H.R. 9060[1]

MEMORANDUM IN SUPPORT OF LEGALITY AND IMPORTANCE

I. INTRODUCTION

H.R. 9060 encompasses the most important piece of Federal Civil Rights legislation to be considered by Congress since Reconstruction.[2]

What the Davis v. Rennie series[3] of reported federal cases does best is illustrate the grotesque inequities in the Federal Civil Rights laws as articulated by the Supreme Court in Will v. Michigan, 491 U.S. 58 (1989).[4] Jason Davis' family seeks to supplement the Federal Civil Rights Act (42 U.S.C. §1983), with but a single sentence in the form of H.R. 9060, to cure these inequities. The Davis case is the poster child for the failed constitutional and federal statutory experiment which is the Will v. Michigan case.[5]

The Will case hurts us all and thwarts some of the best work by our greatest Civil Rights Leaders; both past and present. Will literally has reduced the Federal Civil Rights Act, in many cases, to nothing more than a toothless giant. It has also perpetuated a culture of violence and abuse against the committed mentally ill - across our Nation - since 1989. It did so in Davis.[6] The committed mentally ill are both without both a voice and a remedy because of Will.

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[1] See https://www.congress.gov/bill/116th-congress/house-bill/9060/text?r=1&s=5

[2] H.R. 9060 was filed and introduced by Representative Joseph P. Kennedy, III on 12.31.20.

[3] The Davis series of reported federal cases set forth some of the most profoundly important constitutional protections for the mentally ever articulated by our 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 was actually the first United States case to squarely 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 – 117 (1st Cir. 2001). This opinion by the United States Court of Appeals for the First Circuit ("First Circuit") has been cited hundreds of times, throughout the Country, since it was decided. It is manifestly a landmark civil rights opinion in the mental health arena. The Massachusetts legislature has expressly acknowledged as much in its legislative filings.

[4] The law firm of Brendan J. Perry & Associates, P.C. (Holliston, Massachusetts) has represented Jason Davis and his family since 1996.

[5] The Federal Civil Rights Act is but the conduit through which federal constitutional claims are asserted. Graham v. Connor, 490 U.S. 386, 393-394 (1989). Thus, when it is impermissibly restricted it necessarily results in a concurrent and impermissible restriction upon the Constitution itself. This is precisely what occurred in Will.

[6] On August 12, 1993 Jason Davis was an involuntarily committed and acutely mentally ill inpatient housed within a locked unit at a State Mental Health facility. On said date he was beaten bloody by two Mental Health Care Workers – both of whom were convicted violent felons at hire - while several other Mental Health Care Workers pinned him to the floor, looked on or cheered the result. Jason Davis suffered acute psychiatric injuries from the attack as recounted by the First Circuit. There were actually two separate physical attacks on Jason Davis on August 12, 1993 by his "caregivers". See Davis v. Rennie, 264 F. 3d 95, 116, 86 - 117 (1st Cir. 2001).

However, there is a simple, one sentence cure which, ironically enough, has already been constitutionally blessed by the Will majority itself. Will, 491 U.S., at 66, 58-71. This cure is set forth in H.R. 9060.

One of the best kept constitutional secrets in America is, indeed, the rule of law laid down in Will. Will simply holds that since "States" are not "persons", under the Federal Civil Rights Act, ***they*** may not be sued for civil rights monetary damages claims under this act because it only permits "persons" to be sued. Will, 491 U.S., at 69.[7] This holding doubtlessly provides States with absolute immunity from suit. However, the Will majority, as noted, also concurrently held that Congress has the express constitutional authority to actually define a "State" as a "person" in future iterations of the Federal Civil Rights Act if it sees fit to do so. Id., at 66. This is precisely what H.R. 9060 does:

> For purposes of this section, the term 'person' includes a State or Commonwealth, and a department, office, or officer acting in their official capacity, thereof.

The issues flowing from Will are some of the most profoundly important constitutional issues in the history of our Democracy. Justices Marshall, Stevens, Blackmun and Brennan clearly thought so. They were the four dissenters in Will, 491 U.S., at 71-94 and clearly four of the greatest jurists ever to sit on the Supreme Court. The very purpose of the Reconstruction Era Civil Rights statutes, as well articulated in the Will dissents, was to insure that the State ***was*** financially liable and thus accountable when ***it*** engaged in unconstitutional conduct. Id. The Will majority clearly thwarted the Congressional intent behind the initial enactment of the Reconstruction Era Civil Rights statutes as proved by the Will dissents.[8] The "fix" though, as noted, consists of but a single original intent sentence. We need not relitigate the Will case here though because H.R. 9060 will fill the gaping hole that was left by Will's central holding with, incredibly enough, the constitutional blessing of the Will majority itself. Will, 491 U.S., at 66. In short, the central Will holding stands for the proposition that "The King can do no Wrong." It was Mr. Justice Stevens who observed in his riveting Will dissent that "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 88. (Stevens, J. dissenting).

The Davis case illustrates well the inequities of Will. The State committed Jason Davis to a mental health facility[9] where an historical wave of violence was acute, ongoing, documented and well

[7]This central ruling in Will was 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).

[8]However, to be fair to the Will majority, it does not appear that they expressly set out to provide this absolute immunity. It instead resulted, from the majority's perspective, simply from their interpretation of the 1989 text of 42 U.S.C. §1983 together with its legislative history. Will, 491 U.S., at 58-71. This probably is why the Will Court was so careful to hold that Congress was, thereafter, free to define States as "persons" in future iterations of 42 U.S.C. §1983.

[9]The Westborough State Hospital which was operated by the Massachusetts Department of Mental Health ("DMH") in 1993.

known to all who cared to know.[10] It also provided caretakers to him which included convicted violent felons[11] hired pursuant to a written State hiring policy. When expected and, indeed, statistically probable harm[12] befell Jason Davis on August 12, 1993, 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. First though the State, through the Office of its Attorney General, availed itself to a one month Federal District Court trial which it lost, a Federal Appeal which it lost and a Certiorari filing with the Supreme Court which it lost. The State then ran for the

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[10]The Davis case trial exhibits, which are still part of the record in the United States District Court for the District of Massachusetts ("Federal District Court"), the First Circuit and United States Supreme Court ("Supreme Court"), prove the documented commission of the very worst types of crimes against mentally ill inpatients at the Westborough State Hospital including Rape, Torture, Indecent Sexual Assault and Battery, Criminal Battery, Criminal Assault, Physical Violence, Physical Abuse, Neglect, Threats, Emotional Abuse, Intimidation, Swastika Branding and Verbal Abuse by staff.

[11]Philip Bragg and Paul Rennie were each hired pursuant to the DMH's internal written hiring policy. Philip 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 Westborough State Hospital. Philip 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 Westborough State Hospital in a direct patient care capacity. Philip Bragg also had a history of employment related violence and abuse upon patients prior his savage beating of Jason Davis. A former DMH Commissioner, Eileen P. Elias, testified under oath at trial that Philip Bragg should never have been employed as a Mental Health Care Worker in 1992 - one year before the Davis incident - given his violent proclivities. Paul Rennie was indicted for two counts of armed robbery and one count of assault and battery with a dangerous weapon prior to commencing employment for the DMH at the Westborough State 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 one count of assault and battery with a dangerous weapon. He was incarcerated in a Massachusetts prison for one year prior to his DMH employment. Paul Rennie had a history of employment related violence and abuse upon patients prior to his attack on Jason Davis. See Exhibits 2/1-4; 3/1-2; 4/1-6 @jasonstrongma.com. (References to exhibits in this Memorandum shall be to the Exhibit Number and Page of said exhibits as set forth on the website (jasonstrongma.com), e.g., (2/1-4) shall mean Exhibit 2, Pages 1-4 on said website).

[12]The employment of convicted violent felons Philip Bragg and Paul Rennie by the DMH in 1993, 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 attacks upon Jason Davis on August 12, 1993. See Davis, 264 F. 3d, at 86-117.

proverbial hills after defending the very criminals[13] – in three federal courts – who brutalized Jason Davis. The unpaid Davis judgment is approximately 2.4M.[14]

No matter how evil, reckless or intentional a State's conduct may be States are not presently subjected to damage claims under the Federal Civil Rights Act because of Will. The rule of law laid down in Will works a terrible injustice at the street level and deprives many of their civil rights including my committed mentally ill client, Jason Davis. **Sadly, no matter how many committed mentally ill inpatients are beaten, maimed or killed tonight - within State operated mental institutions across our 50 states – not one of them or their heirs will have a Federal Civil Rights monetary damage claim against any State in the morning. This is true no matter how much blood the State has on its own hands in the aftermath of its unabashed evil, reckless or intentional conduct. This is the failed constitutional and federal statutory experiment which is Will v. Michigan.**[15]

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 the Fourteenth Amendment[16] and the mockery it

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[13]It is self-evident that all Davis case defendants found civilly liable concurrently violated 18 U.S.C. §242 which is the criminal cousin of 42 U.S.C. §1983. Thus, all civil defendants – not just Philip Bragg and Paul Rennie – engaged in criminal conduct. Their conduct alone teaches us that as does the Davis verdict. Davis, 264 F. 3d, at 86-117. (10/1-9; 9/1-16; 50/1-11). The empirical record is all too clear.

[14]The Third Amended Judgment is $2,434,737 as of 1.12.21 with a per diem of $139.40.

[15]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 - 692 & n. 54 (1978) (Brennan, J.); The ability to sue these political bodies for money damages under 42 U.S.C. §1983, but not States, is constitutionally incongruous as the Will dissenters make axiomatic. Will, 491 U.S., 83, 93 (Brennan, J. dissenting; Stevens, J. dissenting). Mr. Justice Stevens observed in Will that the majority's construction of Section 1983 "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. Fundamental notions of equality, as between Plaintiffs and Defendants, demands that States also be subjected to money damage claims under 42 U.S.C. §1983.

[16]It is of great moment to note that: (i) the statute in question (42 U.S.C. §1983) is the conduit through which citizens of a State must assert claims against the State or State officials for violations of the Constitution and other federal statutes; and (ii) all civil rights claims asserted under 42 U.S.C. §1983 are entirely based upon the Fourteenth Amendment since its Due Process Clause incorporates the vast majority of constitutional rights, as set forth in the Bill of Rights, and makes them applicable to the States. See Graham, 490 U.S., at 393-394; 42 U.S.C. §1983; Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971); McDonald v. Chicago, 561 U.S. 742 (2010). (incorporation doctrine analysis). There is "no doubt of the power of Congress to enforce [under Section 5 of the Fourteenth Amendment] every right guaranteed by the Due Process Clause of the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 789 (brackets supplied) (1966); See also City of Boerne v. Flores, 521 U.S. 507, 517-520, 536 (1997). The import of these collective legal principals is simple: since nearly all constitutional rights set forth in the Bill of Rights have been incorporated into the Due Process Clause of the Fourteenth Amendment its follows, given the plain text of Section 1 of the Fourteenth Amendment, Section 5 of the Fourteenth Amendment and 42 U.S.C. §1983, that each of these rights must be asserted through 42 U.S.C. §1983 and is subject to the central majority ruling in Will v. Michigan. See Graham, 490 U.S., at 393-394; Will, 491 U.S., at 58-71; 42 U.S.C. §1983. The salient point is simply that Will's impact and chilling effect is felt across the entire spectrum of conceivable civil rights claims given that vast numbers of them can only be asserted through

makes out of our Democracy, Constitution, Federal Civil Rights Act, judiciary and core purposes of the Reconstruction Era Civil Rights statutes. It did so in Davis. The Commonwealth of Massachusetts was ***itself charged*** with the obligation to keep Jason Davis safe under the Constitution while he was a committed inpatient in its Department of Mental health. See Youngberg v. Romeo, 457 U.S. 307, 315, 324 (1982); Davis, 264 F. 3d, at 86-117.[17] Yet when it failed miserably in this regard, it informed Jason Davis and his family to take the matter up with the convicted 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. See Youngberg. The State eviscerates constitutional rights when only its employees are responsible for protecting them. Will implements both 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. This is the failed constitutional experiment which is Will.

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.[18] 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[19] and attempted to deflect blame against Massachusetts institutions.

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42 U.S.C. §1983. This statute, as we know, was construed by the Will Court to immunize States for money damages claims under 42 U.S.C. §1983. Will, 491 U.S., at 58-71.

[17]When Jason Davis was an involuntarily committed inpatient at the Westborough State 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, 457 U.S., at 315, 324.

[18]On the very day that the State Attorney General's Petition for a Writ of Certiorari was denied by the Supreme Court he withdrew his representation of all State employees in the Davis case. Davis, 178 F. Supp. 2d, at 28-29; (12/1).

[19]The principal constitutional contention asserted by Attorneys General Harshbarger and Reilly, which it asserted in three federal courts including the Supreme Court, 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 do so. 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 and

The Commonwealth was constitutionally required to protect Jason Davis under Youngberg yet when he was savagely brutalized by his State employed "caregivers" the Commonwealth protected them, not him, for their atrocities. Instead of indicting Jason Davis' assailants in State court it defended them in three federal courts including the Supreme Court. This constitutional incongruity was perpetuated by Will which throws Youngberg into the abyss. See supra. The Commonwealth ran for the proverbial hills when it lost for the third time in the Supreme Court via the denial of its Certiorari Petition. The Commonwealth clearly wanted to win at any cost, as its litigation tactics and legal positions so clearly proved, even if it meant making "bad law" along the way which impaired the safety of committed mentally ill inpatients. The Will holdings expressly allowed it to engage in these courses of conduct: it is accountable to nobody and can defend the defenseless anytime it chooses to do so. It did so in Davis.

Under Will, the Commonwealth of Massachusetts was allowed to pluck all the litigation fruit it could – including availing itself to a month long Federal District Court trial, a Federal Appeal and the filing of a Certiorari proceeding in the Supreme Court – while avoiding entirely the judgments entered in the very litigations perpetuated by its vast financial and legal 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 and make a mockery of accountability and justice in our Democracy. The State can simply "play cat and mouse" with both the Constitution and the justice system any time it sees fit to do so.[20] Will eviscerates State liability, in the money damages context, and with it any hope of accountability. The raw tactics which the Will case perpetuates though further disembowel the Federal Civil Rights Act and the U.S. Constitution in the State accountability context. "Cat and mouse" is a terrible game to play with the U.S. Constitution. Will perpetuates this game as Davis has taught us.

Shortly before the 1998 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

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unconstitutional but, if embraced, would have forever jeopardized the safety of mentally ill inpatients in Massachusetts and, indeed, the entire First Circuit. 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 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. 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 State Attorneys General in the Davis line of cases. See jasonstrongma.com and Exhibits 1- 68.

[20]The "grain by grain" corruption analysis of Massachusetts officials is set forth in the sixty (60) page Governor Baker letter (11.3.17) on the website's homepage (jasonstrongma.com) together with all exhibits set forth on said website.

the entire jury verdict if you win but that he will never have to pay you because you will never win." (brackets supplied). I then told Mr. Spicer I would hold the Attorney General to his word. The 2.4M Davis judgment remains unpaid. "Cat and mouse" is the order of the day under Will. It was in Davis. It still is.

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 payment of civil rights damage claims this perpetuates the contemplated sloth, incompetence and chaos one would expect to pervade our State institutions. It does. These conditions spawn multitudes of State perpetuated civil rights violations which plague our Nation and go unchecked. 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 damages to "punish" and "deter" the wrongdoer. Smith v. Wade, 461 U.S. 30, 54, 56 (1983). However, since States enjoy absolute immunity under Will there is neither a vehicle to "punish" nor "deter" them nor is there incentive, on their part, to engage in corrective behavior. The States, after all, are presently accountable to nobody. In Davis the State clearly had blood all over its hands but could still run away into the woods, when all was said and done, because of Will. This should not be permitted in a civilized society such as ours governed, as it is, by a Constitution which is supposed to be fair and just.

During his acceptance speech on November 7, 2020 President Biden-Elect called for racial justice, equality, accountability and an end to systemic racism. Our proposed legislation helps achieve each of these goals in a profoundly important manner. How? By making States accountable. The collective conduct of the 50 States clearly constitutes a sizable portion of the racial injustice, systemic racism, inequality and lack of accountability which plagues our Nation. States, after all, collectively exert legal control over our entire population (331M) in various manners and in a variety of institutional settings. Without accountability, on the part of the States, we will miss our chance to secure racial justice, equality, accountability and an end to systemic racism. There are thousands of cases we could cite now, which show this absence of accountability, but they include Sandra Bland, Samuel DuBose, Jason Davis and Joshua Messier.

II. THE UNITED STATES SUPREME COURT HAS EXPRESSLY RULED THAT THE PRECISE LANGUAGE EMPLOYED IN H.R. 1960 IS CONSTITUTIONAL UNDER SECTIONS 1 AND 5 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

It is not too often that the Supreme Court constitutionally endorses legislation in advance of it being filed. It did so here relative to H.R. 9060. The precise language of H.R. 9060 has already been constitutionally blessed by the Supreme Court through its majority opinion in Will v. Michigan, 491 U.S. 66, 58-71 (1989).[21]

[21] The five justices in the Will majority were Chief Justice Rehnquist, Justice White, Justice O'Connor, Justice Scalia and Justice Kennedy. Will, 491 U.S., at 59.

What the Will majority took away with one hand, by holding that "States" were not "persons" under 42 U.S.C. §1983, it gave back with another. This result obtains since this same Will majority concurrently ruled that Congress could, in fact, define "person" to include a "State" in the future iterations of 42 U.S.C. §1983 based upon Congress' "undoubted power under §5 of the Fourteenth Amendment to override…[the States' Eleventh Amendment]…immunity." Will, 491 U.S., at 66 (brackets supplied). When these Will holdings were articulated by the Supreme Court it full well knew and expressly understood that Congress would, by virtue of defining "person" to include a State, be concurrently providing a "remedy against a State" by a "citizen" consisting of civil rights money damages claims under 42 U.S.C. §1983. Will, 491 U.S., at 66, 58-71; 42 U.S.C. §1983.

It is acutely ironic, given the gaping hole in the Federal Civil Rights Act that one majority ruling in Will caused, to note that these secondary Will majority rulings actually constitute ironclad constitutional predicates which not only support the entire substance of H.R. 9060 but, in addition, the congressional power (§5 of the Fourteenth Amendment) upon which this legislation will be premised. Will, 491 U.S., at 66, 58-71. These Will rulings alone dictate that H.R. 9060 is constitutional in all respects.

The Will Court expressly held that: (i) the precise language in H.R. 9060 is valid under the Constitution; (ii) the precise language in H.R. 9060 is constitutionally premised upon a power (§5 of the Fourteenth Amendment) which Congress can validly exercise here to define a "State" as a "person" under 42 U.S.C. §1983; (iii) H.R. 9060 is not subject to States' Eleventh Amendment immunity; and (iv) 42 U.S.C. §1983 was enacted pursuant to §5 of the Fourteenth Amendment. Will, 491 U.S., at 66, 58-71.

The Supreme Court's holding in Will, that Congress would be exercising its powers under Section 5 of the Fourteenth Amendment if it proposed legislation which defined a "State" to be a "person", is alone dispositive of all Eleventh Amendment immunity issues attendant to H.R. 9060.

Section 1 ("Section 1") and Section 5 ("Section 5") of the Fourteenth Amendment to the United States Constitution read as follows:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Eleventh Amendment to the United States Constitution reads as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Since H.R. 9060 is premised upon the Section 5 enforcement powers,[22] which Congress has under the Fourteenth Amendment, the generic immunity analysis under the Eleventh Amendment gives way to an Eleventh Amendment immunity analysis which is acutely peculiar to Congress' Section 5 enforcement powers. In short, when Congress exercises its enforcement powers under Section 5 the States' Eleventh Amendment immunity is extinguished without addressing the litmus tests and nuances normally associated with generic Eleventh Amendment immunity analyses. See Will, 491 U.S., at 66; Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 727 (2003) (quoting Fitzpatrick *v.* Bitzer, 427 U. S. 445, 456 (1976)).

As noted, the Will majority has already specifically held, relative to the precise language at issue in H.R. 9060, that Congress' has the "undoubted power under §5 of the Fourteenth Amendment to override…[the States' Eleventh Amendment]…immunity." Will, 491 U.S., at 66 (brackets supplied). Section 5 of the Fourteenth Amendment has actually long been interpreted by the Supreme Court to prevent States from successfully asserting immunity from private suit under the Eleventh Amendment in the Federal Courts. "Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce. Congress may, however, abrogate States' sovereign immunity through a valid exercise of its § 5 power, for 'the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.'" Hibbs, 538 U.S., at 727 (quoting Fitzpatrick, 427 U. S., at 456). "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment [under Section 5 of the Fourteenth Amendment], provide for private suits against States or State officials…" Fitzpatrick, 427 U. S., at 456. This is precisely what H.R. 9060 seeks to accomplish. The majority rulings in Will, 491 U.S., at 66 and Fitzpatrick, 427 U. S., at 456 constitute impenetrable constitutional predicates for H.R. 9060.

"It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (brackets in original, quoting Katzenbach *v.* Morgan, 384 U. S. 641, 651 (1966)). This deference would be considerable here since, as proved in succeeding Sections, the proposed legislation merely codifies what 42 U.S.C. §1983 stood for between 1871 and 1989 and does exactly that which the 1871 Congress originally intended.

[22] The ruling by the Will majority, that language of the type contained in H.R. 9060 would be constitutionally premised upon Section 5 of the Fourteenth Amendment, is premised upon constitutional bedrock. The Supreme Court expressly ruled in 1961 that 42 U.S.C. §1983 was itself enacted pursuant to Section 5 of the Fourteenth Amendment. Indeed, this statutory section "came onto the books as § 1 of the Ku Klux Klan Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment." Monroe v. Pape, 365 U.S. 167, 171 (1961). Since H.R. 9060 seeks to supplement 42 U.S.C. §1983 it too would result from and be premised upon the Section 5 powers which Congress possesses. Ibid, at 171.

"All must acknowledge that § 5 [of the Fourteenth Amendment] is 'a positive grant of legislative power' to Congress, Katzenbach *v.* Morgan, 384 U. S. 641, 651 (1966) (brackets supplied). In *Ex* Parte Virginia, 100 U. S. 339, 345-346 (1880), we explained the scope of Congress' § 5 power in the following broad terms: 'Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.'" Flores, 521 U.S., at 517-518.

III. THE PROPOSED LEGISLATION SHOULD BE EMBRACED BY ALL "TEXTUALISTS", "ORIGINALISTS" AND "STRICT CONSTRUCTIONISTS" GIVEN THE RAW TEXT OF H.R. 9060 AND SECTIONS 1 AND 5 OF THE FOURTEENTH AMENDMENT

Some might try to posit that H.R. 9060 is a progressive piece of Federal Civil Rights legislation. It is not. In fact, this legislation should be whole heartedly embraced by all constitutional "textualists", "originalists" and "strict constructionists" if they are fair to their interpretative disciplines. Moreover, the proposed legislation does nothing more than what the 1871 Congress originally intended.

The plain text of Section 1 and Section 5 dictate, in a very simplistic fashion, that States are ***already*** "persons" for the purposes of the Federal Civil Rights Act. Thus, the proposed legislation does nothing more than what the raw text of Section 1 and Section 5 already do. If constitutional "textualists", "originalists" and "strict constructionists" are fair to their interpretative disciplines they too must agree with this proposition. There is simply no contrary constitutional construction possible.

Section 1 of the Fourteenth Amendment reads, in part, as follows:

> **No state shall…deprive any person of life, liberty, or property, without due process of law; nor deny…any person within its jurisdiction the equal protection of the laws.**

There has never been any doubt that the proscriptions contained within the Fourteenth Amendment are exclusively and specifically directed at our 50 States. Indeed, the first words of Section 1 of the Fourteenth Amendment are that **"No State shall…"** That the Fourteenth Amendment directs itself exclusively to the actions of the States could be no clearer given its plain, strict and ordinary text.[23]

Section 5 of the Fourteenth Amendment reads as follows:

> **Congress shall have power to enforce this article by appropriate legislation.**

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[23] It is consequential to note that the Fourteenth Amendment was passed by Congress on June 13, 1866 and ratified by the States on July 9, 1868 well ahead of the 1871 version of 42 U.S.C. §1983.

The Supreme Court has expressly held that 42 U.S.C. §1983 was enacted pursuant to Section 5 of the Fourteenth Amendment. Monroe, 365 U.S., at 171. "Congress' power under §5…extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment." Flores, 521 U.S., at 519 (brackets in original). The Supreme Court "has described this power as 'remedial' …" Id. (citation omitted). "The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause." Id., at 520. Thus, Section 5 restricts itself to the raw enforcement of the "provisions" of the Fourteenth Amendment. The plain, strict and ordinary meaning of these provisions of the Fourteenth Amendment compel States, and only States, not to deprive any person of life, liberty or property, without due process of law, or deny any person of the equal protection of the laws. Section 5 is indeed logical: it can only enforce the provisions expressly delineated within the body of Fourteenth Amendment itself. To do otherwise would be to violate the law. "Congress does not enforce a constitutional right by changing what that right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." Flores, 521 U.S., at 519.

Providing for claims against additional parties in Section 5 legislation, which are not States or State officials acting in their official capacities, would be to illegally redefine the scope of the Fourteenth Amendment itself by changing the substantive nature of its ambit. Id. Congress lacks the power to do precisely this. Id. The proposed text of H.R. 9060 merely " 'carr[ies] out the objects the amendment[ ] ha[s] in view…' " in conformity with Section 5. Flores, 521 U.S., at 517 (citation omitted).

The recited Supreme Court authorities dictate that:

A. Section 5 can only enforce the provisions of the Fourteenth Amendment;

B. The provisions of the Fourteenth Amendment confine themselves to compelling States, and only States, to engage in specific conduct;

C. Section 5 can only be employed to enforce certain State related conduct;

D. Any remedial legislation promulgated by Congress under Section 5 could only pertain to enforcing State related obligations set forth in Section 1 of the Fourteenth Amendment;

E. Even if a State were not expressly delineated as a permissible party, relative to remedial legislation promulgated by Congress to remedy civil rights violations, States would ***always*** be mandatory parties insofar as Section 5 ***enforces*** Section 1 which itself relates ***exclusively*** to State conduct; and

F. It would expressly violate the above authorities if any remedial legislation promulgated by Congress under Section 5, relative to Section 1, did not regulate the behavior of the States ***themselves.***

It is simple: Section 1 of the Fourteenth Amendment compels certain conduct by the States. Section 5 of the Fourteenth Amendment permits Congress to enact Federal Civil Rights liability legislation aimed at enforcing Section 1 of the of the Fourteenth Amendment. Section 5, per force, compels Congress to address State conduct if it chooses to enact remedial Federal Civil Rights legislation given the combined effect of Section 1 and Section 5 of the Fourteenth Amendment. "The prohibitions of the Fourteenth Amendment and Congress' power of enforcement are…directed at the States themselves, not merely at state officers." Quern, 440 U.S., at 355. (Brennan, J. concurring). Given the strictures of Section 5 it is manifest that any legislation promulgated under it - including the precursor to 42 U.S.C. §1983 as enacted by the 1871 Congress – must have been wholly directed at the States by shear definition. Thus, the word "person" in 42 U.S.C. §1983 ***did*** include and must necessarily have included States and State officials acting in their official capacities, given the combined effect of Sections 1 and 5 of the Fourteenth Amendment, even if States were not mentioned by specific reference in the remedial legislation. It must be recalled that "Congress' power under §5…extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment." Flores, 521 U.S., at 519. It can do no more. "State" conduct lies at the very heart of Fourteenth Amendment. It is manifestly and necessarily embedded into all remedial legislation promulgated under Section 5.

It is clear that States are already "persons" under 42 U.S.C. §1983 given the principals set forth above. The proposed supplementation to 42 U.S.C. §1983, which specifically seeks to define a "State" as a "person", accomplishes nothing more than what the raw text of Sections 1 and 5 of the Fourteenth Amendment already accomplish. Thus, the proposed legislation merely implements what is already mandated by this plain, strict and ordinary text. Constitutional "textualists", "originalists" and "strict constructionists" must concur with this proposition if they are to be fair to their interpretative disciplines.

H.R. 9060 would implement a construction of the Fourteenth Amendment and 42 U.S.C. §1983 with which a fair minded "textualist", "originalist" and "strict constructionist" would have to agree. The proposed legislation also does nothing more than what the 1871 Congress originally intended.

IV. WHEN THE 1871 CONGRESS ENACTED THE PRECURSOR TO 42 U.S.C. §1983 IT FULLY INTENDED TO IMPOSE DIRECT LEGAL LIABILITY UPON THE STATES FOR THEIR CONDUCT UNDERTAKEN DURING RECONSTRUCTION

We need not relitigate the Will case here because H.R. 9060 intends to fill the gaping hole that was left by the Will's central holding. However, demonstrating that Congress did, in fact, intend to subject "States" to federal civil rights monetary damages claims - when the precursor to 42 U.S.C. §1983 was enacted in 1871 – is still acutely germane here. "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." Flores, 521 U.S., at 536. If Congress, as it did, sought to impose directly liability upon the States some 150 years ago (1871) its decision to ***again*** do so here would be clearly entitled to an ocean of deference. Id. This is why it is so essential to look back even as we propose this new legislation to fill the very hole created by Will.

The Will dissents make painstakingly clear the fact that the very purpose of the 1871 Congress, in enacting the precursor to 42 U.S.C. §1983,[24] was to impose direct liability upon the States for

[24] §1 of the Ku Klux Klan Act of April 20, 1871. 17 Stat. 13. See Monroe v. Pape, 365 U.S. 167, 171 (1961).

their conduct during the Reconstruction period. This liability included liability for money damages claims under 42 U.S.C. §1983. Will, 491 U.S., at 71-94. When the Ku Klux Klan Act was adopted by the 1871 Congress it was intended to curb rogue behavior by the State actors including Southern Governors and other State officials who were teaming with the Ku Klux Klan to assassinate blacks in the street. "The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls." Will, 491 U.S., at 84-85 (Brennan, J. dissenting). "The Act of 1871, known as the Ku Klux Klan Act, was directed at the organized terrorism in the Reconstruction South led by the Klan, and **the unwillingness** or inability of **State officials** to control the widespread violence." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 610 & n. 25 (1979) (emphasis supplied). The 1871 Congress clearly wanted the States ***themselves*** to be financially liable for the conduct of ***their*** officials acting in their official capacities.

Justice Brennan noted in his dissent that "[t]he question presented is whether the word 'person' in this statute includes the States and State officials acting in their official capacity." Will, 491 U.S., at 72 (Brennan, J. dissenting). "One might expect that this statutory question would generate a careful and thorough analysis of the language, legislative history, and general background of 42 U.S.C. §1983. If this is what one expects, however, one will be disappointed by today's [majority] decision." Id. (brackets supplied). There was simply no legislative analysis undertaken by the Will majority which is acutely odd and, indeed, fatal given that the Court's central task should have been to construe the ***scope*** of the statute in question to discern if a State was a "person" under §1983. Scope constructions of statutes necessarily cannot be viably undertaken without performing an exacting analysis of the statute's legislative history. This was not undertaken by the Will majority.

"I discussed in detail the legislative history of this statute in my opinion concurring in the judgment in Quern v. Jordan, 440 U.S., at 357–365, 99 S. Ct., at 1153–1158, and I shall not cover that ground again here. Suffice it to say that, in my view, the legislative history of this provision, though spare, demonstrates that Congress recognized and accepted the fact that the statute was directed at the States themselves." Will, 491 U.S., at 83-84 (Brennan, J. dissenting). "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." Will, 491 U.S., at 84 (Brennan, J. dissenting). "'[V]iewed against the events and passions of the time,' …I have little doubt that § 1 of the Civil Rights Act of 1871 included States as 'persons.'" Will, 491 U.S., at 84. (citations omitted; Brennan, J. dissenting).

Justice Brennan then recited the precise historical events which dictated that the ***very purpose*** of the 1871 Federal Civil Rights Act was, in fact, to curb illegal Reconstruction Era activities by the States and to insure that the States ***would themselves be liable*** for the Federal Civil Rights violations committed by them during this period.

> 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. 'For a few years 'radical' Republicans dominated the governments of the Southern States and Negroes played a substantial political role. But countermeasures were swift and violent. The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls. The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man. 'Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures. A few months after the ratification of the Thirteenth Amendment on December 6, 1865, Congress, on April 9, 1866, enacted the Civil Rights Act of 1866.... On June 13, 1866, the Fourteenth Amendment was proposed, and it was ratified in July 1868. In February 1869 the Fifteenth Amendment was proposed, and it was ratified in February 1870. On May 31, 1870, the Enforcement Act of 1870 was enacted. Id., at 803–805, 86 S. Ct., at 1161–1163 (footnotes omitted).

Will, 491 U.S., at 84-85 (Brennan, J. dissenting).

Justice Brennan then concluded his thoughts as to why it is that the 1871 Congress intended that the States be liable under the Federal Civil Rights Act for money damage claims: "This was a Congress in the midst of altering the 'balance between the States and the Federal Government…' 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 85 (citation omitted) (Brennan, J. dissenting).

That the very purpose of 42 U.S.C. §1983 was to curb illegal Reconstruction Era conduct by the States and State officials, acting in their official capacities, is evidenced by ***their*** Reconstruction era conduct and the response to it by the 1871 Congress in the form of the Ku Klux Klan Act.[25] It was this conduct which directly spawned the need for the enactment of 42 U.S.C. §1983 in the first place. It is therefore untenable to suggest that States and State officials, acting in their official capacities, should not be subject to the very statute which was directly and specifically aimed at their precise State related conduct. To suggest that the States and States officials, acting in their official capacities, should somehow escape the clutches of 42 U.S.C. §1983 would be to defeat the fundamental purpose which prompted the enactment of this statute in the first place.

Justices Marshall, Brennan, Blackmun and Stevens proved through their dissents that the 1989 text of 42 U.S.C. §1983 already construed States to be "persons". Indeed, their dissents proved that the 1871 Congress placed this very construction on 42 U.S.C. §1983 when it enacted its precursor.[26]

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[25]Section 1 of the Civil Rights Act of 1871.

[26]Section 1 of the Civil Rights Act of 1871.

See supra. H.R. 9060 merely codifies what 42 U.S.C. §1983 stood for between 1871 and 1989. **It does nothing that the 1871 Congress did not originally intend.**

Since Congress sought to impose directly liability upon the States some 150 years ago (1871), through the precursor to 42 U.S.C. §1983, its decision to ***again*** do so here is clearly entitled to an ocean of deference. See Flores, 521 U.S., at 536

V. THE CONTENTION THAT H.R. 9060 WILL OPEN THE LITIGATION FLOODGATES AGAINST THE STATES OR PERPETUATE THEIR FINANCIAL RUINATION IS DISPROVED BY CURRENT SUPREME COURT PRECEDENT AND THE HISTORY OF GOVERNMENTAL CIVIL RIGHTS CLAIMS

At the outset we must remember what principals ***are not applicable*** in the in the Federal Civil Rights arena so that we can gauge the volume of cases to be expected in the aftermath of the proposed legislation becoming law. These principals alone tremendously restrict the volume of cases that could be expected to be brought. Firstly, the principles of respondiat superior and vicarious liability ***are not*** applicable to Federal Civil Rights claims. That is to say, for instance, that an employer ***is not*** independently liable for the actions of its employee just because the employee is employed by the employer. See Monell v. New York City Department of Social Services, 436 U.S. 658, 690 – 694 (1978). These principles come from the common law and are simply not deployed in Federal Civil Rights claims. These principles would remain unchanged if the proposed legislation become law. Id.

The law of "negligence" likewise does not apply to Federal Civil Rights claims. Negligence, simply put, amounts to "accidental" harm occasioned by one person upon another. Negligence occurs where the person owing the duty simply fails to act as a reasonably prudent person would act in the same or similar circumstance. These principals do not apply to Federal Civil Rights claims either. If a State Police Officer, State Prison Guard or State Mental Health Care Worker negligently injures a person, while they are at work, this injury would not give rise to any Federal Civil Rights money damages claim against a State. This will also be the case after the passage of the proposed legislation.

There are actually two incredibly hard legal bridges to cross before a claim can be viably brought against any governmental entity under the Federal Civil Rights Act. First, you must possess a viable claim against the assailant or violator. You then must bring a second claim against the government entity itself after having proved the viability of the underlying claim.

Currently, "Section 1983 itself 'contains no state-of-mind requirement independent of that necessary to state a violation' of the underlying federal right. . . . In any § 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying [1983] violation." Board of County Commissioner's of Bryan County, Oklahoma v. Brown, 520 U.S. 397, 405 (1997). All this means is simply that Section 1983 does not itself contain state of mind requirements since these requirements come from the constitutional claims asserted through Section 1983. There are various "state of mind" requirements in the Federal Civil Rights laws including evil conduct, intentional conduct, reckless conduct, malicious conduct, deliberately indifferent conduct, callous indifference, conscious conduct, objectively unreasonable conduct and the like. Federal Civil Rights cannot be "accidentally" violated because the violator or assailant must intend, in some form or fashion, to

harm somebody or know that harm was likely to result from their conduct or inaction. See Smith v. Wade, 461 U.S. 30, 56 (1983);[27] County of Sacramento v. Lewis, 523 U.S. 833-865 (1998); Rodríguez-García v. Miranda-Marín, 610 F.3d 756, 768 (1st Cir. 2010); Lipsett v. University of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986); Graham v. Connor, 490 U.S. 386, 399 (1989); Tennessee v. Garner, 471 U.S. 1, 16 (1985).

Just because a State Mental Health Care Worker brutalizes a mentally ill inpatient this would not, once again, mean that State itself would be financially liable under the Federal Civil Rights Act. Far from it. This would continue to be true even if the proposed legislation passes. Truth be told, the viability of the underlying claim - against the assailant himself - has nothing to do with whether the State ***itself*** would be liable. Liability of the State, for Federal Civil Rights money damages purposes, would be achieved only after litigants cross a second legal bridge which is extremely hard to cross. A State Police Officer, with an adequate work history who has been adequately trained and supervised, will simply not subject the State ***itself*** to Federal Civil Rights money damages claims even if he commits a heinous and unjustified criminal act while on the job. This would remain true even after the passage of the proposed legislation.

We must remember that since 1978 Federal Civil Rights litigants have been allowed, under U.S. Supreme Court precedent, to bring Federal Civil Rights monetary damage claims against Towns, Counties, Cities and Municipalities. See supra. This is true even though the U.S. Supreme Court ruled in 1989 that such claims could not be asserted against the State or its officers acting in their official capacities. See Will v. Michigan, 491 U.S. 58-94 (1989). However, these governmental precedents, relative to Towns, Counties, Cities and Municipalities, would not only be employed in the "State" context but would concurrently insure that only a paucity of cases against the States would be filed.

The primary contention by adversaries of the proposed legislation will be that the floodgates will open wide thereby perpetuating an avalanche of cases against States which seek money damages under the Federal Civil Rights Act. This contention is entirely disproved though by the binding Supreme Court precedent which sets forth the legal predicates upon which ***governmental liability*** must be premised. This, again, is in addition to the liability of the underlying assailant or violator. No floodgates will open because Supreme Court precedent forecloses such a result.

The same State Police Officer referenced above, with an adequate work history who has been adequately trained and supervised, will not subject the State ***itself*** to Federal Civil Rights money damages claims – even if he commits a heinous criminal act on the job – because of binding Supreme Court cases which address governmental liability.

The U.S. Supreme Court has held that:

[27] "We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. We further hold that this threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness." Smith v. Wade, 461 U.S. 30, 56 (1983).

> 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.

Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986).

"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.

In 1997 the Supreme Court again articulated the central policy making municipal liability predicate in Brown, 520 U.S., at 404.

> 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).

Binding Supreme Court precedent dictates that governmental liability simply does not attach just because a State employee does wrong. Far from it. This will not change with the passage of the proposed legislation. The criteria to prevail upon a claim against the government itself, as proved above, requires much more than this. Liability only attaches when litigants cross this second legal bridge after having crossed the first. Claimants must not only tie their claims directly to the actions of the municipality's policy makers but they must also demonstrate the "requisite degree of culpability" – intent - on the part of these policy makers. See supra. Proving claims against governmental policy makers is an acutely arduous and complicated legal task because of the cited Supreme Court litmus tests. In Davis, the State proximately caused the street level civil rights deprivations and clearly had the "requisite degree of culpability..." Brown, 520 U.S., at 404.

It should be noted that the convicted violent felons who brutalized Jason Davis:

(i) were hired under a written hiring policy promulgated by the State;

(ii) were hired by the State to work in direct patient care capacities with the mentally ill which requires extraordinary patience;

(iii) were hired during a wave of violence and abuse at the State institution including theirs;

(iv) had a recidivism rate of 34.6%;

(v) had work histories which demonstrated extensive violence and abuse upon committed mentally ill inpatients before the Davis attacks;

(vi) were hired by the State following their incarceration for commission of violent crimes against the person; and

(vii) were deficiently trained in restraint practices as evidenced by the gruesome "restraints" to which Jason Davis was subjected as per the reported opinion by the First Circuit. See Davis, 264 F. 3d, at 86 – 117; Exhibits 1-68 @ jasonstrongma.com.

In short, 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. The intensive proof related requirements in this arena insure that only a paucity of cases will be filed. Those who litigate these cases know this to be true. These types of claims, asserted against the State, will be extremely difficult to prevail upon given the strictures of Pembaur, Monell and Brown. Suggestions that the floodgates will open are at odds with the teachings of these cases and the long history of governmental liability in the context of Towns, Counties, Cities and Municipalities.

The public statements issued by Massachusetts State Representative John Rogers, relative to the Davis case, illustrate well the vexing street level effects of Will: (i) "The facts are uncontested. They [Department of Mental Health] hired, failed to train and failed to supervise these workers and to allow the State to walk away is just wrong."; [28] and (ii) "In my mind the liability of the Commonwealth has always been crystal clear."[29]

It would only be the most extreme and outrageous cases which would result in liability against a State for monetary damages, under the Federal Civil Rights Act, if the proposed legislation becomes law. Reasonable people will agree that these extreme and outrageous cases should be met with justice and not the blind eye and the deaf ear to which the Davis family has been subjected.

The State should be liable in a case such as Davis because it did wrong and because it had blood all over its hands. All reasonable people, on both sides of the aisle, should be able to agree on this. H.R. 9060 would achieve justice in cases like Davis because it was both extreme and outrageous.

VI. FEDERAL CIVIL RIGHTS CLAIMS AGAINST STATES WOULD ONLY AMOUNT TO AN INFINITESIMALLY SMALL PORTION OF ANY STATE BUDGET DUE TO THE INFREQUENCY WITH WHICH THESE CLAIMS COULD BE SUCCESFULLY ASSERTED

[28] http://www.wcvb.com/article/family-waits-years-for-millions-after-son-beaten-at-hospital/8034736

[29] https://www.bostonglobe.com/metro/2014/03/09/jason-davis-beating-foreshadowed-joshua-messier-tragedy/JUTn1QniHkN8SCnrwqk9IK/story.html

Money damages claims against the State government - under the Federal Civil Rights Act - would be so incredibly hard to prove that they would be few in number. When they were successfully asserted they would still only be a minute fraction of the State budget. So minute, in fact, that they would be statistically insignificant. The Davis case comes to mind: the last time that the Davis family had a fighting chance to obtain justice, through State legislation, their Federal Court judgment was approximately 2.4M against a State budget of 36B.

VII. THERE IS NO PRACTICAL, LEGAL, FINANCIAL OR SOCIETAL REASON TO CONTINUE THE ABSOLUTE IMMUNITY DOCTRINE ANNUNCIATED BY THE WILL MAJORITY

Only a minute fraction of State governmental employees enjoy the absolute immunity which Will v. Michigan provides. If the proposed legislation is passed State officials, acting in their official capacities, ***would*** be subject to Federal Civil Rights suits for monetary damages.[30] But why should the absolute immunity under Will v. Michigan continue and toward what end? If, pursuant to the proposed legislation, officials could be sued in their "official capacities" they would be defended by the State and any judgment entered would be paid by the State. How, prey tell, is the official capacity officer or the State itself financially disadvantaged in such a context? They are not.

A shown, these cases will be rarer than hen's teeth and would constitute but a minute fraction of any State budget. Only the extreme cases will get across the two legal bridges. Since judgments in "official capacity" suits against a State "officer" would be paid from State coffers - pursuant to the proposed legislation - it is clear that these "official capacity" officer suits would actually offer a layer of insulation to these officers since their personal financial assets would not be in play like they are now. Hafer v. Melo, 502 U.S. 21-31 (1991); Will v. Michigan, 58-94 (1989). See H.R. 9060. Conversely, the "personal capacity" suits - which are currently asserted – insure that the personal financial assets of the officer are in play. Hafer v. Melo, 502 U.S. 21-31 (1991); Will v. Michigan, 58-94 (1989).

The absolute immunity currently provided by Will is unnecessary because it "benefits" but a select few at the top of State governments relative to cases which would infrequently arise and constitute but a minute fraction of State budgets. There is no practical, legal, financial or societal benefit to a continuation of this immunity. The Will immunity actually subjects those immunized (State officials) to personal financial liability and spawns the sloth and chaos which has long impacted our State institutions. The historical problems in our State Mental Hospitals can be traced directly to Will as the Davis case alone proves. See infra. The Will immunity acutely impairs State accountability and the concurrent inclination of State institutions to consistently perpetuate policies and procedures aimed at protecting those in institutional care. The Will immunity places a select few State officials above the law where no person in America should ever be.

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[30]The current state of the law under Will is such that litigants cannot now sue a State or a State Officer, acting in his official capacity, and seek money damages under the Federal Civil Rights Act. Such actions are construed to be actions against the State itself which are foreclosed under Hafer v. Melo, 502 U.S. 21-31 (1991) and Will v. Michigan, 58-94 (1989). The proposed legislation would permit these claims to be brought. Section 1983 litigants currently sue State Officials in their "personal capacities" for their employment related constitutional violations which actually insures that any money judgments obtained must be satisfied from the State Officer's personal financial assets. These personal capacity claims, not the proposed legislation, subjects the State Officer to personal financial liability.

This one sentence supplementation to 42 U.S.C. §1983 is a gear we need to drive our Constitution. The Will rule of law is making a mockery of our Democracy, Constitution, Federal Civil Rights Act, judiciary and core purposes of the Reconstruction Era Civil Rights statutes. It did so in Davis. The Federal Civil Rights Act and the U.S. Constitution are currently toothless giants when it comes to holding States accountable for ***their*** Federal Civil Rights deprivations. We need to change that. H.R. 9060 will.

VIII. STATES ARE ALREADY SUBJECT TO THE PAYMENT OF COSTS, EXPENSES AND FEES DICTATING THAT THE PROPOSED LEGISLATION AMOUNTS TO A VARIATION ONLY IN DEGREE

The concept that States should be subject to financial remuneration, in the Civil Rights context, is hardly a novel concept under existing Supreme Court authorities. Mr. Justice Stevens noted in his Will dissent that in "Milliken v. Bradley, *supra,* for example, a unanimous Court upheld a federal-court order requiring the State of Michigan to pay $5,800,000 to fund educational components in a desegregation decree 'notwithstanding [its] *direct* and substantial impact on the state treasury.' *Id.,* at 289, 97 S.Ct., at 2761 (emphasis added). As Justice Powell stated in his opinion concurring in the judgment, 'the State [had] been adjudged a participant in the constitutional violations, and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate.' *Id.,* at 295, 97 S.Ct., at 2764. Subsequent decisions have adhered to the position that equitable relief—even 'a remedy that might require the expenditure of state funds,' *Papasan, supra,* at 282, 106 S.Ct., at 2943—may be awarded to ensure future compliance by a State with a substantive federal question determination. See also *Quern v. Jordan,* 440 U.S., at 337, 99 S.Ct., at 1143." Will, 491 U.S., at 90 (Stevens, J. dissenting; brackets, italics and emphasis in original).

Mr. Justice Stevens also noted in his Will dissent that, in addition to these substantive payments, the Supreme Court "held in Hutto v. Finney, 437 U.S. 678, 98 S. Ct. 2565, 57 L.Ed.2d 522 (1978), a case challenging the administration of the Arkansas prison system, that a Federal District Court could award attorneys' fees directly against the State under §1988…and could assess attorneys' fees for bad faith litigation under §1983…'to be paid out of Department of Corrections funds.' " Will, 491 U.S., at 91 (Stevens, J. dissenting; citations omitted). Given these cases and Monell there is no viable legal basis upon which to continue to contend that States should enjoy absolute sovereign immunity for civil rights money damages claims. They really do not even enjoy it right now. Allowing Civil Rights victims to assert money damage claims against the States is a variation only in degree, at this point, given the cited authorities. The fact is that States have long been financially liable for their civil rights misdeeds in a very real sense.

IX. THE EVENTS AND CIRCUMSTANCES ATTENDANT TO THE JASON DAVIS CASE PROVIDE THE PALPABLE EVIDENCE NEEDED TO CONCLUDE THAT THE CENTRAL HOLDING IN WILL v. MICHIGAN HAS RESULTED IN THEIR BEING A GAPING HOLE IN THE FEDERAL CIVIL RIGHTS ACT (42 U.S.C. §1983)

The Davis case illustrates well the inequities of Will. The State committed Jason Davis to 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 State hiring policy. When expected and, indeed, statistically probable harm befell Jason Davis on August 12, 1993, 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. See supra. First though the State, through the Office of its Attorney General, availed itself to a one month Federal District Court trial which it lost, a Federal Appeal which it lost and a Certiorari filing with the Supreme Court which it lost. The State then ran for the proverbial hills after defending the criminals - who brutalized Jason Davis - in three federal courts.

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, the hero who came upon the scene and stopped the bloody carnage, Jason Davis and Defendant - eyewitness Nicholas Tassone. In short, in one of the two attacks[31] on Jason Davis on August 12, 1993, he was pinned to the floor in the locked ward by a number of Mental Health Care Workers so that one of their own (Philipp Bragg) could savagely beat him:

> [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, 86-116 (brackets and emphasis supplied; parenthesis in original).

[31] The first attack on Jason Davis was by Paul Rennie in a "Quiet Room" within the locked ward. The "evidence showed that Rennie provoked Davis by taunting him, and then, after the patient reacted, choked him and threw him to the mat." Davis, 264 F. 3d, at 110-111. The First Circuit ruled that when a caretaker taunts an involuntarily committed inpatient the resulting patient behavior cannot then be employed as the constitutional predicate upon which to physically restrain. Davis, 264 F. 3d, at 108 – 111.

The Defendant, Nicholas L. Tassone, was a Mental Health Care Worker on the ward who saw Jason Davis being pulverized by fellow workers on August 12, 1993. He was the lone Mental Health Care Worker who told a semblance of the truth at trial. He 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 observed a "puddle" of "blood" beside Jason Davis' head after the beating. (8/60, 62, 61); Davis v. Rennie, 264 F. 3d 86 – 116 (1st Cir. 2001). Mr. Tassone testified further that when he previously reported physical abuse by fellow Mental Health Care Workers he received "threatening phone calls", had his "tires slashed" and the "windshield broken" on his car. (8/57). The Charge Nurse told Jason Davis, after the attack, 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.

Following the Davis attack a cover up ensued on the part of Davis case defendants, as observed by the First Circuit, which included false allegations of wrongdoing against Special State Police Officer Greg Plesh and the alteration of medical records by Charge Nurse Joyce Weigers. (41/1-2); See Davis, 264 F. 3d, at 94-95, 115-116.[32] Many of the Davis case defendants kept their jobs for years after the Davis verdict was rendered.

The First Circuit 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.

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[32]In her nurse's notes Charge Nurse Joyce Weigers indicated "unknown when or how injury sustained" and "unknown to writer precipitants to occurrence" of injury to Jason Davis yet the Special State Police Officer asked her, during the attack, whether she was going to put a stop to it. (41/1); Davis, 264 F. 3d, at 94, 95, 115-116. She also completed an internal complaint form which alleged that hero Special State Police Officer Greg Plesh engaged in "improper and disturbing arrest of a staff member (Philip Bragg)", who was the principal assailant, when such was not the case. Id., at 95; (41/2). (parenthesis supplied). Bragg and Weigers were both found liable by the jury for violating Jason Davis' federal civil rights. (10/1,7-9; 19/1-3). The jury imposed compensatory damages of $100,000 and punitive damages of $500,000 on each of them. (10/1,7-9; 19/1-3).

Jason Davis' life went into a downward spiral, after the events of August 12, 1993, and he died six years after his trial. (30/2). Jason Davis was just 38 years old when he died. His Mother died soon thereafter. (30/2).

The brutalization of Jason Davis, while he was an involuntarily committed inpatient in a Massachusetts Department of Mental Health facility, unequivocally resulted from the rule of law articulated by the Supreme Court in Will and the culture which it has so clearly perpetuated. Thousands more have fallen prey to this same rule of law and culture insofar as 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 affects on the ability of all citizens to obtain ***street level*** enforcement of their civil rights. My client, Jason Davis, and his family can attest to that.

X. CONCLUSION

When States engage in evil, reckless or intentional conduct they too should be held liable under the Federal Civil Rights Act. People, Towns, Counties, Cities and Municipalities are liable in this context under binding Supreme Court authorities. Why should the King enjoy absolute immunity? My client, Jason Davis, and thousands more have been deprived of their Federal Civil Rights because of the institutional culture which the central holding in Will v. Michigan perpetuates. This failed constitutional experiment must end. H.R. 9060 will ensure that it does.

The Davis family, through the Estate of Jason Davis, would request the following forms of relief:

(i) That H.R. 9060 be passed by the United States House of Representatives and thereafter presented to the United States Senate for review and passage; and

(ii) That the Third Amended Judgment, entered in the Federal District Court, be paid in its entirety including all per diem interest up to and including the date of payment.[33]

In 2014 Mr. William Davis, the surviving father of Jason Davis, had these words for 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 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

[33] The Third Amended Judgment, as noted, is $2,434,737 as of 1.12.21 with a per diem of $139.40.

> 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 Attorneys General in a host of legal proceedings. The Governor recently characterized the Messier case as "awful", "horrible", "tragic" and "disgusting". He was right. The same can be said about my son's case. It is time that the Commonwealth of Massachusetts became fully accountable for what it did to my son on August 12, 1993. I call for the entire payment of the third amended judgment entered in his case... (30/1-4).

I hope the Davis family can finally obtain justice after 28 years.

Our Nation is in dire need of this legislation.

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