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The Honorable Barack H. Obama
President of the United States
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Re: Jason Davis Case - Reconstruction Era Civil Rights Recaptured

Mr. President:

I hope this letter finds you well.

I know I face very long odds relative to the possibility that you will even see this letter.

I hope you do though because, if so, I truly believe that you will file some of the most profoundly important Federal Civil Rights legislation since the passage of the Reconstruction Era civil rights statutes themselves. This legislation will not only fill the gaping hole in Federal Civil Rights Act but it will assist in ameliorating the acute civil rights deprivations which this gaping hole has so clearly perpetuated in recent decades. The "fix" to the Federal Civil Rights Act is accomplished with but a few words the effect of which could never be undone by any Court.

I would treasure the opportunity to stand with you in the Rose Garden should you propose this historic Federal Civil Rights Act legislation. For the sake of our Nation; I pray that you do. I would also relish the chance to testify before a Congressional committee relative to this legislation.

The brutalization of my client, while he was an involuntarily committed inpatient in a Massachusetts Department of Mental Health facility, resulted from the rule of law articulated by the United States Supreme Court in Will v. Michigan Department of State Police, 491 U.S. 58-71 (1989) and the culture which it has perpetuated.[1] See Davis v. Rennie, 264 F. 3d 86 (1st Cir. 2001); Davis v. Rennie, 997 F. Supp. 137 (D. Mass. 1998); Davis v. Rennie, 553 U.S. 1053 (2002); Davis v. Rennie, 178 F. Supp. 2d 28 (D. Mass.

[1]Mr. Justice Brennan authored a dissent in which Justices Marshall, Stevens and Blackmun joined. Mr. Justice Stevens also authored a separate dissent. Will, 491 U.S., at 71 – 94.

2001). Thousands more have fallen prey to this same rule of law and culture as well including Joshua K. Messier and Sandra Bland.

The issue in *Will* was a simple one: Is a "State" a person for the purposes of the Federal Civil Rights Act? The majority opinion found that it was not.[2] Through their dissents, Justices Marshall, Stevens, Brennan and Blackmun determined that a "State" was, in fact, a "person" for the purposes of 42 U.S.C. §1983 and that it was the intent of the 1871 Congress to hold the States themselves financially liable for the constitutional deprivations perpetuated by their agents and employees. Will, 491 U.S. 71 – 94. "In my view, a careful and detailed analysis of Section 1983 leads to the conclusion that States are 'persons' within the meaning of the Statute." Id., at 77. (Brennan, J. dissenting).

> The Civil Rights Act of 1871 was 'intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.' Monell v. New York City Dept. of Social Services, 436 U.S., at 700 - 701. Our holdings that a 1983 action can be brought against state officials in their official capacity for constitutional violations properly recognize and are faithful to that profound mandate. If prospective relief can be awarded against state officials under 1983 and the State is the real party in interest in such suits, the State must be a 'person' which can be held liable under 1983. No other conclusion is available.

Will, 491 U.S., at 92 (Stevens, J. dissenting).[3] "Aside from all these reasons, the [majority's] holding that a State is not a person under §1983 departs from a long line of

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[2] However, in 1978 the Supreme Court expressly held that counties, municipalities, cities and towns can, in fact, be sued for money damages under 42 U.S.C. §1983. The contention that these political bodies can be sued for money damages but that States cannot is constitutionally incongruous as the *Will* dissenters make axiomatic. See Monell v. New York City Department of Social Services, 436 U.S. 658, 690 - 691 & n. 54 (1978) (Brennan, J.); Will, 491 U.S., 83, 93 (Brennan, J. dissenting; Stevens, J. dissenting). The majority's construction of Section 1983 in *Will* "draws an illogical distinction between wrongs committed by county or municipal officials on the one hand, and those committed by state officials on the other." Will, 491 U.S., at 93 (Stevens, J. dissenting). "Taking the example closest to this case, we might have observed in *Monell* that §1983 was clumsily written if it included municipalities, since these, too, may act only under color of state authority. Nevertheless, we held there that the statute does apply to municipalities." Will, 491 U.S., at 83 (Brennan, J. dissenting). "Local governing bodies…can be sued directly under §1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other §1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." Monell, 436 U.S., at 690-691.

[3] One of Justice Brennan's many impenetrable arguments in his *Will* dissent, in support of the contention that States are "persons" under the Federal Civil Rights Act, comes from the times and context in which the precursor to 42 U.S.C §1983 was enacted. (§ 1 of the Civil Rights Act of 1871, 17 Stat. 13). "As to the more general historical background of § 1, we too easily forget, I think, the circumstances existing in this country when the early civil rights statutes were passed. '[V]iewed against the events and passions of the time,' *United States v. Price, 383 U.S. 787, 803, 86 S.Ct. 1152, 1161, 16 L.Ed.2d 267 (1966),* I have little

judicial authority based on exactly that premise." Will, 491 U.S., at 94. (Stevens, J. dissenting; brackets supplied).

The dissents in *Will v. Michigan* are two of the most important dissents in the history of the Supreme Court and, indeed, our Nation given the fundamental civil rights principles they seek to protect. I would respectfully submit that these dissents are the modern day equivalent of Mr. Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 552-564 (1896) insofar as they too seek to protect bedrock principles of our civil rights laws which are essential to their continued vitality. The core civil rights principles, which the *Will* dissenters sought to protect, included the following: (i) the ability to make States a party to civil rights damage claims; (ii) the ability to compel States to pay civil rights damage claims; (iii) equality of treatment between those asserting civil rights damage claims against Municipalities and those asserting such claims against a State; and (iv) the ability to realize one of the central purposes of the Reconstruction Era civil rights statutes, i.e., to hold States liable for the monetary damages associated with their civil rights deprivations. Will, 491 U.S., at 71-94. These protections inure to the benefit of all civil rights claimants, across the entire spectrum of civil rights claims, and insure compliance with the rule of law. With all due respect to the *Will v. Michigan* majority, Justices Marshall, Brennan, Stevens and Blackmun were the intellectual soul and moral compass of the Supreme Court in 1989. The *Will* dissenters manifestly had four of the greatest legal minds ever to grace the Supreme Court. Their dissents, like Justice Harlan's 1896 dissent in *Plessy*, were the correct dissertations of the law as their plain words and the sands of time have so clearly taught us. The impassioned pleas of Justices Marshall, Brennan, Stevens and Blackmun should no longer be the lone cries in the constitutional wind.

Whether a "State" is a person might seem like only a nuanced aspect of Federal Civil Rights legislation. In reality, however, this determination is dispositive in discerning whether the Federal Civil Rights Act, in combination with the constitutional and statutory rights it is designed to enforce, is a toothless giant. It has been, in the context of civil rights damage claims against the States, since 1989. The majority rule in *Will* uncontrovertibly perpetuated a constitutional rule of law whereby States have no liability whatsoever for any

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doubt that § 1 of the Civil Rights Act of 1871 included States as 'persons.' The following brief description of the Reconstruction period is illuminating: 'The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent. Congress had taken control of the entire governmental process in former Confederate States. It had declared the governments in 10 'unreconstructed' States to be illegal and had set up federal military administrations in their place. Congress refused to seat representatives from these States until they had adopted constitutions guaranteeing Negro suffrage, and had ratified the Fourteenth Amendment. Constitutional conventions were called in 1868. Six of the 10 States fulfilled Congress' requirements in 1868, the other four by 1870.' This was a Congress in the midst of altering the 'balance between the States and the Federal Government.' *Ante*, at 2308, quoting *Atascadero State Hospital v. Scanlon*, 473 U.S., at 242, 105 S. Ct., at 3147. It was fighting to save the Union, and in doing so, it transformed our federal system. It is difficult, therefore, to believe that this same Congress did not intend to include States among those who might be liable under §1983 for the very deprivations that were threatening this Nation at that time." Will, 491 U.S., at 84-85. (Brennan, J. dissenting; italics in original).

civil rights damage claims. Murders and other civil rights atrocities committed by State actors, as per the central command of ***Will***, no longer subject States to possible liability even when committed pursuant to a State custom or policy. This is precisely what the ***Will*** dissenters fought so hard to prevent. Will, 491 U.S. 71 – 94. (Brennan, J.; Stevens, J. dissenting).

Both ***Will*** and its progeny now only permit civil rights damage claims to be asserted directly against State employees and State agents in their personal capacities. Will, 491 U.S., at 58-71; Hafer v. Melo, 521 U.S. 21-31 (1991). Likewise, all civil rights damage awards, in these litigations, may only be satisfied from the personal financial assets of these same State agents and employees. Id., Ibid. Hence, although the Federal Civil Rights Act has been long thought of as a vehicle to assert civil rights damage claims against the State this has, in actuality, not been the case for 27 years. Therein lays the problem. "Legal doctrines often flourish long after their raison d'être has perished. The doctrine of sovereign immunity rests on the fictional premise that the 'King can do no wrong.'" Will, 491 U.S., at 87. (Stevens, J., dissenting; italics in original). It is constitutionally stunning to note, at this late date, that private individuals alone are legally responsible for the defense and payment of civil rights damage claims asserted in the aftermath of unconstitutional State conduct. As incredible as it may seem, States have simply had no legal obligations, relative to these claims, since 1989. The Will dissenters cogently demonstrated that this concept alone defeats one of the central purposes of the Reconstruction Era civil rights statutes which was to hold States *themselves* accountable for their own unconstitutional conduct.[4] Will, 491 U.S., at 71-94.

There can be no meaningful improvement in our State institutional conditions, policies and procedures when nobody is held accountable. When States are never subject to suits for or payment of civil rights damage claims this perpetuates the contemplated sloth, incompetence and chaos which one would expect to pervade our State institutions. These conditions, in turn, spawn the multitude of State perpetuated civil rights violations which plague our nation. Ours is a Nation which has a civil judicial system which has always prospered, since the founding, upon the proposition that the imposition of civil court damages is a deterrent to those whose actions Courts seek to affect. Indeed, within the civil rights sphere itself, Courts impose civil rights damages to "punish" and "deter" the wrongdoer. Smith v. Wade, 461 U.S. 30, 54 (1983). However, since States enjoy complete immunity under ***Will*** there is neither a vehicle to "punish" or "deter" them nor is there

[4]When civil rights claimants are relegated to claims against only State employees and their personal financial assets these claims are only sparingly asserted. This is clearly one of the chilling effects of the ***Will*** holdings. Civil rights litigators most usually spend inordinate amounts of time to perfect their cases. These cases truly are labors of love. The prospect of obtaining a "paper judgment", against employees who clearly lack the ability to pay the multi-million dollar jury verdicts which are many times obtained in the civil rights arena, is an acute disincentive for private litigants to continue to serve as private attorneys general in the administration of our civil rights laws. Thousands of hours of litigation work routinely go uncompensated in such circumstances. As an example, it bears noting that more than 2500 hours of litigation time was expended in the District Court litigation alone in the ***Davis*** case. Thus, when States are wholly immunized from defending against and paying civil rights damage claims, as they are under ***Will***, this produces a chilling effect on the assertion of civil rights claims against the State. Will certainly has this affect.

incentive, on their part, to engage in corrective behavior. The States, after all, are accountable to nobody in the present context.

My client's father, Mr. William Davis, said it best in his 2014 letter to the Massachusetts Senate:

> I know that money will never bring back my son nor will it fully compensate our family for the torment visited upon him on August 12, 1993. However, what I do know is that the payment of the judgment in my son's Federal Civil Rights case will finally mark a place in time where the Commonwealth admits that it was both wrong and not above the law. It will also cement the proposition that the historic laws Jason made will be neither in vein nor unappreciated by the very government which subjected him to the torment which he suffered on August 12, 1993 and thereafter. Improvement, after all, only comes through full accountability. I respectfully submit that Governments should be characterized by integrity and honor which, to date, have been absent here. My son was actually a hero. Although plagued by mental illness and suicidal ideations, he endured a four week trial and two federal appeals in route to making historic constitutional law which now protects all mentally ill throughout our Nation. He should be treated like a hero and not the criminals who both attacked him and were then subsequently protected by the Commonwealth's Attorney General in a host of legal proceedings.

Since States are immunized from being named as parties to civil rights damage claims or paying associated damages they have little or no incentive to improve the institutional conditions which perpetuate the claims which persistently arise. This culture produced grotesque violence against my client, Jason Davis, and thousands of others. However, the cure is easily at hand, it could never be undone by any Court, it would perpetuate the objectives of the ***Will*** dissenters and it would further the central purposes of the Reconstruction Era civil rights statutes.

The majority opinion in ***Will*** did not intimate, nor could it under controlling Eleventh Amendment[5] jurisprudence, that Congress lacks the power to enact legislation which declares that a State is a "person" for the purposes of 42 U.S.C. §1983. The majority in ***Will***

[5] ***Will*** was a State Court action dictating that the Eleventh Amendment was not even inapplicable. Will, 491 U.S., at 71-72, 89 (Brennan, J. dissenting; Stevens, J. dissenting). However, any legislative amendment to 42 U.S.C. §1983 would concededly have to survive an Eleventh Amendment analysis so that claims could be asserted against the State in both State and Federal Court under its provisions. The statutory amendment proposed here would easily survive any Eleventh Amendment analysis in light of the governing and uncontroverted Eleventh Amendment concepts articulated through the Will decision. "'[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" Will, 491 U.S., at 75 (Brennan, J. dissenting; brackets supplied; quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)). The constitutional balance could be altered here, between the States and the Federal Government, because the word "person" could be defined in a statutory amendment with unmistakably clear language which would actually appear on the face of the statute (42 U.S.C. §1983). Thus, full compliance with the Eleventh Amendment could be easily achieved.

simply observed that "[w]e found nothing substantial in the legislative history that leads us to believe that Congress intended that the word 'person' in §1983 included States of the Union. And surely nothing in the debates rises to the clearly expressed legislative intent necessary to permit that construction." Will, 491 U.S., at 69 (brackets supplied). A terse amendment to 42 U.S.C. §1983 would cure the ill alleged by the ***Will*** majority and concurrently satiate the Eleventh Amendment authorities cited by both the majority and dissenters in ***Will***. Id., at 58-94.

The full text of 42 U.S.C. §1983 reads as follows:

> 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The proposed statutory amendment would be inserted after the period which succeeds the word "Columbia" in the last sentence of 42 U.S.C. §1983:

> For the purposes of this section, the term person shall include a State and a Commonwealth together with their departments, offices, officers acting in their official capacities, agencies, entities, bodies politic and bodies corporate.

This proposed statutory amendment cures the four principle ills of which the ***Will*** dissenters complained: (i) the inability to make the State a party to civil rights damage claims; (ii) the inability to compel States to pay civil rights damage claims; (iii) the inequities inherent in the ability to assert civil rights damage claims against Municipalities but not States; and (iv) the evisceration of one of the central purposes of the Reconstruction Era civil rights statutes, i.e., holding the States themselves financially accountable. Will, 491 U.S., at 71-94 (Brennan, J. dissenting; Stevens, J. dissenting).

I full well know that the statutory amendment proposed here would probably not pass in your final year in office and that it will be met with much consternation by those in the other party. These eventualities, I respectfully submit, are irrelevant. We have a national epidemic of violence against our citizens by those acting under color of State law. The proposed amendment is certainly a methodology which can eradicate some of this violence while concurrently recouping the core objectives which spawned the Reconstruction Era civil rights statutes in the first place. It is important to mark a place in time where we all join the ***Will*** dissenters in an attempt to again construe the Federal Civil Rights Act in a

manner which is consistent with how our founders wanted it to be construed. My Father used to love this quote: "the tools belong to the man who can use them." The tools, Mr. President, belong to you given your Civil Rights prowess and exquisite oratory skills. It could well be decades before another President even considers filing legislation of this ilk which will hurt the cause considerably. Even if this legislation is defeated or tabled it will still serve a critically important function in our constitutional system as we try to reinvigorate one of its most critical components. The pleas of the ***Will*** dissenters should be met with silence no longer. This silence is now in its twenty-seventh year. We need to bookend these pleas with Federal Legislation so the Executive and Legislative Branches are heard as well. The ***Will*** dissents and this proposed legislation will collectively serve the same function that the ***Plessy*** dissent did – they will serve as beacons of righteousness.

The last section of this letter is devoted to demonstrating precisely how the central command of ***Will*** affects the Constitution, the Federal Civil Rights Act, civil rights victims, their families and future civil rights victims in the context of a real case. I was lead counsel for Jason Davis in his Federal District Court trial, an appeal in the First Circuit Court of Appeals and a certiorari proceeding in the United States Supreme Court.[6] When we analyze a real case over the course of its 23 year legal and legislative history, including its reported opinions, we become informed as to precisely why the ***Will*** experiment is a failed one, why the proposed amendment is a constitutional imperative and why the ***Will*** dissenters were so right. The history of the Davis case and its salient facts are critical in this regard. It must be kept in mind, under and because of ***Will***, that the Commonwealth itself could not have been be named as a party and that any damages awarded could not have been collected from its coffers. Likewise, under ***Will***, the Commonwealth had no obligation to represent any of the Davis case defendants and it had no obligation to indemnify any one of them for any civil rights damages awarded by a jury. It is manifest that the ***Will*** holdings colored the Commonwealth's strategy throughout the 23 year history of the Davis case in a way which is illustrative of precisely why these holdings have been so constitutionally destructive to our Nation.

An analysis of the Davis case demonstrates the following constitutional "fallouts" from the ***Will*** decision: (i) even though States put into motion certain constitutional deprivations they cannot be sued for civil rights damage claims nor can civil rights damage awards be satisfied from their coffers; (ii) States have been entirely removed from the civil rights damage claim arena; (iii) since States are not subject to suit for or payment of civil rights damage claims they have no incentive to effect the real institutional change which is always needed; (iv) States often represent the individuals who are subject to suit for and payment of civil rights damage claims; (v) in the course of this representation the States often articulate arcane legal positions which are not only contrary to the public good but

[6] The law firm of Brendan J. Perry & Associates, P.C., my brother, Terance P. Perry, and I have represented Jason Davis and his family since 1996. My father, Brendan J. Perry, the founder of Brendan J. Perry & Associates, P.C., represented Jason Davis and his family from 1996 until my father's death in 2010. He was responsible, on behalf of the firm, for agreeing to represent Jason Davis in 1996. When we entered into this agreement in 1996 we all had full knowledge of the rule of law laid down in Will v. Michigan Department of State Police, 491 U.S. 58-71 (1989).

which evidence a win at any cost mentality even if it means making some "bad law" along the way; (vi) in the course of this representation the States often play "cat and mouse" with the victims of its civil rights deprivations, relative to settlements and payments of jury verdicts, because both the State and the victims' lawyers full well know that the ***Will*** holdings insulate the State from any financial liability; (vii) in the course of this representation the States often seek and obtain all the "fruit" of the legal process, including attempts to prevail on immoral and illegal contentions, but when judgments are entered they often run for the proverbial hills; (viii) in the course of this representation the States often spend hundreds and thousands of dollars defending against civil rights damage claims, which are true and just, and then refuse to pay these judgments when they lose; (ix) although States are obligated to provide certain constitutional protections to their citizens many times these protections are hollow, empty and unfulfilled obligations given the central ***Will*** holding; and (x) although States have no legal obligation under the Constitution to pay civil rights damage claims they do sometimes arbitrarily decide to pay some, but not others, depending upon the politics of the day. Each of these circumstances was encountered in the ***Davis*** case.

Jason Davis was an involuntarily committed mentally ill patient at the Westborough State Hospital ("Hospital") in 1993. This facility was operated and controlled by the Massachusetts Department of Mental Health ("DMH").[7] Davis was acutely ill for nearly his whole adult life and spent much of it in mental health facilities due to the severe and debilitating mental illnesses from which he had suffered since adolescence. On August 12, 1993, during the course of an involuntary commitment at the Westborough State Hospital, he was savagely beaten by one Mental Health Care Worker while several others pinned him to the floor to perpetuate the beating. All the while, a Charge Nurse looked on and actually encouraged the beating. See Davis v. Rennie, 264 F. 3d 86 - 116 (1st Cir. 2001).

Two of the principal aggressors, Phillip Bragg and Paul Rennie, were convicted violent felons upon hire at the DMH which it knew. Both Phillip Bragg and Paul Rennie had been hired by the DMH at the Hospital to work in direct patient care capacities following their convictions and incarcerations for violent felonies. Mr. Bragg and Mr. Rennie were each hired pursuant to and in accord with the DMH's internal written hiring policy. Phillip Bragg had been indicted for assault with intent to murder and assault and battery with a dangerous weapon (gun) prior to commencing employment for the DMH. He pled guilty to assault and battery with a dangerous weapon (gun) and was sentenced to 10 years of incarceration in a Massachusetts prison (one year served) prior to commencing employment for the DMH at the Hospital. Phillip Bragg's felony prison sentence resulted from his having shot a 16 year old boy in the eye with a gun at short range. He was released from prison only a short time before he began employment for the DMH at the Hospital.

[7] It is of great constitutional moment here to note that when Jason Davis was an involuntarily committed inpatient at the Hospital the Commonwealth of Massachusetts itself, in particular its Executive Branch, had a federal constitutional obligation to insure that he was not subject to punishment, not held in unsafe conditions, provided with reasonable non-restrictive conditions of confinement, provided with the right to be free from unjustified intrusions on his personal security and provided with the right to be free from unreasonable bodily restraints. Youngberg v. Romeo, 457 U.S. 307, 315, 324 (1982).

Phillip Bragg also had a history of employment related violence and abuse upon patients prior to the incident involving Jason Davis. A former DMH Commissioner, Eileen P. Elias, testified under oath that Phillip Bragg should never have been employed as a Mental Health Care Worker in 1992 - one (1) year before the *Davis* incident - given his violent proclivities.

Paul Rennie had been indicted for two counts of armed robbery and one count of assault and battery with a dangerous weapon (pipe) prior to commencing employment for the DMH at the Hospital in a direct patient care capacity. Paul Rennie sought to steal a car from one victim by striking him with a metal pipe and to rob money from yet another victim at gunpoint. Paul Rennie pled guilty to these two counts of armed robbery and the one count of assault and battery with a dangerous weapon and was incarcerated in a Massachusetts prison for one (1) year. Phillip Bragg's and Paul Rennie's employment by the DMH at the Hospital constituted an extreme risk of harm to all mentally ill inpatients subject to their "care" including Jason Davis. Their conduct on August 12, 1993 came as a surprise to nobody given their extensive histories of violence and recidivism rates amongst convicted violent felons. See attached Criminal Records. (Exhibit "1").

Prior to trial in the *Davis* case mediation was conducted before Senior District Judge A. David Mazzone in Boston Federal Court. The Commonwealth offered Five Hundred Thousand ($500,000) Dollars at mediation, in complete settlement of the case, with the caveat that Jason Davis receive nothing. His proportionate share, the Commonwealth proposed, would be remitted back to Commonwealth as payment for "back rent" for his having been an inpatient at the Department of Mental Health for so many years. Jason Davis and his lawyers adamantly rejected this offer of settlement which they deemed to be morally reprehensible. They expressed this sentiment to the Commonwealth and Senior District Judge Mazzone. Shortly before trial in the Davis case an Assistant Attorney General, Richard H. Spicer, orally informed the undersigned that Attorney General Scott Harshbarger had a message for me. The message was as follows: "Mr. Perry, Scott [Harshbarger] wanted me to tell you that he will pay the entire jury verdict if you win but that he will never have to pay you because you will never win." I then told Mr. Spicer I would hold the Attorney General to his word. The *Davis* jury verdict remains unpaid.

Jason Davis' Federal Civil Rights case was tried in 1998 for one month in the Federal District Court in Boston before the venerable Senior District Judge Morris E. Lasker. Judge Lasker was a civil rights jurist of national repute before his death in 2009. He sat for 25 years in the Southern District of New York before sitting in Boston Federal Court for another 16. He was appointed in 1968 by President Johnson upon then Senator Robert F. Kennedy's recommendation. Jason Davis won a jury verdict in October of 1998 which now stands at more than $2.2 million dollars. Then Massachusetts Attorney General Scott Harshbarger represented all but two of the Davis case defendants in the 1998 trial. Attorney General Thomas Reilly thereafter represented all State defendants in a 1999 First Circuit appeal. Thomas Reilly later filed a Petition for a Writ of Certiorari with the United States Supreme Court on behalf of the State workers. The Commonwealth's Attorneys General lost to Jason Davis in all three Federal Courts. See Davis v. Rennie, 264 F. 3d 86 (1st Cir. 2001); Davis v. Rennie, 997 F. Supp. 137 (D. Mass. 1998); Davis v. Rennie, 553 U.S. 1053

(2002); Davis v. Rennie, 178 F. Supp. 2d 28 (D. Mass. 2001). See attached 2014 Boston Globe article (Exhibit "2"). The principal contention asserted by the Commonwealth in the *Davis* line of cases was that it was constitutionally permissible for State employed Mental Health Care Workers and Charge Nurses to stand idly by while their fellow employees savagely beat an involuntarily committed mentally ill inpatient bloody. This position was not only immoral and unconstitutional but, if embraced, it would have forever jeopardized the safety of mentally ill inpatients in our Country. Senior District Judge Lasker, sitting in Boston Federal Court, the First Circuit and then the United States Supreme Court, through its denial of the Commonwealth's Certiorari Petition, all rejected this flawed constitutional contention. The First Circuit actually wrote at length as to precisely why the Commonwealth's position was blatantly unconstitutional. Davis, 264 F. 3d, at 86 – 116.

Suffice it say that the Commonwealth wanted to "win at any cost" even if it impaired the safety of the mentally ill and meant that some "bad law" would have to be made along the way.[8] Prior to filing a Notice of Appeal in the First Circuit the Commonwealth, not the State employees, offered Jason Davis the sum of Seven Hundred and Fifty Thousand ($750,000) Dollars which it withdrew after offering it. This sum was substantially less than half of the judgment entered on the jury verdict. After losing at the First Circuit the Commonwealth again offered Seven Hundred and Fifty Thousand ($750,000) Dollars before it filed its Petition for a Writ of Certiorari.[9] It again withdrew this offer of settlement. It never made another one. On the very day that the Commonwealth's Petition for Certiorari was denied by the Supreme Court, the Commonwealth's Attorney General withdrew his representation of all State employees. See Davis v. Rennie, 178 F. Supp. 2d 28 (D. Mass. 2001).

In its 2001 reported opinion the First Circuit recalled the brutalization of Jason Davis through the trial testimony of Special State Police Officer Greg Plesh, who came upon the scene and stopped the bloody carnage, Jason Davis and eyewitness Nicholas Tassone:

[8] *Davis* was actually the first case in the history of the United States to specifically hold that the Due Process Clause of the Fourteenth Amendment to the United States Constitution forbids Doctors, Nurses and Mental Health Care Workers from standing idly by while one of their own physically brutalizes an involuntarily committed mentally ill inpatient in a State hospital. Davis v. Rennie, 264 F. 3d 86 – 116 (1st Cir. 2001). This case has been cited literally hundreds of times, throughout the Country, since it was decided. The *Davis* case is manifestly a landmark civil rights case in the mental health arena. The Massachusetts legislature has expressly acknowledged as much. Jason Davis unquestionably made a profound contribution to the national constitutional landscape in the mental health arena.

[9] The three offers of settlement made by the Commonwealth to Jason Davis evidence the fact that the Commonwealth has always known, despite the holdings in *Will,* that *it was responsible* for the violence inflicted upon Jason Davis. That is precisely why the offers were made. The Commonwealth actually did pay the judgment entered against one of the tortfeasors (Nicholas L. Tassone) in the approximate amount of $177,000. This was the lone tortfeasor who told a semblance of the truth at trial. This payment did little more than pay for the pure costs, including expert fees, deposition fees, appellate printing fees, trial transcript fees and litigation costs, associated with litigating a case in three federal courts over a six year period. This payment likewise evidences an acknowledgement by the Commonwealth that *it* was responsible for the violence inflicted upon Jason Davis notwithstanding *Will.*

> [Special State Police Officer Greg Plesh] recounted: 'Jason is lying down the hallway, head is away from me, feet are towards me. Staff is encircling him. And it's not what I saw, it's what I felt. I initially felt the thud through the [concrete slab] floor and then heard a thud.' Plesh said he looked up and saw Bragg punch Davis in the head four to five times. Plesh continued: I turned to [Charge Nurse] Joyce Wiegers who was on my right shoulder. When I saw Jason Davis being punched, I said, 'Did you see that? Are you going to do anything about this? Are you going to allow this to happen?' She didn't say anything, and I really wasn't waiting at that point. Some more was occurring and at that point I decided to intervene. As the MHWs (Mental Health Care Workers) began rolling the patient onto his stomach, Bragg twisted Davis's neck to the side and Plesh climbed over the other MHWs to push Bragg away. Davis testified about the punching: 'It was over and over and over and over again. It was like it would never stop. And then I was calling for help and nobody was stopping them and they kept hitting me. I felt the blood; it was, you know, it was coming down my face.' Plesh said that Davis' 'eyes were rolling out of his head,' that '[t]here was swelling, bruising all in his face,' and that he checked to make sure that Davis's neck had not been broken. Tassone said that Davis's face was cut and bloody. (brackets supplied).

Davis, 264 F. 3d, at 94 (brackets supplied; parenthesis in original).

A Defendant, Nicholas L. Tassone, testified that Jason Davis looked like "a fighter looks after they get out of the ring, how sometimes they get cut on their eye, and they have blood dripping down their face." He testified further that he observed a "puddle" of "blood" beside Jason Davis' head. The Charge Nurse actually told Jason Davis, after the beating, that "[t]his is what you get when you act – this is what you get when you act like this." Davis, 264 F. 3d, at 94-95. The First Circuit also recounted the acute psychiatric injuries sustained by Jason Davis, as per his treating psychiatrist, within its 2001 reported opinion:

> Davis presented additional medical evidence at trial from Dr. R. Amos Zeidman, his treating psychiatrist for periods beginning in 1991. In late 1996 or early 1997, Dr. Zeidman diagnosed Davis with Post Traumatic Stress Disorder (PTSD) as a result of the physical restraint at Westborough. **He said that Davis 'was horrified' by the event because '[h]e thought he was going to die.'** Dr. Zeidman said that Davis's PTSD symptoms included insomnia, anxiety, panic states, flashbacks, nightmares, and an inability to concentrate. He said that Davis was having difficulty making progress in therapy because he was afraid to trust anyone and that '[t]he quality of his life has suffered terribly for this.' Here, the evidence supports a finding of significant actual and potential harm. According to Dr. Zeidman, the psychological harm Davis has suffered from the incident has seriously affected his quality of life, causing a range of PTSD symptoms,

> demonstrating the reasonable relationship between the injury and the amount of the award.

Id., at 95, 116 (emphasis supplied).

Jason Davis died a few years after his trial at age 38. His Father observed, in the letter remitted to the Massachusetts Senate in 2014, that:

> The trial was agonizing for my son Jason. He was suicidal throughout it as expressed by him to family members and his lawyers as well. His suicidality and suicidal ideations actually limited his ability to even attend his own trial. He was also suicidal throughout the four year period during which the Commonwealth filed appeals in the Federal Court of Appeals and the United States Supreme Court. My son Jason made moderate gains, in improving the quality of his life through regimented therapy, in the years prior to 1993. After the incident his life went into a downward spiral and he died six years after his trial at age 38. His Mother died soon thereafter.

The length of the month long Federal District Court trial in the ***Davis*** case was due, in large part, to the time consuming task of introducing into evidence the voluminous and graphic documentation which exhibited the grotesque physical violence undertaken by staff against mentally ill inpatients at the Westborough State Hospital. All of this violence predated the Jason Davis incident date.[10] This evidence documented the commission of the very worst types of crimes against the person and included Rape, Homosexual Rape, Torture, Indecent Sexual Assault and Battery, Criminal Battery, Criminal Assault, Physical Violence, Physical Abuse, Neglect, Threats, Intimidation and Verbal Abuse by staff against mentally ill inpatients.

The Jason Davis case emanated from "physical" and "four point mechanical" restraints which went horrible awry in the involuntarily committed inpatient State hospital setting. Convicted violent felons, and others, beat Jason Davis bloody while he was an involuntarily committed mentally ill inpatient at the Westborough State Hospital. The circumstances surrounding this savage assault have been a matter of public record since no later than the date on which the verdict was rendered in October of 1998. Since that date the Federal District Court trial Judge rendered numerous written opinions, relative to the ***Davis*** incident, in the context of the flurry of post-trial motions filed by the Commonwealth's Attorney General. In addition, the First Circuit rendered a rather granular and extensive reported opinion in 2001 which details the gruesomeness of the Davis incident. Davis v. Rennie, 264 F. 3d 86 -116 (1st Cir. 2001). The Commonwealth, through its Attorney General, represented the ***Davis*** case defendants at trial, on appeal and in the United States Supreme Court. It was obviously intricately familiar with this case as was the DMH.

The rather extensive ***Davis*** record has been in the public domain since no later than 1998. Even a cursory review of this voluminous record evidenced the need to immediately

[10] Jason Davis' counsel possesses all trial exhibits as does the District Court and the First Circuit.

overhaul the "restraint" related protocols relative to mentally ill inpatients in Massachusetts institutions. Given the gory details of the ***Davis*** incident one would think that a massive overhaul of the restraint process would have been undertaken forthwith relative to the hiring, training and supervision of those employees charged with implementing restraints. At bottom, intensive employee screening should have been employed after ***Davis*** to insure that the personality types of those hired or retained to implement restraints were conducive to the tasks at hand. Patient, understanding and compassionate personality types, with high frustration levels and "long fuses", should have been preferred over those possessing quick tempers who sought to resolve "problems" with physical violence. The lessons, which should have been learned in the aftermath of the ***Davis*** case, were not. This is precisely why Joshua K. Messier was murdered 17 years later also while in State custody. Nobody cared to learn the ***Davis*** lessons because the central command of ***Will*** made it unnecessary to do so.

On May 4, 2009 Joshua K. Messier was an involuntarily committed mentally ill inpatient at the Bridgewater State Hospital in Massachusetts where he had been committed for the purposes of psychiatric observation. On said date he was murdered during the course of a "physical restraint" and a "four point mechanical restraint" which went horribly awry. His death certificate and autopsy, which were authored by a Massachusetts Medical Examiner (Medical Doctor), list "homicide" as his "manner of death". They also depict his "cause of death" as "cardiopulmonary arrest during physical restraint, with blunt impact of head and compression of chest, while in agitated state." See attached Death Certificate (Exhibit "3"). Joshua K. Messier's autopsy also depicts, with great exactitude, numerous blunt force trauma injuries to his head, brain, neck, torso and extremities. Mr. Messier suffered, as well, from brain bleeding as a result of the savage attack upon him. The videotaped death of Joshua K. Messier, made publicly available via the internet, also demonstrates that he was murdered as a result of intentional, willful, malicious and gratuitous excessive force having been employed upon him. If the Commonwealth had learned its lessons in ***Davis***, Joshua K. Messier would be alive today. This senseless murder of a 23 year old young man never had to occur. However, the central command of ***Will*** simply made it unnecessary for the Commonwealth to learn anything from its mistakes in ***Davis*** because there was no imperative to do so. Hence, Joshua K. Messier was murdered.

I too have deep respect for President Lincoln. An iconic picture of him hangs but a few feet from the desk where this letter was written. I feel compelled to evoke his memory, heart and courage at this time. I have no doubt that President Lincoln would embrace both the proposed statutory amendment and the ***Davis*** case itself. It was, after all, his Reconstruction though he died in 1865. One can hear President Lincoln's oratory, before a Joint Session of Congress, ring through the decades. The 1871 Congress provided us with rights which ***Will*** stripped away. It is respectfully submitted that the 2016 Congress and our Nation need to know that respecting the intent of the 1871 Congress is imperative for the continued vitality of our Constitution. A Joint Session of Congress would return us, for a moment in time, to the Reconstruction Era which is precisely where this issue needs to be resolved.[11] The proposed amendment is the gear which drives our Constitution and

[11]"'[V]iewed against the events and passions of the time…'" United States v. Price, 383 U.S. 787, 803 (1966)*; supra;* See also Will, 491 U.S., at 84-85; 71-94. (Brennan, J. dissenting; Stevens. J. dissenting).

prevents it from being viably classified as a toothless giant. The *Will* rule of law is making a mockery of our Constitution, our Federal Civil Rights Act and the core purposes of the Reconstruction Era civil rights statutes. It did so in *Davis*. It was President Lincoln who observed in 1859 that **"[t]he people — the people — are the rightful masters of both Congresses, and courts — not to overthrow the Constitution, but to overthrow the men who pervert it —"** (emphasis supplied). The *Will* majority perverted the Constitution through the rule of law which they articulated.[12]

In a Joint Session of Congress on March 15, 1965 President Johnson stated that "I speak tonight for the dignity of man and the destiny of democracy. I urge every member of both parties, Americans of all religions and of all colors, from every section of the Country, to join me in that cause. At times history and fate meet at a single time and place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama." So it is today in Westborough, Massachusetts.

I attach a January 19, 2016 letter from Massachusetts Governor Charles D. Baker which is "right on point". It essentially constitutes the "poster child" for the need to eradicate the *Will* rule of law. See attached Governor Baker letter (Exhibit "4"). This letter is entirely premised upon *Will*. We had asked the Governor to stand with us in the public domain. He will not.[13] For 23 years the Commonwealth of Massachusetts has disrespected Jason Davis based upon the *Will*[14] doctrine. The unpaid judgment stands at more than 2.2 million dollars. Four previously filed State legislative bills, which sought payment of the Federal Court judgment entered upon the *Davis* jury verdict, have failed. In the closing moments of your recent gun violence speech your eyes welled up when talking about the First Graders at Sandy Hook Elementary School. Mine did too not only for those First Graders but for Jason Davis as well. I felt your acute pain in a profound manner at that precise moment in time. I have felt this pain for more than two decades with Jason Davis, his family, my Father and my Brothers. No matter how hard we try and no matter what we do the machine of Government will not allow us to get true justice - just as it will not allow

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[12]The Federal Civil Rights Act is but the conduit through which constitutional claims are asserted. Graham v. Connor, 490 U.S. 386, 393-394 (1989). Thus, when it is impermissibly restricted it necessarily results in an impermissible restriction upon our Constitution. This is precisely what occurred here. It is beyond cavil that the *Will* rule of law is actually one which both directly affects and "perverts" our Constitution.

[13]The letter sent to Governor Baker contains the following sentences: "I would ask that you meet with the Davis family, publicly acknowledge the Davis case for the first time in the history of the Executive Branch and publicly support and spearhead legislation aimed at paying the entire Davis case judgment forthwith. The continued silence of the Executive Branch would be simply intolerable in a civilized society like ours is supposed to be. I look forward to standing elbow to elbow with you as the Government looks itself in the eye on this matter for the first time in 22 years. I must say, with all due respect, that enough is enough."

[14] Although States have no obligation to pay civil rights damage awards they sometimes do, under State indemnification statutes or through legislative enactments, because of political pressure. The Commonwealth did so in the Messier case. The Davis family was glad it did. That said, Jason Davis' judgment should have been paid as well.

you to pass reasonable gun safety legislation. No family should suffer in the way the Davis family has since 1993. We need to end the failed constitutional experiment which is *Will* since it conflicts with the very essence of our civil rights laws and our moral fabric.

In the *Davis* case the State placed Jason Davis in an institution where an historical wave of violence was acute, ongoing, documented and well known to all who cared to know. It also provided care takers to him which included convicted violent felons hired pursuant to a written DMH hiring policy.[15] When expected harm befell Jason Davis the State, relying as it could on *Will*, told him to take the matter up with the convicted violent felons who brutalized him insofar as it was washing its hands of the matter. The inequities which the *Will* holdings perpetuate are too numerous to list here but none is more vexatious than the hollowness which it brings to many of our constitutional provisions. The Commonwealth of Massachusetts was itself charged with the obligation to keep Jason Davis safe under the Constitution. See Youngberg v. Romeo, 457 U.S. 307, 315, 324 (1982). Yet when it failed miserably in this regard it informed Jason Davis and his family to take the matter up with the violent felons who attacked him. Youngberg, 457 U.S., at 315, 324; Will, 491 U.S., at 58 -71. These violent felons were not, however, charged with insuring his safety; this was the State's obligation under the Constitution. Ibid. The State eviscerates constitutional rights when only its employees are responsible for protecting them. *Will* implements claim shifting and damage shifting to private individuals. *Will* also effects the shifting of the State's obligation to provide constitutional protections into the abyss as the combined effect of *Youngberg* and *Will* make all too clear. If States are immunized from damage claims, resulting from their failure to provide the very protections which the Constitution compels them to provide, such protections will simply not be provided. They were not in *Davis* or *Messier*. This is the failed constitutional experiment which is *Will.*

In a seminal[16] 1928 dissent Justice Brandeis observed that:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[15] Liability against the Commonwealth itself would have been soundly premised upon the written hiring "policy" and the "custom" of violence in accord with the facial text of 42 U.S.C §1983 and the analogous *Monell holdings.* Monell, 436 U.S., at 690-691.

[16]The Olmstead dissents by Justices Brandeis and Holmes, like *Plessy*, later became the law of the land relative to critically important constitutional concepts (Fourth Amendment). Olmstead v. United States, 277 U.S. 438 (1928) The *Olmstead* majority had ruled that evidence obtained from warrantless, and thus illegal, wiretaps was admissible in criminal prosecutions. *Olmstead* was overruled 39 years later. See Katz v. United States, 389 U.S. 347 (1967).

The examples set by the Government in ***Will***, ***Davis*** and ***Messier*** are poor ones. It is sad to note that Sandra Bland's heirs could suffer the same fate as Jason Davis' given the central ***Will*** holding.

On that seminal night in June of 1963 President Kennedy proclaimed that "the rights of every man are diminished when the rights of one man are threatened."

The current construction of the Federal Civil Rights Act under ***Will*** threatens and has harmed our Nation's men, woman and children across the entire spectrum of civil rights claims. This construction likewise threatens the continued vitality of our Constitution.

It would be the work of a billion men to have you stand with the Davis family relative to Jason Davis' case and cause. The words which you spoke on February 12, 2013 ring true here. "Defending our freedom, though, is not just the job of our military alone. We must all do our part to make sure our God-given rights are protected here at home."

It is my most fervent hope that the proposed federal legislation will be filed.

Please note that the only reason I copied Attorney General Lynch is because I was concerned that you might never see this letter given the volume of your incoming mail.

I would be honored to confer with you, on these matters, in the White House.

Thank you Mr. President.

Sincerely,
BRENDAN J. PERRY & ASSOCIATES, P.C.

By:/s/ Christopher M. Perry
Christopher M. Perry

CMP/pmc (four (4) enclosures)

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