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January 16, 2018

The Honorable John Lewis
United States Congressman
343 Cannon House Building
Washington, DC 20515

Re: **Civil Rights Issue**

Representative Lewis:

I seek your help on this most important Civil Rights issue because you are the Civil Rights giant in Congress. Raw politics precludes me from requesting assistance from the Massachusetts Congressional contingent given that my client's blood was spilled on Massachusetts soil in a Massachusetts institution. The Massachusetts government and many principals in its Executive Branch have thwarted our attempts at justice for twenty-four years.

The issues raised in this letter are some of the most profoundly important issues to ever arise regarding our Civil Rights statutes. Justice Marshall, Justice Stevens, Justice Blackmun and Justice Brennan thought so as well.

Literally nobody knows, outside of a small pocket of lawyers and judges, that States cannot be held financially liable for ***any*** civil rights claim no matter how egregious, intentional and malicious their conduct. The controlling case is Will v. Michigan Department of State Police, 491 U.S. 58-94 (1989). At bottom, States get off "Scott free" for ***their*** unconstitutional conduct, under Will, in the context of civil rights monetary damage claims. The fix though is statutorily based and can be accomplished with but a few words.

The central holding in Will v. Michigan adversely affects literally every type and kind of civil rights claim known to the United States judiciary including all forms of discrimination and brutality against all races, creeds, national origins, colors and ethnicities. This case has real life and devastating effects on the ability of all citizens to ***actually obtain*** street level enforcement of their civil rights. My client, Jason Davis, and his family can attest to that. There can be no meaningful improvement in our State institutional conditions, policies and procedures when the State ***itself*** is ***never*** held accountable.

I would respectfully submit that, like Mr. Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 552-564 (1866), there is never an incorrect time to put a line in the sand no matter how unyielding our potential adversaries will be. I know you know this better than anybody. Such a line in the sand will serve as a beacon for future administrations and give us a chance to go on the "offense", relative to a core Civil Rights issue, in these highly intolerant times.

The issues flowing from Will v Michigan are clearly some of the most profoundly important constitutional issues in the history of our democracy. The brain trust and intellectual soul of the Supreme Court in 1989, Justice Marshall, Justice Stevens, Justice Blackmun and Justice Brennan, clearly thought so. They were the dissenters in Will, 491 U.S., at 71-94. The very purpose of the reconstruction era civil rights statutes, as articulated in the Will dissents, was to insure that the "State" ***was*** financially liable and thus accountable when ***it*** engaged in unconstitutional conduct. Fixing the harm done by the majority in Will would be the work of a billion men and woman. The Will majority clearly thwarted the Congressional intent behind the initial enactment of the Reconstruction Era Civil Rights Statutes as the dissents make clear.

The proposed statutory amendment would be inserted after the period which succeeds the words "District of Columbia" in the last sentence of 42 U.S.C. §1983. The amendment would be as follows: **"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 relative to which the *Will* dissenters so vociferously 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, Towns, Counties and Cities 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).

The Huffington Post wrote a recent (1.12.18) article on the impact of Will v. Michigan on a real life legal case. This article was based on a Federal Civil Rights case I litigated for my client, Jason Davis. I attach the article and the link is as follows:[1]

https://www.huffingtonpost.com/entry/corruption-in-massachusetts_us_5a5853c4e4b00b4ea8d0837c

The Jason Davis case is the literal poster child for why it is that the Will doctrine is so incredibly harsh and why it produces such danger to those kept in State custody when States are ***never*** financially liable for any civil rights monetary claims. When States are immunized from liability the progress of the system stops dead in its tracks.

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[1] If one Googles "Massachusetts Corruption HuffPost" the article appears.

Will was a State Court action dictating that the Eleventh Amendment was not even applicable. 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. The statutory amendment proposed here would easily survive any Eleventh Amendment analysis in light of the governing and uncontroverted Eleventh Amendment concepts actually articulated in the Will decision itself. "'[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" would be defined in a statutory amendment - with unmistakably clear language - which would appear on the face of the statute. Thus, full compliance with the Eleventh Amendment would be easily achieved given the text of the proposed amendment.

The Will Court did not hold, nor could it have, that States could never be made parties to Federal Civil Rights claims which seek monetary damages. It simply held that the raw text of 42 U.S.C. §1983 did not support such a construction in 1989. However, the text of 42 U.S.C. §1983 ***could*** be amended to include States as parties to Federal Civil Rights claims which seek monetary damages without affronting any Eleventh Amendment principal.

The Will v. Michigan holdings literally eviscerate some of the greatest work done by some of our greatest Civil Rights leaders. It would be nice to reclaim this rarified legal turf. It was ours from 1866 until 1989. At present, the Federal Civil rights act is, in part, a toothless giant because of the Will doctrine.

On behalf of my client I would like to ask for your official support relative to the Civil Rights case of Jason Davis[2] and the proposed statutory amendment to 42 U.S.C. §1983. I would relish the chance to testify before Congress and meet with you on these most important matters.

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[2] *Davis* was the first case in the history of the United States to specifically hold that the Due Process 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. The Commonwealth, for its part, argued in three federal courts – including the U.S. Supreme Court - that there was no constitutional obligation for health care workers to stop fellow employees from physically brutalizing mentally ill inpatients. This position was not only immoral but, if embraced, would have forever jeopardized the safety of the mentally ill inpatients in this State. All three federal courts rejected the Commonwealth's flawed and immoral constitutional contention. The First Circuit 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. Jason Davis is the one of the real heroes here for he sought and obtained justice when the Commonwealth had no interest in doing so. He did its job.

My client's website is jasonstrongma.com

Thank you for considering these matters.

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

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

CMP/pmc
Enclosures

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