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April 19, 2018

Senator Elizabeth Warren
317 Hart Senate Office Building
Washington, D.C. 20510

Senator Edward Markey
255 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Jason Davis - Civil Rights Case

Proposal: Amendment to Federal Civil Rights Act & Justice for Brutalized Mentally Ill Person

Dear Senators:

I wanted to thank each of you for making your staff available for the meeting conducted on the captioned matter on 4.13.18 at Senator Warren's office in Springfield, MA. I would also like to thank the staff members involved in that meeting including those who participated by phone from Washington, D.C. The constitutional issues raised in the Davis case are profoundly important to our Nation.

My passion for these issues is not driven by the outstanding judgment as some posit. It is instead driven by that one sentence supplementation we seek to 42 U.S.C. §1983.[1]

This is the land where giants play: our Founders spoke to this issue in 1871 through the initial version of 42 U.S.C. §1983. Justices Marshall, Brennan, Blackmun and Stevens also spoke to these issues through their vigorous and eloquent dissents in Will v. Michigan Department of State Police, 491 U.S. 58, 71-94 (1989). Their collective genius is of no small consequence here in discerning the legal propriety of the proposed amendment. In fact, it is dispositive.

The proposed one sentence amendment goes to the very heart of our Democracy: it makes States liable and accountable for ***their*** civil rights deprivations and thus implements the rule of law. **The**

[1] The proposed legislative amendment to 42 U.S.C. §1983 is 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."

adage that the "King can do no wrong" has no place in our World much less the U.S. Constitution. We know that now more than ever given the events of the last 15 months. The one sentence amendment insures accountability for the "King". Justices Marshall, Brennan, Blackmun and Stevens proved that the 1989 text of 42 U.S.C. §1983 already made States liable for ***their*** civil rights deprivations. The Reconstruction Era Congress intended to place this very construction on 42 U.S.C. §1983, when its precursor was initially enacted, as the Will dissents make clear. The proposed amendment merely codifies what 42 U.S.C. §1983 stood for between 1871 and 1989. Adding this one "original intent" sentence to 42 U.S.C. §1983 does not "open up" the Federal Civil Rights Act in any respect.

The brutalization of my client, while he was an involuntarily committed inpatient in a Massachusetts Department of Mental Health facility[2], 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. 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). Thousands more have fallen prey to this same rule of law and culture as well including Joshua K. Messier and Sandra Bland. When an acutely ill, involuntarily committed mentally ill inpatient is beaten nearly half to death by convicted violent felon State employees, while in State "care", the State should not be able to run away from the 2.3M Federal jury verdict that is rendered. Massachusetts did precisely that in the Davis case because of the holdings in Will. In Davis, the State placed Jason Davis in a mental health facility where an historical wave of violence was acute, ongoing, documented and well known to all who cared to know. It also provided caretakers to him which included convicted violent felons hired pursuant to a written hiring policy. When expected and, indeed, statistically probable harm[3] 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. This is the failed experiment which is Will v. Michigan. **This is the "King can do no wrong" personified.** 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).

Another one of the evil results from Will is that it actually perpetuates the ability of a State to engage in corrupt behavior, to the detriment of the public good, without fear of reprisal or any call

[2] Westborough State Hospital.

[3]The employment of convicted violent felons Philip Bragg and Paul Rennie, by the Massachusetts Department of Mental Health at the Westborough State Hospital, constituted an extreme risk of harm to all mentally ill inpatients subject to their "care", including Jason Davis, given their histories of violence and the national recidivism rate of 34.6 percent amongst convicted violent felons. See Recidivism of Prisoners released in 1983 (Bureau of Justice Statistics Special Report – Department of Justice). In short, placing Philip Bragg and Paul Rennie in direct patient care capacities was not unlike having a fox guard the henhouse. Not surprisingly, Bragg and Rennie were the principal aggressors in the two savage beatings of Jason Davis on August 12, 1993. See Davis v. Rennie, 264 F. 3d 86-116 (1st Cir. 2001).

for accountability.[4] Yet when it comes time to pay the judgment, which results from the State's own behavior, it runs for the proverbial hills. That is precisely what happened in Davis. Davis, 264 F. 3d, at 86-116; Davis, 553 U.S., at 1053; Davis, 178 F. Supp. 2d 28 (D. Mass. 2001). See Ex. 12 (Withdrawal Letter) on website. jasonstrongma.com. As soon as Attorney General Thomas Reilly lost at the U.S. Supreme Court he withdrew from the Davis case. See Davis, 178 F. Supp. 2d 28 (D. Mass. 2001); Ex. 12. If States were held accountable in these litigations they would not have the luxury of asserting corrupt legal positions, which impair the rights of an entire class, and then running off into the sunset when these positions are rejected by the Courts.

Make no mistake about it though the Commonwealth of Massachusetts was the ***real party*** in interest in the Davis case: its hands were firmly on the legal helm and it funded all litigation expenses across all three federal court litigations. When the State, through two of its Attorneys General, realized it could not "shake" Jason Davis – despite the use of the State's vast financial and legal resources over a seven (7) year period in three federal courts – it quit the case to avoid wrangling about judgments, post judgment discovery and other collection type matters with Davis' lawyers. In common parlance, it was time to pay the fiddler; but the State refused to make good on a debt which was clearly its own. In Davis, the State literally defended the very criminals it should have indicted, "circled the wagons" on behalf of the Commonwealth, engaged in what amounted to a legal cover up, corruptly tried to make new law which would have hurt the mentally ill as a class and attempted to deflect blame against Massachusetts institutions. It then ran for the

[4]The principal constitutional contention asserted by Attorneys General Harshbarger and Reilly, in the Davis line of cases, was that the United States Constitution does not obligate Doctors, Mental Health Care Workers, Charge Nurses or other health care personnel to stop one of their fellow employees from savagely brutalizing a mentally ill inpatient even if they have both the time and opportunity to stop such a beating. Simply put, their core constitutional position was that all health care personnel can simply look the other way and do nothing when the mentally ill are being brutalized in their presence. Davis, 264 F. 3d, at 86 – 116. This position was not only corrupt, barbaric, immoral and unconstitutional but, if embraced, would have forever jeopardized the safety of mentally ill inpatients in this State and the entire First Circuit as well. Doctors, Nurses and Mental Health Care Workers simply would have been provided with a perpetual constitutional license to stand idly by while fellow workers beat mentally ill inpatients bloody in their presence. The speciousness of this core constitutional argument by Attorneys General Harshbarger and Reilly is evidenced by the fact that reviewing Courts resorted to age old and fundamental U.S. Supreme Court precedent to summarily reject it. See Youngberg v. Romeo, 457 U.S. 307, 314-324 (1989); Deshaney v. Winnebago Department of Social Services, 489 U.S. 189, 199-200 (1989); Davis, 264 F. 3d, at 97-98. The Romeo case was decided some 11 years before the Davis incident even occurred. Thus, Attorneys General Harshbarger and Reilly not only attempted to disadvantage an entire class of our most vulnerable citizens but their unsuccessful attempt to do so was predicated upon a contorted view of the law which was entirely at odds with long standing constitutional protections for the mentally ill. Once again; a "win at any cost" mentality. What kind of State Attorneys General could argue for such a legal position? What does it say about them as leaders, attorneys and Attorneys General? What does it say about them as people? Famed Collegiate Basketball Coach John Wooden once said that "the true test of a man's character is what he does when no one is watching." When nobody was watching Attorneys General Harshbarger and Reilly were content to not only defend the very criminals who brutalized Jason Davis – instead of indicting them - but also make "law" which provided them with a license to engage in further brutalities. Attorneys General Harshbarger and Reilly simply wanted to "win" at any cost even if they had to make some "bad law" along the way. There was, quite obviously, no end to which the Massachusetts Attorneys General would not go to beat Jason Davis. This was hardly the only corrupt legal position asserted or tactic undertaken by the four State Attorneys General in the Davis line of cases. See jasonstrongma.com

hills. The State wanted to win at any cost, as its litigation tactics and legal positions so clearly prove, even if it meant making law which intentionally impaired the prospects for safety of the institutionalized mentally ill. The Will holdings allowed it to engage in this very conduct. Thus, under Will, the State, as Massachusetts did, was allowed to pluck all the litigation fruit it could – including availing itself to a one (1) month Federal District Court trial, a federal appeal at the First Circuit and the filing of a Certiorari Petition in the U.S. Supreme Court – while avoiding entirely the judgments entered in the very litigations perpetuated by ***its*** financial and lawyer related resources. All the roses but none of the thorns; this is the impact of Will. These litigations are very simply ones where the State is the ***real party in interest,*** which controls and financially supports the legal agenda, yet it can still hide behind the curtain when it loses and pretend that it has no relation to or interest in the litigation. These litigations are manifestly perpetuated by the Will holdings which make a mockery of accountability and justice in our Democracy. The State, once again, can play cat and mouse with both the Constitution and the justice system.[5]

One could be a Senator for fifty years and never have a chance to file legislation of this import. It is hard to imagine legislation which would eclipse the proposed amendment in terms of importance. This amendment has a "Founding Father" type of importance attached to it, as the Will dissents make clear, and clearly effectuates the intent of the Reconstruction Era Congress from 1871. It also puts accountability and the rule of law back into the Constitution. Under Will, States are not accountable but Towns, Counties, Cities and Municipalities are in the Civil Rights monetary damages context. See Monell v. New York City Department of Social Services, 436 U.S. 658, 690 - 691 & n. 54 (1978). Will leaves a horrible and residual imprint on the Constitution as the Jason Davis case proves. The representatives of Black Lives Matter and all those associated with this cause sure would like this one sentence to be placed into 42 U.S.C. §1983. The outright murder of innocent victims on the Streets of America will not stop until State's are, in fact, again accountable. The Sandra Bland case comes to mind.[6] The State chose to indemnify her; they had no obligation to do so under Will. They should have one.

Senior Counsel for Senator Markey had two inquiries during the 4.13.18 phone call: (i) why did other civil rights organizations choose not to participate in the Davis case; and (ii) why has nobody tried to amend 42 U.S.C. §1983 since Will was decided in 1989. In a 12.11.17 email to me the ACLU stated that: "Due to limited resources and the fact that other organizations are more appropriate leaders on these issues, we are declining to get involved in these matters." In a very recent email to me the Lawyers Committee for Civil Rights stated that: "I am writing in response to your request for representation. Unfortunately, our office will not be able to assist you in this particular matter. I just started working here, and I didn't realize that our team had already reviewed your case a couple of months ago. Please understand that this decision is not based on the merits of your case. The Lawyers' Committee for Civil Rights is a small, non-profit law office with limited resources. As a result, we are only able to accept a limited number of cases. Thank you for contacting the Lawyers' Committee. I wish you the best in resolving this matter." Other Civil Rights organizations simply failed to respond to our inquiries.

[5]The "grain by grain" corruption analysis is set forth in the sixty (60) page Governor Baker letter (11.3.17) and its 53 Exhibits. These documents were previously provided and are also set forth on the website. jasonstrongma.com.

[6] https://en.wikipedia.org/wiki/Death_of_Sandra_Bland

As to why nobody else has thought of filing the proposed amendment one simple thought predominates: the novelty of a legal concept does not point to its incorrectness. Indeed, the law could never progress if this were the case because the law would embed the requirement of stagnation into itself. The Davis case, for example, established many novel constitutional concepts which were not wrong simply because nobody thought of them before. Attorney Thurgood Marshall's call for integrated classrooms in Brown v Board of Education of Topeka, Kansas, 341 U.S. 483 (1954) was "novel". Did the absence of a prior attempt to integrate the classroom mean Attorney Marshall was wrong? The absence of a prior attempt to amend 42 U.S.C. §1983 is wholly irrelevant in discerning the viability of the proposed amendment. **It is of dispositive consequence to note though that the proposed amendment here is nothing more than the result of "reverse engineering" the Will dissents which, themselves, are impenetrable.** The Will majority did not rule that 42 U.S.C. §1983 could not be amended to define a "State" as a person. It merely ruled that the 1989 version of 42 U.S.C. §1983 did not define a "State" as a person. That position, though legally untrue, has no bearing upon the legal propriety of the proposed amendment. At any rate; Congress controls the verbiage of its own statutes.

We need not worry about any "floodgates" opening because of the proposed amendment. It will not have that effect. A State Police Officer, with a perfect work history who has been adequately trained and supervised, will not subject the State to Civil Rights liability if he commits a murder on the job. This results from the dictate of other currently effective Supreme Court cases which require that there be a governmental "policy" in effect which ***itself*** perpetuates the street level misconduct:

> If the decision to adopt that particular course of action is properly made by that government's authorized decision makers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

Monell v. New York City Department of Social Services, 436 U.S. 658, 690-691 & n. 54 (1978)

In 1997 the Supreme Court again articulated the policy making municipal liability predicate in Board of Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 404 (1997):

> As our §1983 municipal liability jurisprudence illustrates, however, it is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. (emphasis in original).

These cases evidence the fact that governmental liability would not arise simply because a State employee did wrong. The criteria to assert a claim against the government itself are much more stringent than this. In Davis, the convicted violent felons were hired under a written hiring policy during a wave of violence at the institution – itself a policy of inaction – in the presence of a recidivism rate of 34.6% for convicted violent felons. Moreover, the convicted violent felons at issue also had work histories littered with violence and abuse against mentally ill inpatients, before the Davis incident occurred, coupled with constitutionally deficient restraint training. Thus, there were layers and layers of "policies" of action and inaction at play in Davis which tied the State ***itself*** to the "street level" misconduct. However, to be clear, aberrational behavior by a rogue employee – who had no adverse employment history and who was not ill trained or supervised - will not perpetuate State liability even if 42 U.S.C. §1983 is amended in the manner proposed.

These cases make critical distinctions relative to what ***would be*** the scope of ***State*** Civil Rights liability. The cited cases are those which govern Town, County, City and Municipal liability in the Civil Rights context.[7] They would be equally applicable to the State under the proposed amendment therefore insuring that the "floodgates" would not open. This is a critical observation about the proposed amendment and would do much to combat adversaries of it. In short, if a State ***is*** found liable under Monell and Brown ***it should pay*** because ***it would be*** responsible in every sense of the word. Such was the case in Davis.

To fluff off the amendment as a bunch of nothing and then discount the Jason Davis case as a squabble over so much money – a mere collection case at this point – actually proves Jason Davis' predicate in seeking to amend 42 U.S.C. §1983 in the first place. In a 2014 letter to the Massachusetts Senate Jason's father stated that:

> 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 law. It will also cement the proposition that the historic laws Jason made will be neither in vain 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.

[7] **In 1978 the Supreme Court expressly held that Towns, Counties, Cities and Municipalities can, in fact, be sued for money damages under 42 U.S.C. §1983.** See Monell v. New York City Department of Social Services, 436 U.S. 658, 690 - 691 & n. 54 (1978) (Brennan, J.); The contention that these political bodies can be sued for money damages under 42 U.S.C. §1983 but that States cannot is constitutionally incongruous as the Will dissenters make axiomatic. 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). "Local governing bodies…can be sued directly under §1983 for monetary, declaratory, or injunctive relief where…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." Monell, 436 U.S., at 690-691. Fundamental notions of equality, as between both Plaintiffs and Defendants, demands that States also be subjected to money damage claims under 42 U.S.C. §1983.

Treating Jason Davis' plight as merely being that of a man on the wrong end of a collection case is to victimize him again, dismiss the vile and corrupt conduct of five Massachusetts Democratic power brokers, dismiss the vile conduct of the convicted violent felons who brutalized Jason Davis after being hired by the State, dismiss the vile conduct of the State, dismiss the vexatious impact of Will, dishonor Jason Davis' agony and that of his family and diminish the substantial and novel contributions Jason Davis made to our Nation's constitutional landscape in the mental health arena. See Davis v. Rennie, 264 F. 3d. 86 – 116 (1st Cir. 2001). This "collection case" characterization of the Davis case is precisely what is wrong with America right now. It is a vile thread to even attempt to weave into this case.

I do evoke his memory often because he is a great litmus test for us all: Bobby Kennedy. He would not shun the Davis family; nor would he look askew at the proposed legislative amendment. He would probably ponder about these matters for days on end. He and his brother, after all, filed ***their*** landmark Federal Civil Rights legislation in June of 1963 knowing full well it could have cost President Kennedy the 1964 Election due to the Southern Democrats alone. They filed the legislation nonetheless because the Nation needed it. Country over party; plain and simple. Neither Robert F. Kennedy nor President Kennedy would look the other way in the Davis case nor would they substantially delay the filing of the proposed amendment. Why? Because the Davis family needs justice and the Country needs the amendment. We all know where Senator Edward M. Kennedy would have stood on the issues in this case. It would have been great to have him on the call on Friday. He would not have been passing the buck, looking askew at the proposed legislative amendment or characterizing this case as a mere collection case. As President Obama said in his eulogy for Senator Kennedy: "He was a veritable force of nature…" We need a "veritable force of nature." Only cowardice and "good ole boy" politics have prevailed to this point.

Those five powerful Democrats, who wronged Jason Davis, loom large. They always have. Their conduct was corrupt, vile, evil, disgusting and wrong as proved by uncontroverted empirical data on the website. jasonstrongma.com. See pages 1-60 of Governor Baker letter on website with its 53 Exhibits; See also 1.12.18 Huffington Post Article[8] – "Corruption in Massachusetts". Nobody wants to talk about the corruption of these five powerful Democrats. Nobody ***will*** talk about that. Silence prevails. The remediation of this corrupt conduct though should actually be the subject matter of an independent federal statute in aid of the mentally ill as I have indicated many times. See Youngberg v. Romeo, 457 U.S. 307 (1982); Will. Nobody is above the law. Those five powerful Democrats have been placed there by others. They did wrong yet nobody will say one word about it. Nobody ever has. What these five powerful Democrats did was injurious to the plight and safety of the mentally ill and runs counter to Youngberg's constitutional obligations – to keep the mentally ill safe - yet nobody will talk about it. Why? The power and legacy of these five Democrats simply continues to eclipse the power of the wrongs in Davis.

I ***was*** reluctant to seek help from the Massachusetts Congressional contingent as was alluded to by Senior Counsel for Senator Markey on 4.13.18 during the meeting. Why would I not be? Why would any reasonable person not be? That is precisely why I sought help from Representative John Lewis. Look at what those five powerful Democrats ***did*** to Jason Davis coupled with the power

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

they obviously possess within Massachusetts political circles. One is an impending presidential candidate (Governor Patrick) and four others are or were State Attorneys General. When those five powerful Massachusetts Democrats are on one side of the political scale and Jason Davis is on the other – who wins? The Massachusetts Democrats always win even when considerations of even handed justice compel a contrary result. Again, these five powerful Massachusetts Democrats loom large. They always have.

There has never been a better time in American history to put this one sentence into 42 U.S.C. §1983. The Republican Party is in turmoil. The Speaker of the House is resigning which will create a huge vacuum all by itself. The Executive Branch is in chaos. There will be a sea change in both the Senate and the House which will result in Democratic control. President Trump is a horse trader. He would make a deal, after the new majority is seated in January, 2019, which involves the one sentence proposed here. At worst, a democratic President would embrace the amendment upon arrival in the White House. The rule of law and accountability are being questioned daily by those who disrespect our Democratic processes and norms. The proposed amendment focuses on making States liable and accountable for their civil rights deprivations thus itself implementing the rule of law. The proposed amendment will invigorate the very heart of our democracy as our Founders intended in 1871.

When the new majority in the House and the Senate take their seats in January, 2019 the proposed amendment should be front and center with the Massachusetts Congressional contingent leading the way. When was the last time a Massachusetts legislator proposed a landmark piece of Federal Civil Rights legislation? Senator Kennedy's 1990 "The Americans with Disabilities Act" became law when President Bush was in the White House.[9] See 42 U.S.C. §12101. It is time to think as grand as Senator Kennedy did. Few ever do. President Kennedy filed his Civil Rights legislation knowing full well it might cost him the presidency he so loved. No legislator faces such a possibility here. We talk of profiles in courage.

I look forward to working with each of you to finally bring justice to both Jason Davis and his family. Our Country is also in dire need of the requested amendment to 42 U.S.C. §1983. It is respectfully submitted that this legislation needs to become law at the earliest possible time.

The pleas of the *Will* dissenters should no longer be the lone cries in the constitutional wind. We must bookend them with legislative action. Justice Harlan's 1896 dissent in *Plessy*[10] teaches us precisely why drawing a line in the sand is so critical. The Supreme Court blessed us with monumental cures for Civil Rights ills in both the *Plessy* and *Will* dissents. We should ignore the *Will* cure no longer. It is a beacon of righteousness which should be embraced in the plain text of 42 U.S.C. §1983.

We simply cannot turn our heads away from Jason Davis any longer.

Thank you.

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[9] http://www.cnn.com/2009/POLITICS/08/29/kennedy.disabilities/index.html

[10] Plessy v. Ferguson, 163 U.S. 537, 552-564 (1896) (Harlan, J. dissenting)

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

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

CMP/pmc
Via Email/U.S. Mail

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