 (concluding that the state statute "does not discriminate against federal law but, rather, treats federal and state claims alike"); *Meehan*, 808 N.E.2d at 562-63 (finding "no discrimination against the federal" right because the statute also applied to state claims, and concluding that its decision is "supported by the clear public policy of the state" because the Illinois legislature did not want federal discrimination claims heard in Illinois courts); *Brewer*, 791 N.E.2d at 665-66 (relying on the Illinois statute's application to analogous state-law claims and emphasizing that the "codification of public policy is for the [state] legislature"); *Faulkner-King*, 590 N.E.2d at 518 (finding that when Congress uses state courts to enforce federal rights, "it must do so subject to all conditions which the State court imposes on other litigants").

This Court's guidance is needed to clarify whether states may substitute their own policies for Congress' so long as they treat the affected subcategory of state and federal claims identically.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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

Counsel of Record

Of Counsel

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

Dated: April 9, 2008