No. 07-10374

In the Supreme Court of the United States

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

On Petition for a Writ of *Certiorari* to the New York Court of Appeals

REPLY BRIEF IN SUPPORT OF 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

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REPLY BRIEF

Nothing in the New York Attorney General's opposition weakens the case for this Court's review or supports the New York Court of Appeals' decision. The Attorney General does not deny that the decision below limits the access of New York's prisoners to its courts to vindicate federal rights today, and foreseeably forever. He does not deny that it imposes the same limits on anyone else harmed by state corrections employees, including other corrections employees. *See* Pet. 25-28. He does not deny that the state legislature refers to the statute at issue as immunizing state corrections employees. And he does not deny that the effect of the statute *is* to immunize these state employees from most private damages suits.

The Attorney General also does not deny that New York's courts entertain Section 1983 suits under virtually all circumstances, including any Section 1983 suit brought against state employees who work for agencies other than the Department of Corrections. And he expressly concedes that New York's courts entertain even Section 1983 suits against corrections employees *if* the plaintiff asks for injunctive or declaratory relief, or asks for damages but the alleged conduct is ruled – under state law standards – outside the scope of employment. Opp. 6.

Finally, the Attorney General admits that New York's law is intended to protect its employees and operations, which he characterizes as minimizing damages claims against state correction employees, preventing their disruptive effect on state prison operations, and substituting New York State as defendant. *Id.* 10. Each is contrary to Congress' choice that people should be able to sue the actual

state employees who violate their federal rights.

Thus, it is undisputed that New York's courts generally hear Section 1983 suits, that the challenged state law limits and conditions one specific subcategory of these rights, and that the statute does so in furtherance of state goals inconsistent with Congress'. It is also undisputed that the decision below applies to prisoners and anyone else suing New York's corrections employees from now on, and that such complaints are plentiful and likely to remain so.

In arguing both that this case is not certworthy and that the court below was correct, the Attorney General has had to paint himself into a contradiction. His certworthiness argument is essentially that there is little impact on plaintiffs – their rights are preserved in other ways – but, simultaneously, he argues that the impact for New York is significant – their prison employees and operations are protected from claims. *Both* cannot be true. And they are not.

Nor are the legal principles at issue insignificant. The Attorney General, like the bare majority below, reads "valid excuse" to mean "states can do anything they want if they do it in the guise of jurisdiction." He, and the bare majority below, read the companion concept of "neutral rule" to mean "identical treatment for a small subcategory of federal and state claims" for *any* reason, even to protect the state's employees, operations and purse from the very claims Congress conferred. This *carte blanche* view of state power to reject federal claims which it does not like while opening its courts generally to Section 1983 claims, as well as tort claims, runs aground on this Court's careful explanations of the governing principles in *Howlett*

v. Rose, 496 U.S. 356 (1990), *Felder v. Casey*, 487 U.S. 131 (1988), and others.

Thus, the Attorney General's opposition only reinforces the importance of resolving the issues raised by the decision below. If those subject to unlawful conduct "under color of state law" in New York, or in similarly inclined states, are fully to enjoy the rights conferred by the United States Constitution and federal laws, this Court's review is critical.

ARGUMENT

1. The Attorney General's position – that the availability of federal courts for vindication of federal rights renders the constitutionality of state restrictions in state courts inconsequential – would have counseled against ever considering the constitutionality of such restrictions. Nonetheless, this Court has repeatedly considered, and often invalidated, these restrictions, even though – in every case – federal courts remained an available alternative forum. *See, e.g., Howlett v. Rose*, 496 U.S. 356 (1990); *Felder v. Casey*, 487 U.S. 131 (1988); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988); *Martinez v. California*, 444 U.S. 277 (1980); *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950); *Testa v. Katt*, 330 U.S. 386 (1947); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 234 (1934). The Attorney General's assertion that prisoners routinely file Section 1983 claims in federal court, Opp. 2, attests to the abundance of such claims and their statutory exclusion from New York's courts.

2. Likewise, the Court has made clear that a state's substitution of a right fashioned to suit its policies does not render the constitutionality of state

restrictions on federal claims in state courts inconsequential, or free the state from its obligations under the Supremacy Clause, by repeatedly finding such state substitutions or conditions on federal rights unconstitutional. *See, e.g., Howlett v. Rose*, 496 U.S. 356; *Felder v. Casey*, 487 U.S. 131; *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330; *Martinez v. California*, 444 U.S. 277.

a. To begin with, the Attorney General has mischaracterized the practical impact of New York's displacement of federal law with state law intended to protect the state's corrections employees, prison operations, and coffers.

Congress determined that the availability of damages suits against state employees who wield power unlawfully provides, in itself, a powerful deterrent to such misconduct. *See Wyatt v. Cole*, 504 U.S. 158, 161 (1992). New York's substitution of a Court of Claims action against the State of New York wholly undermines that goal and its value to those subject to abuses of state power. Those guilty of misconduct are not held to account in public and the deterrent value of being brought to court, with all that entails, is lost. Indeed, the acknowledged purpose of the state statute is to protect state corrections employees from the very risks Congress imposed to discourage misconduct.

The substitute state right that the Attorney General relies on is also far less protective of those harmed by misuse of state power than the federal right conferred by Congress. It includes a series of substantive and procedural restrictions aimed at protecting the State from liability in circumstances where federal law *would* impose liability on the state's employees.

For example, Section 1983 has a three-year statute of limitations. New York's substitute state rule has a notice of intent requirement that effectively shortens the limitations period to 90 days. *See* N.Y. Ct. Cl. Act §10(3). In addition, although Section 1983 permits plaintiffs to be awarded punitive damages, New York's substitute right precludes it. *Compare Smith v. Wade*, 461 U.S. 30 (1983), *with Sharapata v. Islip*, 437 N.E.2d 1104, 1105 (N.Y. 1982).

New York's substitute right also precludes awards of attorney fees, in contrast to federal law governing Section 1983 claims, which expressly provides for fee awards. *Compare* 42 U.S.C. §1988 (in a §1983 action, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs") *with* N.Y. Ct. Cl. Act. §27 ("nor shall counsel or attorney's fees be allowed by the court to any party"). Finally, New York's substitute right precludes jury trial, N.Y. Ct. Cl. Act §12(3), and puts a plaintiff seeking both compensation and injunctive relief to the additional burdens of bringing separate actions in separate courts, *see* N.Y. Ct. Cl. Act §9; *Silverman v. Comptroller*, 339 N.Y.S.2d 149, 150 (N.Y. App. Div. 1972).

Thus, the practical result of the challenged state statute is far from inconsequential, for both deterrence of misconduct and compensation to victims.

b. In any event, New York lacks the power to make this substitution. The Supremacy Clause, at the very least, means that states lack the power to override Congress' choice by forcing plaintiffs to resort to a different one. The Attorney General's defense of the statute on the ground that it serves New

York's interest in protecting state employees from most damages suits is at most an explanation, not a constitutionally cognizable valid excuse. *Congress* provided for suits against state employees, including suits for compensatory and punitive damages. "[T]he 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." *Howlett*, 496 U.S. at 371.

The Attorney General's argument that the New York legislature preferred a different solution than the one Congress devised is necessarily unavailing. "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 because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all." *Mondou v. New York*, 223 U.S. 1, 57 (1912); *accord Howlett*, 496 U.S. at 371 (confirming *Mondou*'s view); *Felder*, 487 U.S. at 143 ("The decision to subject state [employees] to liability for violations of federal rights, however, was a choice that Congress, not the [State] Legislature, made, and it is a decision that the State has no authority to override.").

c. The Attorney General's characterization of Section 1983 prisoner claims as frivolous and vexatious, Opp. 10, also cannot help him. First, this "justification" does not even fit the statute he is defending, because the challenged statute precludes not only the federal claims the Attorney General dubs

"frivolous" – prisoner claims – but also claims by other state corrections employees under Section 1983 or any other applicable federal statute.

Critically, this Court has already rejected this basis for states to decline to hear entire categories of federal claims. *Howlett* explains that although states may adopt neutral rules "to discourage frivolous litigation *of all kinds*," they "may not . . . declar[e] a whole category of federal claims to be frivolous." 496 U.S. at 380. *Accord Felder*, 487 U.S. at 149-50 ("a judgment that factors such as minimizing the diversion of state officials' attention from their duties outweigh the interest in providing claimants ready access to a forum to resolve valid claims . . . is manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes", *id.* at 150) (quotations omitted).

The Attorney General's citation to last Term's decision, *Jones v. Bock*, 549 U.S. 199 (2007), Opp. 10, is also unavailing. To the extent *Jones v. Bock* has any bearing at all, it argues against his position. The Court rejected a federal appellate court's implementation of provisions Congress enacted to protect against frivolous prisoner suits because the court had ventured beyond the restrictions Congress authorized. *That* certainly provides no support for the Attorney General's position that a state may venture so far beyond restrictions authorized by Congress as to refuse to hear a subcategory of federal claims Congress expressly provided.

3. The Attorney General's leap from "states are not required to entertain Section 1983 claims" to "states can gerrymander their jurisdiction rules to hear only those subcategories of Section 1983 claims they deem consistent with state policy" is

unsupported and unsupportable. The initial proposition is undisputed but irrelevant. New York's courts of general jurisdiction *are* open to most categories of Section 1983 claims, as well as a full range of analogous tort claims. But there is no basis for the illogical leap the Attorney General needs to defend Correction Law §24.

a. The early and mid-century cases the Attorney General cites do not support his leap. None of them address the critical issue the Attorney General needs to make this leap because none involve a state law that applies narrowly to particular federal and state claims, but not to similar ones. Thus, none counsel that a state may preclude a subcategory of federal claims from courts with jurisdiction over the parties and similar types of cases, because it views permitting such suits as bad policy, *if* it precludes the identical subcategory of state claims.

McKnett and *Mayfield* involved FELA claims brought by non-residents against non-residents arising from events that occurred out-of-state. In both, this Court explained that states are free to deny jurisdiction to non-residents over federal law disputes arising outside their borders, but must do so on the same terms as they deny it to non-residents for out-of-state disputes generally. *Herb v. Pitcairn*, also a FELA case, ruled that a court of geographically limited jurisdiction could refuse to hear a federal case arising outside its geographical purview. The state had courts of general jurisdiction; the plaintiff simply filed in the wrong court. *Testa v. Katt* struck down a state court's refusal to hear a federal claim on the ground that the federal government was a foreign sovereign.

Thus, each of these cases addressed an across-the-board rule, leaving the only

question whether the rule was limited to federal claims or not. *McKnett*'s and *Testa v. Katt*'s were. *Mayfield*'s and *Herb v. Pitcairn*'s were not. None presented any occasion for this Court to address whether states may apply specific, substantive-policy-based rules to deny jurisdiction to a subcategory of federal (and identical state) claims because they disagree with Congress' policy of providing them.

b. This Court's more recent cases set forth principles that strongly indicate that states do not have this power. *Felder*, *Martinez* and *Monessen Southwestern Railway* rejected application of state rules to federal claims, even though the rules *also* applied to identical state claims. The Attorney General's attempt to distinguish the rulings is premised on the fact that neither involved a rule denominated as jurisdictional.

Howlett, however, specifically addressed this very question and said unequivocally that states cannot substitute their policies for Congress' by framing the vehicle as a rule of jurisdiction. "The fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." 496 U.S. at 381. "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.

Indeed, *Howlett* explained that the statute at issue in *Felder* would have been an equally invalid excuse if it had been jurisdictional. Noting that Wisconsin would otherwise be able to overrule *Felder* "by simply amending its notice of claims statute

to provide that no state court would have jurisdiction of an action in which the plaintiff failed to give the required notice. The Supremacy Clause requires more than that." *Id.* at 383.

But New York has done almost exactly that. It removed jurisdiction from its state courts for most actions against state corrections officers and limited jurisdiction for actions based on their conduct to plaintiffs who have given the state-prescribed notice, sued solely the State of New York and limited requested relief to compensatory damages. Moreover, it is undisputed that the courts from which New York removed jurisdiction had power over the parties, who were New York residents, and competence over Section 1983 actions generally.

Indeed, the Attorney General does not even attempt to argue that Correction Law § 24 – which is codified with the state's corrections statutes, not with its judicial administration ones – is motivated by a concern over the parties or subject matter. Rather, he explains that New York's law is intended to minimize damages suits against state correction employees, prevent their disruptive effect on state's prisons, and substitute the State as defendant. Opp. 10. All are manifestly contrary to Congress' intentions, which expressly provided rights of action against the state employees who violate a plaintiff's' rights. The only other goal the Attorney General identifies – "efficient administration of New York's finite judicial resources by . . . channeling this litigation into New York's Court of Claims, which has exclusive jurisdiction to hear, and expertise in adjudicating, damages claims against the State," *id.* 10-11 – would not even arise if New York did not deny the

right Congress conferred in order to substitute a quite different one under state law.

Thus, under the legal framework set forth in *Howlett*, which concededly did not decide a case factually parallel to this one, New York cannot escape its obligation under the Supremacy Clause by gerrymandering jurisdiction in this way. "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." *Howlett*, 496 U.S. at 381 (quotations omitted).

4. The Attorney General's failure to see the conflict between Oregon's application of the Supremacy Clause and New York's arises from the same myopia. *Rogers v. Saylor*, 760 P.2d 232 (Or. 1988), did not involve a rule denominated as jurisdictional. It ruled that a state statute capping compensatory damages and prohibiting punitive damages awards against state employees could not be applied constitutionally to Section 1983 claims. The statute, part of the state's tort laws, applied to both federal and state claims against state employees.

As *Howlett* noted about the statute at issue in *Felder*, the Oregon statute can easily be framed as a jurisdictional rule: denying jurisdiction to suits against state employees seeking more than $100,000 per occurrence in compensation or seeking punitive damages. *That statute*, of course, looks much like New York's, which denies jurisdiction to most suits against state corrections employees that seek damages. *Howlett* teaches that there is no distinction between Oregon's statute as enacted and Oregon's statute refashioned as a jurisdictional requirement for purposes of the Supremacy Clause. Moreover, Oregon would have reached the same

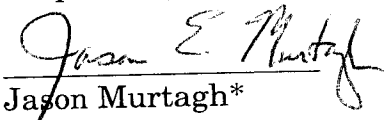
conclusion if the statute at issue *had* been denominated as jurisdictional, as underscored by *Barcik v. Kubiaczyk*, 895 P.2d 765, 772 (Or. 1995) (finding state jurisdictional rules inapplicable to plaintiff's Section 1983 claims under the Supremacy Clause because they did not reflect concerns of power over the person and competence over the subject matter).

Thus, Oregon and New York have, in fact, reached conflicting conclusions in applying the Supremacy Clause to whether such state rules may constitutionally govern federal claims.

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

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CERTIFICATE OF SERVICE

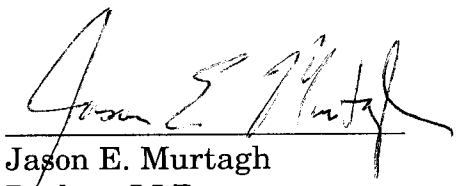
I, Jason E. Murtagh, a member of the Bar of this Court, certify that on May 22, 2008, I caused one copy of Petitioner's Reply Brief in Support of a Petition for a Writ of *Certiorari* to be served by Federal Express on counsel listed below. 28 U.S.C. § 2403(b) may apply and the Attorney General of New York was served in his capacity as counsel for respondents. I further certify that all parties required to be served have been served.

Barbara Underwood
Andrea Oser
Nancy A. Spiegel
Robert M. Goldfarb

120 Broadway
New York, New York 10271
Tel: 212-416-8016

Andrew M. Cuomo
Attorney General, State of New York

The Capitol
Albany, New York 12224
Tel: 518-473-6053



Jason E. Murtagh
Dechert LLP
Cira Centre
2929 Arch St.
Philadelphia, PA 19104
(215) 994-4000
Counsel for Petitioner Keith Haywood