UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JAMES LOMBARDI, and	:	
JOSHUA DAVIS	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. WES-PAS-19-0364**
:		
GINA RAIMONDO, in her official capacity as Governor of the State of Rhode Island	:	
Defendant.	:	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR TO ABSTAIN.

Plaintiffs have brought the above-captioned action against the Governor of the State of Rhode Island, in her official capacity ("Defendant"), challenging R.I.G.L. § 13-6-1, the "Civil Death Act," as unconstitutional under the First, Fifth, Seventh, Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Defendant has moved to dismiss the complaint on the following grounds: 1. lack of standing; and 2. failure to state a claim for violation of any of the cited constitutional provisions. In the alternative, Defendant asks the Court to abstain from proceeding.

Plaintiffs submit the within Memorandum of Law in opposition to Defendant's Motion to Dismiss the Complaint or to Abstain. For the reasons set forth herein, each of the bases cited by the Defendant is without merit, and the motion should be denied.

I. HISTORY OF CIVIL DEATH LAWS

A look at the historical past indicates that the ancient Greeks were the first to strip criminals of their civil rights, including the right to appear in court, vote, make speeches, attend assemblies, and serve in the army. In due course, civil-disability laws became part of the legal systems in England, Europe, and the United States. Today, of the fifty states, only

Rhode Island still retains a broad civil-death statute.[1] See generally, Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vand.L.Rev. 929 (1970); Bogosian v. Vaccaro, 422 A. 2d 1253, n1 (RI 1980).[2]

"In ancient Greece, those criminals 'pronounced infamous' were unable to appear in court or vote in the assembly, to make public speeches, or serve in the army. . . . European lawmakers later developed the concept of 'civil death, which put an end to the person by destroying the basis of legal capacity, as did natural death by destroying physical existence.'" Ewald, "Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States (2002) 2002 Wis. L.Rev. 1045, 1059-1060.

Because civil death revoked the full spectrum of rights of people convicted of certain offenses, it was historically "limited to very serious crimes" and imposed "only upon judicial pronouncement in individual cases." Ewald, Civil Death, supra, 2002 Wis. L.Rev. at p. 1061; see also 4 Blackstone, Commentaries 373.

In the United States, however, this distinction eroded in the years following the Civil War, and many states began to impose forms of civil death broadly.

As was recently noted by the Court in Kanter v. Barr, 919 F. 3d 437 (7th Cir. 2019), over the history of the United States:

> Courts were consistent and explicit about the difficulty of trying to apply the doctrine of civil death outside the context of the death penalty. See, e.g., Shapiro v. Equitable Life Assur. Soc. of U.S., 182 Misc. 678 (N.Y. Sup. Ct. 1943) ("Palpable anomaly inevitably results from attempting to attribute civil death, not only to persons about to be executed, but, also, to persons who may remain physically alive for many years and also may be paroled or pardoned."); Byers v. Sun Sav. Bank, 41 Okla. 728, 139 P. 948, 949 (1914) ("[Civil death] had its origin in the fogs and

[1] New York retains a civil-death prohibition on marriage. See infra at 33-34.

[2] In Bogosian, the Court noted that because an agreement to pay a brokerage fee was entered into a year and a half before Vaccaro was convicted of a crime carrying a life sentence, it was not a nullity at the time of execution due to Vaccaro's civil death. It held that the provision of R.I.G.L § 13-6-3, providing for a process by which a prisoner with less than a life sentence could devise his property, was not applicable to life prisoners by implication.

> fictions of feudal jurisprudence and doubtlessly has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government. At any rate, the full significance of such statutes have never been enforced by our courts for the principal reason that they are out of harmony with the spirit of our fundamental laws and with other provisions of statutes."); Avery v. Everett, 110 N.Y. 333 (1888) ("Anyone who takes the pains to explore the ancient and in many respects obsolete learning connected with the doctrine of civil death in consequence of crime, will find that he has to grope his way along paths marked by uncertain, flickering, and sometimes misleading lights; and he cannot feel sure that at some point in his course he has not missed the true road.")

Kanter v. Barr, 919 F. 3d at 460, fn 9.

In Ferreira v. A.T. Wall, 2016 WL 8235110 (D.R.I. 2016), the Plaintiffs challenged the constitutionality of the Civil Death Act as it applied to bar inmates who had life sentences at the A.C.I. from marrying. The Court determined that it was constrained by Butler v. Wilson, 415 U.S. 953, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1974), as binding legal precedent on the Court, and accordingly entered summary judgment against the Plaintiffs. In Butler, the Supreme Court summarily affirmed the ruling of a three-judge court in Johnson v. Rockefeller, 365 F.Supp. 377 (S.D.NY 1973), rejecting a constitutional challenge to New York's "deprivation of the right to participate in the ceremony of marriage" for inmates serving life sentences. Id at 380. Plaintiffs address the narrow reach of a summary affirmance infra at 33-34.

In Gallop v. Adult Correctional Institutions, 182 A.3d 1137, 1142 (R.I. 2018) (hereinafter "Gallop I"), the Rhode Island Supreme Court stated that R.I.G.L. § 13-6-1 the Civil Death Act imparts upon the individual sentenced to life in prison and held at the Adult Correctional Institutions (hereinafter "ACI") a statutory disability. It then stated "[t[he Legislature has unambiguously mandated that persons serving a life sentence are prohibited from asserting civil actions. Section 13–6–1. The plaintiff does not fall under any exception to § 13–6–1, as prescribed by the Legislature; thus he is without recourse. . . ." Id. at 1143.

For the Superior Court to exercise its subject matter jurisdiction and hear Plaintiff's claim would have "been error and an excess of jurisdiction. . . when the Legislature has declared plaintiff to be civilly dead." Id. at 1143.

In Zab v. Zab, 203 A.3d 1175 (R.I. 2019) (hereinafter "Zab I"), the Rhode Island Supreme Court went further and stated: "[P]laintiff had no legal right to seek to have the record of his marriage sealed because he is deemed by statute to be 'civilly dead.' Moreover, the appeal from the Family Court[3] also is not properly before us, because plaintiff is civilly dead and therefore he has no right to litigate this issue in the Supreme Court." Id.

In neither Gallop I nor Zab I was the constitutionality of the statute addressed. In Gallop v. Adult Correctional Institutions, SU18-246 (Nov 14, 2019) (hereinafter "Gallop II"), counsel for Gallop attempted to raise the constitutional issue on his second appeal, but the Supreme Court declined to rule on the constitutionality of the statute under the "raise-or-waive" rule. Thus the Civil Death Act has not been declared unconstitutional and is in full effect for those prisoners who have been sentenced to life in prison and held at the ACI.

In August 2019, two more plaintiffs attempted to obtain a ruling on the constitutionality of the Civil Death Act in our state courts. Each case squarely raised constitutional arguments based on both the Rhode Island and United States Constitutions. Citing Gallop I, the Superior Court concluded in Zab v. Ashbel T. Wall, PM-2017-4195 (hereinafter "Zab II") and Rivera v. Department of Corrections, PC-2017-433, that the Civil Death Act has stripped the Superior Court of authority to address the Act's constitutionality. A copy of the transcript of the decision of the Superior Court is attached as Exhibit A.[4]

[3] R.I.G.L.§ 8-10-3 sets forth the jurisdiction of the Family Court to include generally all matters pertaining to families, youth and divorce.

[4] In ruling on this motion, this court may "consider matters of public record and facts susceptible to judicial notice." U.S. ex rel. Winkelman v. CVS Caremark Corp., 827 F.3d 201,

II. FACTS ALLEGED IN THE COMPLAINT.

Plaintiffs James Lombardi (hereinafter "Lombardi") and Joshua Davis (hereinafter "Davis") are citizens of the United States and the State of Rhode Island. (Complaint ¶ 1,2). Lombardi is serving a sentence of life in prison with the possibility of parole. (¶ 6). Davis is serving a sentence of life in prison without the possibility of parole. (¶ 7). Both are serving their life sentences at the ACI, the adult prison operated by the executive branch of the State of Rhode Island through the Rhode Island Department of Corrections (hereinafter "RIDOC"). (¶ 1,2).

The Defendant Gina Raimondo, sued in her official capacity, is the Governor of the State of Rhode Island and charged by Article IX § 2 of the Rhode Island Constitution to take care that the laws of the State of Rhode Island are faithfully executed, and is alleged to have acted under color of state law within the meaning of 42 U.S.C. § 1983. (¶ 3). As Governor, Defendant Raimondo has a duty to prevent the enforcement of laws which are unconstitutional and abridge the rights of prisoners who are incarcerated at the ACI as it is implicitly linked in her duty to faithfully execute the Constitution and laws of the State of Rhode Island and of the United States. (¶ 8).

On or about September 10, 2018, Plaintiff Lombardi was in his cell located in the Maximum Security facility of the ACI when his leg hit the sharp edge of a footlocker that was provided to him for his use in his cell by RIDOC. (¶ 9). As a result, the Plaintiff suffered a cut to his lower left leg, causing pain and resulting in permanent disfigurement, i.e. a ¾-inch scar.(¶ 9). Prior to the time the Plaintiff suffered injury, RIDOC either knew or

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208 (1st Cir. 2016). It is permissible, then, to "take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand." Kowalski v. Gagne, 914 F.2d 299, 305 (1st Cir. 1990); see, e.g., Bluetarp Fin., Inc. v. Matrix Constr. Co., Inc., 709 F.3d 72, 78 (1st Cir. 2013) (taking judicial notice of related state court cases).

reasonably should have known that footlockers of the type that it placed in his cell were very hazardous to the occupants of the confined area of the cell because the footlocker had very sharp edges which could easily cut an inmate who came into contact with it. (¶ 10) Despite this knowledge, RIDOC made a deliberate decision not to provide Plaintiff Lombardi with a non-hazardous footlocker, placing Lombardi in unreasonable and continuous danger of injury from contact with the footlocker's sharp edges which he was unable to avoid when he was mandatorily incarcerated by RIDOC in his cell (¶ 11). RIDOC knew of the hazardous nature of the footlocker provided to inmates, including Plaintiff Lombardi, and was deliberately indifferent to the harm it presented. (¶ 11). RIDOC provided plastic, smooth-edged footlockers to inmates at both its Intake Service Center and Male Medium Security facilities, allowing inmates at the Maximum Security facility to have the plastic footlockers only if the inmate had additional funds and individually purchased the plastic footlocker through commissary services. (¶ 12, 13). Thus he alleges the outline of what could be a claim for the violation of his Eighth Amendment rights redressable by 42 U.S.C. § 1983.

Plaintiff Lombardi also alleges that RIDOC was negligent in allowing him to be injured by the footlocker, because, despite its knowledge that the footlocker presented a hazard to Lombardi, RIDOC did not seek to mitigate the hazard and provide to Plaintiff a footlocker that had smooth edges, nor did the RIDOC warn him of the sharp edges or take other steps to remedy the defect. (¶ 14).

Plaintiff Davis alleges that he has a medical condition that requires insulin, which must be administered to him by injection, that he receives from RIDOC nursing staff who use a common vial of insulin to treat Plaintiff and other insulin dependent inmates. (¶ 15,

16, 17). Davis alleges that on or about September 6, 2018, a RIDOC nurse knowingly or recklessly used a contaminated syringe and contaminated insulin to inject the Plaintiff. (¶ 18). As a result, the RIDOC nurse exposed Plaintiff Davis to blood borne pathogens to include potentially life-threatening viruses such as HIV and Hepatitis. (¶ 19). Plaintiff Davis alleges that this constitutes medical malpractice, in that the action is below the standard of care for a nurse and that this conduct constitutes a battery upon Plaintiff Davis who objected to and did not consent to the administration of contaminated insulin. (¶ 20,21).

Davis further alleges that the administration of the contaminated insulin by RIDOC nurses is a violation of his Eighth Amendment rights, in that it constitutes cruel and unusual punishment of Davis (¶22). He alleges that the RIDOC employee took these actions toward Plaintiff with intent, and/or with willful and deliberate indifference to Plaintiff Davis's right to adequate medical care, and his right not to be deliberately exposed to potentially deadly blood borne pathogens. (¶ 22). As a result of these actions, Lombardi alleges that he has suffered damages to include pain and suffering, physical injury, and severe emotional distress. (¶ 23, 24).

Jointly, Plaintiffs allege that R.I.G.L. § 13-6-1, the Civil Death Act, treats Plaintiffs as dead and therefore incapable of sustaining injury or acquiring a cause of action for negligence or otherwise. See Gallop v. Adult Correctional Institutions, 182 A.3d 1137 (R.I. 2018). (¶ 25)

The Plaintiffs allege that the Civil Death Act denies them effective access to the courts of the State of Rhode Island to pursue their claims based in negligence and under 42 U.S.C. § 1983, against the State, through the RIDOC, for the injuries that they have sustained. (¶ 27, 28).

Specifically, Plaintiffs allege that the Civil Death Act denies persons incarcerated for life terms at the ACI the benefit of basic civil, statutory and common law rights, including the right to file suit and be heard in State Court, the right to own property in the inmate's sole name, the right to enter into contracts for legal representation or other purposes, the right to any gains they might receive from the prosecution of a personal injury claim, and the right to be free of negligent or intentional conduct causing injury, that may or may not rise to the level of cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. (¶ 29).

Plaintiffs allege that they stand in real jeopardy, with no adequate remedy at law, based on the provisions of R.I.G.L. § 13-6-1, of RIDOC and other entities violating their civil rights and that the Civil Death Act poses a real threat to Plaintiffs who would otherwise seek a jury trial on their claims against RIDOC in state court. (¶ 30, 31, 32).

The Plaintiffs allege that the Civil Death Act, R.I.G.L. § 13-6-1, denies them their rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. (¶ 34).

Plaintiffs further allege that the Civil Death Act, R.I.G.L. § 13-6-1, imposes on them an excessive and outmoded punishment contrary to evolving standards of decency and thereby denies Plaintiffs of rights protected by the Eighth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. (¶ 35). Because the Civil Death Act, R.I.G.L. § 13-6-1, treats Plaintiffs as if they were dead, by denying Plaintiffs' basic civil, statutory, and common law rights and access to the courts, it violates the Plaintiffs' rights as protected by the First, Fifth, and Seventh Amendments to the United States Constitution as they apply to the states by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. (¶ 36).

In this action, Plaintiffs seek an order declaring that the Civil Death Act, R.I.G.L. § 13-6-1, is unconstitutional, the issuance of a permanent injunction preventing enforcement of the Civil Death Act, and attorneys' fees and costs under 42 U.S.C. § 1983.

III. STANDARD

Defendant moves to dismiss this complaint under Fed. Rule of Procedure 12 (b)(6). When reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court accepts as true the well-pleaded factual allegations of the complaint and draws all reasonable inferences in favor of the plaintiff. See Cook v. Gates, 528 F.3d 42, 48 (1st Cir. 2008); McCloskey v. Mueller, 446 F.3d 262, 266 (1st Cir. 2006). Dismissal is proper if – after accepting all facts as true and viewing them in the light most favorable to the movant – the complaint fails to allege a plausible right to relief. Doe v. Brown Univ., 896 F.3d 127, 130 (1st Cir. 2018). Plausibility demands that the factual allegations "be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). It is gauged by drawing not only on "judicial experience," but also on "common sense." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). That is, the factual allegations, direct and inferential, must meet each material element necessary to sustain recovery under some actionable legal theory. Farm Family Cas. Ins. Co. v. Rivers Paving, Inc., 141 F. Supp. 3d 176, 177 (D.R.I. 2015). On a motion to dismiss under Rule 12(b)(6), the court is to be "laser-focused" on the legal adequacy of the complaint, not the ultimate right to relief. Pimental v. Wells Fargo Bank, N.A., C.A. No. 14–494S, 2015 WL 5243325, *4 (D.R.I. 2015) (citations omitted).

"There are two elements to a claim under § 1983. A plaintiff must show (1) that he has been deprived of a right secured by an appropriate federal law and (2) that the defendant was

acting 'under color of' state law in depriving him of this right." 13D Fed. Practice & Procedure (Wright & Miller), Juris. § 3573.2 (3d ed.)(footnote omitted). Since there is no question here of state action, in the presentation which follows, Plaintiffs will focus on the identification of rights secured by the United States Constitution denied to them by the Civil Death Act. On a motion to dismiss, Plaintiffs are not required to establish their entitlement to relief, but rather that they have articulated a plausible right to relief. "The purpose of Rule 12(b)(6) is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits." Network Communications, Inc. v. City of New York, 458 F.3d 150, 155 (2d Cir. 2006), cert. denied, 558 U.S. 1100 (2009) (emphasis in original). They have done so.

IV. ARGUMENT

In her motion, Defendant Governor Raimondo essentially alleges that Plaintiffs lack standing to bring the complaint because a) it is speculative as to how the Rhode Island Supreme Court will rule with respect to the Plaintiffs' ability to assert their claims under 42 U.S.C. § 1983 in state court; b) it is speculative that they will not be able to pursue a negligence claim in state court (ECF 7-1 at15); and c) Plaintiffs have no standing to assert a challenge beyond a negligence claim. Further, Defendant alleges that each of the constitutional challenges fails to state a claim. Defendant alternatively asserts that the court should abstain from hearing the action on the ground that the Rhode Island Supreme Court has yet to rule on the constitutionality of the Civil Death Act. ECF 7-1 at 37-39.

A. Plaintiffs have standing to bring this case in Federal Court.

In Ex parte Young, 209 U.S. 123 (1908), the United States Supreme Court established an important limit on the sovereign immunity principle. That case involved a challenge to a Minnesota law reducing the freight rates that railroads could charge. A railroad

shareholder claimed that the new rates were unconstitutionally confiscatory, and obtained a federal injunction against Edward Young, the Attorney General of Minnesota, forbidding him in his official capacity to enforce the state law. Perkins v. Northern Pacific R. Co., 155 F. 445 (C.C.D.Minn.1907). When Young violated the injunction by initiating an enforcement action in state court, the Circuit Court held him in contempt and committed him to federal custody. In his habeas corpus application, Young challenged his confinement by arguing that Minnesota's sovereign immunity deprived the federal court of jurisdiction to enjoin him from performing his official duties.

In disagreement, the Supreme Court held that because an unconstitutional legislative enactment is "void," a state official who enforces that law "comes into conflict with the superior authority of [the] Constitution," and therefore is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 U.S., at 159–160, 28 S.Ct. 441. "[W]hatever power a state may have is subordinate to supreme national law." Hines v. Davidowitz, 312 U.S. 52, 68 (1941).

This doctrine has existed alongside our sovereign immunity jurisprudence for more than a century, accepted as necessary to "permit the federal courts to vindicate federal rights." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 105 (1984). It rests on the premise—less delicately called a "fiction," id., at 114, n. 25 —that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign immunity purposes. The doctrine is limited to that precise situation, and does not apply "when 'the state is the real, substantial party in interest,' " id., at 101 (quoting Ford Motor Co. v. Department of Treasury of Ind., 323 U.S. 459, 464 (1945)),

as when the "'judgment sought would expend itself on the public treasury or domain, or interfere with public administration,' " 465 U.S., at 101, n. 11(quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)).

Here, the relief sought by the Plaintiffs is that the Defendant be enjoined from violating Federal Law by the continued enforcement of R.I.G.L. § 13-6-1. The fact that it seeks enjoinder prior to the filing of any state suit on the issue does not bar their claims.

Each plaintiff has articulated federal and state claims for injuries sustained by him which, but for the Civil Death Act, could be pursued in state superior court for damages against the State and/or agents or employees of the RIDOC. At present there is no available state forum for the Plaintiffs. In two cases recently decided on August 21, 2019 by the Superior Court, Zab v. Ashbel T. Wall, PM-2017-4195 (hereinafter "Zab II") and Rivera v. Department of Corrections, PC-2017-433, Justice Lanphear held that he has no authority because of the Civil Death Act to address the Act's constitutionality, thus giving the Young Rule significance in this matter. (See Transcript Exh. A).

Here, as in Young, the state courts do not provide a forum where the Plaintiffs can assert the Defendant should be enjoined from enforcing the Civil Death Act. As noted in the Federalist No. 80, p. 475 (C. Rossiter ed. 1961) (A. Hamilton): "[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions." The Rhode Island Courts have been very clear they have no power to adjudicate the Plaintiffs' claims because once they are determined to be prisoners sentenced to life at the ACI, the Court acts in excess of its jurisdiction in making any other determination. See Gallop I.

Defendant makes three separate "standing" arguments without addressing the actual standards to determine standing. We address those standards below. What is particularly surprising and disturbing is that Defendant argues that the Court should consider Plaintiffs'

claim that their negligence claims would not be able to be heard in state court as sheer speculation and conjecture, when, in precisely the same posture in state court, defending the RIDOC, the Attorney General argued that the Zab and Rivera plaintiffs' negligence claims were absolutely barred by the decision in Gallop I. Exhibit A at 17-18. ("The plaintiffs were civilly dead inmates who sought to bring a negligence action. That is the exact same case here. That is what the Supreme Court dealt with in Gallop, and without question the Supreme Court in Gallop held that the Civil Death Statute prohibited the plaintiff from pursuing that claim."). The gloss that Defendant seeks to add here is that the Rhode Island Supreme Court has not yet addressed a challenge that the Civil Death Act violates the federal Constitution. Respectfully, that is not a standing issue, and Plaintiffs are not required to present their federal constitutional challenges to the state court in the first instance.

1. Plaintiffs' claims satisfy traditional notions of Article III Standing.

Standing involves "a blend of constitutional requirements and prudential considerations." Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982). The constitutional requisites stem from the admonition that a federal court is empowered only to decide "cases" and "controversies." See U.S. Const., Art. III. Not every dispute is a case or controversy. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." Diamond v. Charles, 476 U.S. 54, 62 (1986). To clear the Article III hurdle, the party who invokes a federal court's authority must show that (1) he or she personally has suffered some actual or threatened injury as a result of the challenged conduct; (2) the injury can fairly be traced to that conduct; and (3) the injury likely will be redressed by a favorable decision from the court. See Valley Forge, 454 U.S. at 472; Vote Choice, Inc. v. DiStefano, 4

F.3d 26, 36 (1st Cir.1993). The complaining party must satisfy this test throughout the litigation, not just at the moment when the complaint is filed. See Steffel v. Thompson, 415 U.S. 452, 459 n. 10 (1974).

a. Plaintiffs have suffered some actual or threatened injury as a result of the challenged conduct.

In New Hampshire Right to Life Political Action Committee v. Gardner, 99 F.3d 8 (1st Cir. 1996), the First Circuit Court of Appeals noted that a Plaintiff's injury can be the threatened enforcement of an unconstitutional statute. Here, in the face of Gallop I, Gallop II, Zab I, and Zab II, it is clear that the Rhode Island Courts are unable to hear the Plaintiffs' claims that the Civil Death Act violates Federal Law. In Zab II, the Supreme Court itself indicated that it did not have the ability to hear the Plaintiff's appeal because he was civilly dead. To suggest that Plaintiffs need file their action in state court or await a decision from the Rhode Island Supreme Court before they can seek an injunction flies directly in the face of the Supreme Court's decision in Ex Parte Young, where it was held plaintiff was not required to violate a criminal statute and be prosecuted before he could litigate the constitutionality of the statute in Federal Court. This was in part because it might be several years before there was enforcement of the statute or before the plaintiff received resolution on the constitutionality of the statute. ("To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take." Ex Parte Young, 209 U.S. at 165).

The injury talked of in Ex Parte Young does not have to be threatened criminal prosecution, but as here, can involve the enforcement of a state law. In Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), the Supreme Court held that a cause of action brought by the Village of Bellwood, which had sent testers in to buy houses from Gladstone, alleging that there was a violation of the Fair Housing Act, was sufficient to state an injury, where that injury was based on the effect of race-based segregation on the community, not to an individual seeking to buy a house. Here, prisoners who have been sentenced to life and held at the ACI have repeatedly sought to bring civil actions to redress their injuries, and the Rhode Island State Courts have repeatedly held they have no jurisdiction to hear these claims. The Plaintiffs' have an injury.

b. The Plaintiffs' injury can fairly be traced to the challenged or threatened conduct.

The enforcement of the Civil Death Act by the Rhode Island Courts is exactly what is causing the Plaintiffs to have the injury they seek to redress in this case. This act is being enforced to deny Plaintiffs the ability to have their civil claims redressed in State Court.

c. The injury the Plaintiffs have suffered likely will be redressed by a favorable decision from the court.

The Plaintiffs' injuries are clearly redressable in this action. A holding by this Court that the statute is unconstitutional and an order enjoining its enforcement by Defendant Raimondo would allow the Plaintiffs to proceed with their civil claims. See generally Diamond v. Charles, 476 U.S. at 57 n. 2; Kentucky v. Graham, 473 U.S. 159, 165–66 (1985). Accordingly, Plaintiffs have satisfied the letter of Article III standing and can properly assert this action.

2. The rule of prudential standing dictates this Court entertain this matter.

Rules of prudential standing, by contrast to the rules of classical standing, are more flexible "rule[s] ... of federal appellate practice," Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326, 333 (1980), designed to protect the courts from "decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Warth v. Seldin, 422 U.S. 490, 500 (1975).

The Declaratory Judgments Act permits a district court, "[i]n a case of actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a). Once a plaintiff has alleged facts to support Article III standing, "a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to . . . limit access to the federal courts to those litigants best suited to assert a particular claim." Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. at 99–100. In order to establish prudential standing, a plaintiff must show, among other things, that he is asserting her "own legal interests rather than those of third parties." Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). Here Plaintiffs seek to assert their own legal rights to seek remedies in state court; accordingly, these rules do not bar the Plaintiffs' suit or mandate it be dismissed.

3. The Court should not abstain from hearing the Plaintiffs' claims under the *Pullman Doctrine*.

As an alternative argument, Defendant contends that the Court should abstain from considering Plaintiffs' challenge to avoid a premature constitutional determination. The very cases and arguments cited by Defendant refute this argument. Defendant quotes extensively from Ford Motor Co. v. Meredith Motor Co., 257 F.3d 67, 71 (1st Cir. 2001).

> Ford Motor does not support abstention here.
>
> > It is well established that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); see also Pustell v. Lynn Pub. Schs., 18 F.3d 50, 53 (1st Cir.1994); Guiney v. Roache, 833 F.2d 1079, 1081 (1st Cir.1987); Santasucci v. Gallen, 607 F.2d 527, 528 (1st Cir.1979). However, "[a]mong those cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law." Harris County Comm'rs Court v. Moore, 420 U.S. 77, 84, 95 S.Ct. 870, 43 L.Ed.2d 32 (1974).

Ford Motor Co. v. Meredith Motor Co., 257 F.3d 67, 71 (1st Cir. 2001)

In Southern Union Co. v. Lynch, 321 F. Supp. 2d 328 (D.R.I. 2004)(Smith, J.), this Court considered the Pullman standards to determine that abstention was not appropriate. The Court noted that abstention should be employed sparingly and only when there "is substantial uncertainty over the meaning of the state law at issue, and [when] a state court decision would obviate the need for a federal ruling." Southern Union, 321 F.Supp 2d at 335 (emphasis added), citing Ford Motor Co. v. Meredith Motor Co., 257 F.3d at 71. In rejecting abstention, the Court observed that, notwithstanding the lack of state court decisions on the issue, there was "little ambiguity or uncertainty about the meaning of the provisions at issue" or in the statutory language at issue. 321 F.Supp. at 335-336. The fact that companion issues were being litigated in state court did not alter its assessment since the companion issues would not provide a clarification of ambiguous or uncertain law: "obviating the need to decide the issue raised by Count I [does not] amount to a

'clarification' simply because it relieves the Court of answering the federal question." 321 F. Supp. 2d at 335 n.9.

Here, as well, abstention is wholly inappropriate. The meaning of the Civil Death Act is plain and, moreover, has been definitively determined by the Rhode Island Supreme Court in Gallop I and Zab I. The decisions were issued within the past two years. Both the plain language of the Civil Death Act and the definitive interpretation by the Rhode Island Supreme Court are established. This Court should not stay its hand.[6]

B. Plaintiffs have stated plausible claims that Rhode Island General Laws § 13-6-1 is unconstitutional.

In this action, Plaintiffs seek an order from this Court declaring that the Civil Death Act, R.I.G.L. § 13-6-1, is unconstitutional as applied to bar an inmate serving a life sentence from proceeding in a civil action, and denies said inmates basic civil, statutory and common law rights. While Plaintiffs' believe it is improper to decide the constitutional issues on a Federal Rule of Civil Procedure 12(b)(6) motion, the arguments are addressed in abbreviated format to show that proper claims exists upon which relief could be granted.

1. The Civil Death Act is unconstitutional as it prevents Plaintiffs from proceeding in state court under 42 U.S.C. § 1983.

The Civil Death Act is unconstitutional as it acts to divest the Rhode Island Courts of their jurisdiction to hear 42 U.S.C. § 1983 claims asserted by inmates in violation of the Supremacy Clause. In Haywood v. Drown, 556 U.S. 729 (2009), the United States Supreme

[6] In Johnson v. Rockefeller, 58 F.R.D. 42, 47 (S.D.N.Y. 1972), the court preliminarily concluded that abstention was not appropriate on a challenge to the New York civil death act, noting that the New York Court of Appeals, while not addressing the constitutionality of the civil death statutes at issue, had "authoritatively construed them." Final determination was reserved to the three-judge court, which proceeded to the merits. Johnson v. Rockefeller, 365 F.Supp. 377.

Court declared unconstitutional a New York State statute that limited the venue for claims by prisoners against correctional officers under 42 U.S.C. § 1983 to courts of limited remedies. The lower state courts had held that the Plaintiff inmate's claim in a state Court of General jurisdiction under 42 U.S.C. § 1983 had to be dismissed for want of jurisdiction under the New York Statute. The United States Supreme Court disagreed under the Supremacy Clause. It noted that New York had created courts of general jurisdiction "that regularly sit to entertain analogous suits, [and] is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy." Id. at 740. This was even though New York state policy was to limit prisoner claims. As the Rhode Island Superior Court routinely hears 42 U.S.C. § 1983 claims, the State cannot constitutionally enact a statute that limits its ability to hear claims of inmates sentenced to life in prison and held at the ACI. Nevertheless, the Civil Death Act has been interpreted to do just that. Plaintiffs were told by the Rhode Island Supreme Court in Gallop I and Zab I that they are barred from having any civil actions heard in the state Superior, Family and Supreme courts because the state courts act in excess of their jurisdiction when they hear claims of inmates sentenced to life in prison who are housed at the ACI because of the effect of the Civil Death Act.

In Gallop I, the R.I. Supreme Court did not state that any of the state courts had jurisdiction to hear 42 U.S.C. §1983 claims asserted on behalf of prisoners serving life sentences at the ACI. It stated:

> We are of the opinion that § 13–6–1 is clear and unambiguous on its face and should be construed according to its plain and ordinary meaning, as intended by the Legislature. See Hazard, 68 A.3d at 485. The statute unambiguously declares that a person such as plaintiff, who is serving a life sentence, is deemed civilly dead and thus does not possess most commonly recognized civil rights. Section 13–6–1. The Legislature has enumerated certain exceptions to § 13–6–1—"[h]owever, the bond of matrimony shall not be dissolved"—but there is no exception for claims impacting a prisoner's civil rights. We decline to read such an exception into the statute. Our interpretation of § 13–6–1 leads to the necessary and logical conclusion that the

> Superior Court had no authority to hear this case, because plaintiff's civil rights were extinguished by operation of law once his conviction became final . . .

Gallop I at 1141.

It further noted: "While the Superior Court had exclusive original subject-matter jurisdiction to hear the case at bar, whether the court has the authority to do so in light of the statutorily mandated disability is the crux of the issue." Gallop I at 1142. "In the case at bar, the Legislature has unambiguously mandated that persons serving a life sentence are prohibited from asserting civil actions.[7] Section 13–6–1." Id. at 1143. This is not language that lends credence to Defendant's argument that there is an exception for federal claims. It is language which clearly states the Superior Court is deprived of jurisdiction to hear these claims.

As noted in Gallop I: "The plaintiff attempted to add a § 1983 claim because, he contends, that statute precluded the Superior Court from dismissing his complaint based on his interpretation that § 1983 'invalidates any state law which stands in the way of any person filing suit to vindicate violation of federal protected rights' 'under color of law[.]' The plaintiff has failed to produce any authority that holds that a state court is bound to hear a § 1983 action where this Court has deemed the party to be civilly dead." That is fairly chilling to the idea that a Plaintiff can bring such a claim and be heard in state court.

Going further in Zab v. Zab, 203 A.3d 1175 (R.I. 2019), the Supreme Court stated: "[P]laintiff had no legal right to seek to have the record of his marriage sealed because he is deemed by statute to be 'civilly dead.' Moreover, the appeal from the Family Court also is

[7] As it is generally understood, a civil action is an action that is brought to enforce, redress or protect a private or civil right. In Gillson v. Vendome Petroleum Corp., 35 F. Supp. 815, 819 (D. La. 1940), the court defined civil action as "every species of 'suit' not of a criminal kind, and comprehends every conceivable cause of action, whether legal or equitable, except such as are 'criminal', in the sense that the judgment may be a fine or imprisonment, etc."

not properly before us, because plaintiff is civilly dead and therefore he has no right to litigate this issue in the Supreme Court." In other words, the Plaintiff had no right to take an appeal to the Supreme Court.

Article X, Section 2 of the Rhode Island Constitution makes this clear: "Jurisdiction of supreme and inferior courts — Quorum of supreme court. The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity. It shall have power to issue prerogative writs, and shall also have such other jurisdiction as may, from time to time, be prescribed by law. A majority of its judges shall always be necessary to constitute a quorum. The inferior courts shall have such jurisdiction as may, from time to time, be prescribed by law." (Emphasis added.)

This is particularly true where, as here, it has long been held that "[t]he jurisdiction of the Superior Court is solely statutory in nature and cannot be extended by judicial interpretation." Pratt v. Woolley, 117 R.I. 154, 157, 365 A.2d 424, 426 (1976) (citing Boss v. Sprague, 53 R.I. 1, 162 A. 710 (1932)). Accordingly, "[t]he Superior Court may [hear] by petition only those matters for which it has specific statutory authorization." Id. at 160, 365 A.2d at 428. The jurisdiction of these courts is eliminated by the Civil Death Act, where it otherwise would exist under R.I.G.L. § 8-1-2, § 8-2-13, or § 8-2-14.

The Defendant's contention that the State has never asserted the Civil Death Act as a defense against a 42 U.S.C. § 1983 claim is incorrect. The State has previously raised the Civil Death Act as a defense in an least one *pro se* action of which undersigned counsel are aware: an action brought by a prisoner serving a life sentence at the ACI who asserted claims under 42 U.S.C. § 1983. The State withdrew its defense only when cooperating counsel for the ACLU entered a limited appearance to assist the prisoner. See Paiva v.

Aceto, PC17-1486 (Exh B). This is the best indication that the State, itself, has at least in some instances, argued that claims under 42 U.S.C. § 1983 are barred by the Civil Death Act.

The Defendant's motion to dismiss on this ground should be denied.

2. Plaintiffs have sufficiently articulated the salient facts of the underlying torts upon which they would seek relief in Superior Court if their claims were not barred by the Civil Death Act.

The current action does not seek to litigate Plaintiffs' underlying claims for damages under state and federal law against the responsible parties. The current action has sufficiently articulated the nature and factual underpinnings of those claims to establish standing to challenge the Civil Death Act, which prevents the state courts from hearing their claims. No more is required.

3. The Civil Death Act is unconstitutional as it removes from the Plaintiffs rights guaranteed by the First Amendment.

The United States Supreme Court has repeatedly recognized that even prisoners enjoy a constitutional right of "access to the courts." Coleman v. Peyton, 362 F.2d 905 (4th Cir.), cert. denied, 385 U.S. 905 (1966). Though not among the rights specifically set forth in the Bill of Rights, the right of access to the courts stems from the first amendment right to petition for redress of grievances. Such right may be traceable, in fact, to the Magna Carta. Flood v. State ex rel. Homeland Co., 95 Fla. 1003, 117 So. 385 (1928). Indeed, there can be no doubt under Haywood v. Drown, 556 U.S. 729 (2009), that inmates are allowed to access both federal and state courts to bring civil actions to secure their federal constitutional rights. To the extent this statute purports to prevent the Plaintiffs from doing so, it is unconstitutional.

The United States Supreme Court has recognized a prisoners' right of access to the court and have not specifically limited it to civil litigation encompassed by 42 U.S.C. § 1983

or sentencing. See Chambers v. Baltimore & O.R., 207 U.S. 142, 48 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.") See also, Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.") When R.I.G.L. § 13-6-1 is enforced as it has been here, the Plaintiffs are left with no meaningful opportunity to be heard in State Court.

Numerous courts have drawn no distinction between prisoners like Plaintiffs seeking such relief as habeas corpus and those wishing to file civil actions generally. "[T]he constitutional protection of access to the courts ... includes access to all courts, both state and federal, without regard to the type of petition or relief sought." Hooks v. Wainwright, 352 F.Supp. 163, 167 (M.D.Fla.1972). See also Corpus v. Estelle, 551 F.2d 68, 70 (5th Cir. 1977) ("[R]easonable access to the courts must include access in general civil legal matters."); Souza v. Travisono, 368 F.Supp. 959, 966 (D.R.I.1973) (Prisoners right of access to the courts is not dependent on the type of legal matter involved and may extend to all civil matters.). This fundamental, constitutionally guaranteed right of access to the courts cannot be reconciled with such all-encompassing statutory provisions as the Civil Death Act.

In Thompson v. Bond, 421 F.Supp. 878 (W.D. Mo 1976), the District Court addressed the exact same issues as is presented in this case, namely a restriction on the

Plaintiffs' ability to petition the court due to Missouri's Civil Death statute. It declared the statute unconstitutional. In doing so, it stated that "a state statute, which in broad and unqualified language, deprives all state inmates of the right to file any type of civil action in state court contravenes the constitutional imperative that citizens are entitled to reasonable access to courts." Id. at 888.

In addition, as the denial of access to the Rhode Island courts occurs before reaching the merits of the Plaintiffs' claims, it acts to deny Plaintiffs "effective" and "meaningful" access to the courts. Bounds, 430 U.S. at 822. While other legislatures and courts have addressed the bar to inmates' claims caused by their imprisonment by tolling the statute of limitations or allowing for "spoliation of evidence" lawsuits, Rhode Island has not done either, allowing only for the appointment of an administrator of the prisoner's estate by a creditor of the prisoner, not in any way allowing the prisoner to assert a suit even when they could be paroled, pardoned, or a conviction vacated.

The Civil Death Act cannot be defended on the grounds that prisoners with life sentences file too much litigation. There is no offer of proof establishing such a reality. As stated in Thompson v. Bond, 421 F. Supp. 878 (D. Or 1976), where there is no offer by Defendant of empirical data or documentary evidence to show that prisoners are inherently inclined to file spurious lawsuits, because the civil death statute completely denied the ability to file suit and have a case heard, it was unconstitutional. "Even if it could be established that many prisoner suits are frivolous, a statute foreclosing the filing of all prisoner suits, regardless of their merit, would be overbroad." Id. at 885,citing Delorme v. Pierce Freightlines Co., 353 F.Supp. 258, 260 (D. Ore. 1973;); see Buckley v. Valeo, 424 U.S. 1, 17-20, 96 S.Ct. 612, 634-635, 46 L.Ed.2d 659 (1976). Similarly, the legislature, instead of stripping Plaintiffs of all their rights, even to file a civil action and be heard, could have

conceivably adopted less extreme alternatives to prevent spurious prisoner suits. Eliminating them altogether is overbroad. As will be discussed next, it also cannot be justified on the grounds that it is lawful punishment for the crime.

The motion to dismiss on this ground should be denied.

4. The Statute violates the Plaintiffs' Eighth Amendment rights by imposing cruel and unusual punishment.

On its face, the statute subjects the Plaintiffs to cruel and unusual punishment. It removes from Plaintiffs each and every one of their civil rights. There cannot possibly be a reason to deprive Plaintiffs of any legal action he might otherwise have, except for the legal disability imposed on him by statute, to protect himself from another's conduct. This includes the ability to sue due to another's negligence which causes him injury, assault and battery of his person, or violation of his eighth amendment rights. Interpreting the language of the Eighth Amendment to the United States Constitution, the Supreme Court has found that "the touchstone [of "excessiveness"] is [the nature of the punishment] in relation to the offense." Austin v. U.S., 509 U.S. 602, 627 (1993); see U.S. v. Emerson, 107 F.3d 77, 80 (1st Cir. 1997). The Plaintiffs have been convicted of offenses that are heinous, but the punishment under the Civil Death Act is set so high that it deprives them of even the most basic redress for the worst mistreatment. It is disproportionate.

> The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. See, e.g., Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). "[P]unishments of torture," for example, "are forbidden." Wilkerson v. Utah, 99 U.S. 130, 136, 25 L.Ed. 345 (1879). These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes.

Graham v. Florida, 560 U.S. 48, 59 (2010).

In Harmelin v. Michigan, 501 U.S. 957 (1991), the Court held that the Eighth Amendment contains a "narrow proportionality principle," that "does not require strict

proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id., at 997, 1000–1001. Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense. Weems v. United States, 217 U.S. 349, 367 (1910).

In Solem v. Helm, 463 U.S. 277 (1983), the Supreme Court set out those factors that should be assessed in determining if a sentence is proportional to the crime. It instructed that the Court should look at: 1. The gravity of the offense, 2. Sentences imposed on criminals in the same jurisdiction, 3. Sentences imposed for commission of the same crime in other jurisdictions. Id. at 291.

> A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id., at 100–101, 78 S.Ct. 590.

Atkins v. Virginia, 536 U.S. 304, 311–12 (2002)

Plaintiffs concede that they have been sentenced for the commission of gravely serious offenses for which the Rhode Island Courts have, in other instances, imposed similar sentences. The third prong of this test is what is really at issue. The notion of "civil death" as a form of punishment is "'archaic,' 'outmoded and medieval,' 'an outdated and inscrutable common law precept,' and 'a medieval fiction in a modern world.'" Thompson v. Bond, 421 F.Supp. 878 (W.D.Mo. 1976). But for Rhode Island, and in a very limited form, New York, this form of punishment has long since been rejected by the states that previously imposed

it.[8] Of the five U.S. Territories, only one, the Virgin Islands, continues to have a broad civil death law on the books, and it is questionable whether it is being enforced.

In New York—the other state with the vestige of a civil death statute--most of the provisions of its civil death statute were repealed in the 1970s in response to a constitutional challenge, leaving only its marriage prohibition. The plain language of the New York statute allows inmates with life sentences "to commence, prosecute or defend an action or proceeding in any court within the state." NY CIV RTS § 79-a.

In the Virgin Islands, the civil death act, 14 V.I.C. § 92, states: "Whoever is sentenced to imprisonment for life is thereafter deemed civilly dead." There are no cases that cite to this law as the basis to deny a prisoner with a life sentence the right to file and proceed with litigation or that interpret it to limit the life prisoner's ability to assert claims against their jailors for mistreatment. There is nothing that indicates that their rights to property are extinguished.

The Rhode Island Civil Death Act imposes a punishment far greater and more chilling than seen anywhere else in the United States or its territories. On its face, it removes each and everyone one of the civil rights an inmate sentenced to life has and removes from that inmate all rights to property, except as those rights might affect the inmates spouse. No other state's' statute does that.[9] While RIDOC is generally required by the Eighth Amendment to provide its inmates with food, shelter, and medical care, see Estelle v.

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[8] Plaintiffs allege in the complaint that the number of states with such statutes had been reduced to 13 by the 1970s. ECF 1 at 2. See also Johnson v. Rockefeller, 58 F.R.D. at 49 and n. 10 (collecting statutes as of 1972).

[9] Civiliter Mortuus was imported to United States jurisprudence from England. The harshness of the common law with respect to forfeiture of estates, corruption of blood and destruction of civil rights no longer obtains in England. 33 and 34 Victoria, c. 23 (1870). "The general effect of these statutes may be stated to be, that attainder has been abolished as from 4th July, 1870. ***" Stephen's Commentaries on the Laws of England (16th Ed.) vol. 1, p. 371. One hundred forty-nine years later, however, the statute is still in Rhode Island.

Gamble, 429 U.S. 97, 103-104 (1976), under the plain text of this statute, inmates sentenced to life in prison and housed at the ACI have no actual ability to enforce this guarantee and prevent this type of mistreatment.

There is no compelling reason under the Eighth Amendment to immunize the conduct of the State and others to claims of abuse or mistreatment by the Plaintiffs. There is no valid reason to bar an inmate, such as Davis, from making a battery or Eighth Amendment claim based on RIDOC nurse's intentional decision to assault him by exposing him to blood borne pathogens, even if that conduct does not arise to an Eighth Amendment violation. This behavior, by its very nature, is an inhumane condition of confinement. It is not a far reach to suggest that inmates who have been sentenced to life might also be subject to sexual assault in prison[10], denied food or water by RIDOC, or locked into solitary confinement for years at a time by RIDOC. There is simply no justification for the extreme results of this statute. This statute constitutes the ultimate in cruel and unusual punishment in that regard.

As the statute is unconstitutional under the Eighth Amendment, the motion to dismiss should be denied on this ground.

5. The Statute is invalid because it denies Plaintiffs equal protection of the laws.

There are at least two different classes created by the Civil Death Act that must be assessed under the equal protection clause.

A. The statute denies individuals who are sentenced to life imprisonment in the State of Rhode Island all of their civil rights, but does not prevent inmates housed in another state who have received the same life sentence from a Rhode Island Court from exercising the same rights.

[10] The Prison Rape Elimination Action of 2003 (PREA) was enacted by Congress to address this known evil.

B. The Statute denies prisoners who have been sentenced to life imprisonment and held at the ACI all of their civil rights whereas other prisoners sentenced to, for example, more than 100 years at the ACI, which is the equivalent of a life sentence, are not denied these rights.

In Gallop v. Adult Correctional Institutions, 182 A.3d 1137 (R.I. 2018), the Supreme Court stated: "The [Civil Death] statute unambiguously declares that a person such as plaintiff, who is serving a life sentence, is deemed civilly dead and thus does not possess most commonly recognized civil rights" with the legislature enumerating certain exceptions applicable to spousal rights. Id. at 1141. [11] Further, that "the Legislature has unambiguously mandated that persons serving a life sentence are prohibited from asserting civil actions." Id. at 1142. This statute, therefore, serves to deprive the Plaintiffs of their ability to file a civil action, which impinges on their fundamental right to access the Courts. See also Zab v. Zab, 203 A.23d 1175 (R.I. 2019) ("§ 13-6-1, taken in its natural sense, intends to mandate 'that persons serving a life sentence are prohibited from asserting civil actions.'").

Here the statute creates a class including Plaintiffs who are sentenced to life and housed at the ACI who are treated differently than individuals who are imprisoned at the ACI who are serving the equivalent of life sentences and treated differently from individuals with life sentences housed out of state or at a Federal Facility. The Plaintiffs are denied access to the Courts to file civil suits and exercise all of their civil rights not otherwise restricted due to imprisonment, but those who have been sentenced to the equivalent of life and housed at the ACI are not. And, as the statute applies by its terms only to inmates sentenced to life "imprisoned at the ACI," accordingly it does not affect those sentenced to

[11] Rhode Island General Laws § 13-6-1 states: "the bond of matrimony shall not be dissolved, nor shall the rights to property or other rights of the husband or wife of the imprisoned person be terminated or impaired, except on the entry of a lawfully obtained decree for divorce."

life by Rhode Island Courts and housed out of state under the New England Interstate Compact.

The Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons. The Constitution does not require things which are different in fact to be treated in law as though they were the same." Rinaldi v. Yeager, 384 U.S. 305, 309 (1966)). "The Equal Protection Clause . . . does. . . deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 75-76 (1971). As was decided by the Supreme Court in Eisenstadt v. Baird, 405 U.S. 438, 454-455 (1972), "providing dissimilar treatment for married and unmarried persons who are similarly situated . . . violate(s) the Equal Protection Clause." See also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . ., it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."). In determining whether the classification produced by a statute survives the equal protection analysis, the nature of the classification and the individual rights possibly violated by the legislation must be examined. Zabocki v. Redhail, 434 U.S. 374 (1978)

The first step in an equal protection analysis is determining whether the plaintiffs have demonstrated that he was treated differently than others who were similarly situated to them. See, e.g., Samaad v. City of Dallas, 940 F.2d 925, 940–41 (5th Cir.1991). Absent a threshold showing that Plaintiffs are similarly situated to those who allegedly receive

favorable treatment, the plaintiffs do not have a viable equal protection claim. See id. at 941 (holding that black residents failed to state an equal protection claim where they did not allege the existence of a similarly situated group of white residents who were treated differently). Thus, before the court can reach the merits of their equal protection claim, it must determine if the plaintiff and other inmates who have life sentences and housed out of state or at Federal Facilities, or other inmates with what are the equivalent of life sentences, are similarly situated.

Here the nature of the classification is that it puts all inmates sentenced to life by a Rhode Island State court and incarcerated at the ACI in a class, separate and apart, from all other inmates sentenced by the courts of the State of Rhode Island, who have received the same sentence and are housed out of state. Further, it sets the first class apart from any prisoners who have received the equivalent of the same sentence as Plaintiffs, who may in fact be serving more time than Plaintiffs, by stripping only from Plaintiffs all of their civil rights. The statute results in these individuals being put into different classes for reasons totally unrelated to the objective of the statute, which as urged by the state is punishment and deterrence

"Where the legislation infringes upon explicit constitutional rights, such as those guaranteed by the First Amendment, or upon interests fundamental to our society of ordered liberty, such as the right to travel or to privacy, the Court applies a much stricter scrutiny: legislative enactments must be narrowly drawn to express only a compelling state interest." Roe v. Wade, 410 U.S. 113, 155 (1973). Accordingly, to survive constitutional scrutiny, R.I.G.L. § 13-6-1 must pass the strict scrutiny test. Under strict scrutiny analysis, the government has the burden of proving that classifications "are narrowly tailored

measures that further compelling governmental interests." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

R.I.G.L. § 13-6-1 infringes on the constitutional rights of the Plaintiffs and all other inmates serving life sentences at the ACI as it literally suspends all of their civil rights, including those guaranteed to the Plaintiffs by both the State and Federal Constitutions. A strict scrutiny analysis has to be applied. Without looking at the other rights guaranteed Plaintiffs', the Supremacy Clause mandates that citizens of the State of Rhode Island, to include prisoners, are entitled to certain federal constitutional protections which include a constitutional right of "access to the courts." Coleman v. Peyton, 362 F.2d 905 (4th Cir.), cert. denied, 385 U.S. 905 (1966).

The statute fails constitutional muster under a strict scrutiny analysis. There cannot possibly be a compelling state interest that justifies declaring inmates who have received a life sentence and are housed at the ACI as civilly dead whereas all other prisoners housed at the ACI, including those that have effectively longer sentences than the Plaintiffs, and all other inmates who have received the exact same sentence as Plaintiffs but are housed out of state or at a federal facility, are not declared civilly dead.[12] This statute removes from Plaintiffs their rights to due process, equal protection, a remedy for all wrongs done to them, their right to a trial by jury, and their ability to petition the government (i.e. file a lawsuit or

[12] R.I.G.L. § 13-11-1 et seq. provides for an interstate compact allowing for the transfer of inmates between the state of Rhode Island and other states. R.I.G.L. § 13-11-2 allows transfer: "Whenever the duly constituted authorities in a state party to this compact, and which has entered into a contract pursuant to article III, decides that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment, the officials may direct that the confinement be within an institution within the territory of the other party state, the receiving state to act in that regard solely as agent for the sending state."

proceed in court), amongst other things. It is blatantly unconstitutional. There is no reason for the invidious distinction the statute draws.

Other courts have reached the same conclusion. In McCuiston v. Wanicka, 483 So. 2d 489, 492 (Fla App. 2d 1986), the Florida Court of Appeals invalidated its Civil Death Act which denied an inmate the right to be heard in court, stating that: "we find no compelling rationale for overriding the right of access. We reject respondent's assertion that the loss of the right to sue is simply an additional punishment validly assessed for felony offenses." It further rejected the argument that it is a valid exercise of legislative authority in curbing the volume of frivolous litigation stating: "assuming that a statute directed toward curbing this abuse of legal process would represent a legitimate legislative endeavor, the present statute inhibits far more than the mere 'nuisance' lawsuit."

In Delorme v. Pierce Frieghtlines Co., 353 F. Supp. at 259, the Court held that a state statute that suspended the right of an imprisoned felon to pursue administrative or judicial actions violated the Equal Protection Clause because it may forever bar "their access to legal machinery to redress legitimate complaints."

Regardless of a prisoner's misdeeds—however reprehensible—"[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Safely, 482 U.S. 78, 84 (1987). The most fundamental of the constitutional protections that prisoners retain are the First Amendment rights to file prison grievances and to pursue civil rights litigation in the courts, for "[w]ithout those bedrock constitutional guarantees, inmates would be left with no viable mechanism to remedy prison injustices." Rhodes v. Robinson, 408 F.3d 559, 567 (9th Cir. 2005). This is exactly what the Civil Death Act does.

Defendant's reference to Ferreira v. A.T. Wall is without merit as well. In Ferreira, the Plaintiffs challenged the Civil Death Act as it restricted their right to marry. No other

challenge was raised. Judge Lisi determined that she was bound by Butler v. Wilson, 415 U.S. 953, (1974), to enter summary judgment on this issue. In Butler, the Supreme Court summarily affirmed Johnson v. Rockefeller, 365 F.Supp. 377 (S.D.NY 1973), aff'd sub nom. Butler v. Wilson, supra. The court in Johnson held: "Insofar as the deprivation of the right to participate in the ceremony of marriage can be considered as imposing punishment in addition to incarceration it is a penalty which is well within New York's power to prescribe. A state has considerable freedom within the limits of the Eighth Amendment in determining what form punishment for crime shall take. Deprivation of physical liberty is not the sole permissible consequence of a criminal conviction." Id. at 380.

It should be noted that the original plaintiffs in Johnson had also challenged New York's civil death statute as broadly depriving them "of (1) access to the state courts to sue for money damage claims and (2) the right to marry." 365 F.Supp. at 380. However, during the pendency of the lawsuit, New York repealed all of the provisions except those concerning the right to marry, mooting all other challenges. The three-judge panel resolving the case made clear that the only issue remaining to be decided was the constitutionality of "the ban on [the right to go through the formal ceremony of] marriage applied to prisoners serving life sentences in state prisons in New York." Id. at 380. That is the decision which was summarily affirmed by the Supreme Court.[13]

Unlike an affirmance on the merits, "a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below." Mandel v. Bradley, 432 U.S. 173, 176 (1977). The Supreme Court has stated that the

[13] At the time, challenges to the constitutionality of a state statute were required to be heard by a three-judge panel and subject to direct, not discretionary, appeal to the United States Supreme Court. See, e.g., Johnson v. Rockefeller, 58 F.R.D. at 48 (convening three-judge court).

precedential value of a summary affirmance "extends only to 'the precise issues presented and necessarily decided.'" Metromedia, Inc. v. San Diego, 453 U.S. 490, 499 (1981).

Thus, the summary affirmance in Butler is narrowly limited to upholding the constitutionality of a provision, such as contained in the Rhode Island Civil Death Act, but not challenged here, prohibiting a prisoner subject to a life sentence from participating in a formal marriage ceremony. The three-judge trial court made expressly clear that any challenge to other "civil death" impediments had been repealed and were not before it. Thus, this court's decision in Ferreira following Butler has no application here.

It is well settled that a prison inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, supra, 417 U.S., at 822. The stripping of these rights is not part of the legitimate penological objectives of the correctional system.

As this statute creates an unconstitutional division between individuals sentenced to life and incarcerated in Rhode Island, versus those sentenced to life and incarcerated in another state or federal facility, and those who receive the equivalent of a life sentence but are not stripped of their civil rights, the statute violates the equal protection clause. As there is no basis that would pass a strict scrutiny analysis, or even rational basis analysis, the motion to dismiss should be denied on this ground.

6. The Statute is invalid because it denies Plaintiffs their rights to Due Process as guaranteed under the Fourteenth Amendment.

"[A]n individual claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interests 'may arise from two sources—the Due Process Clause itself and the laws of the States." Hewitt v. Helms, 459 U.S. 460, 472 (1983). Here Plaintiffs are asserting a violation of their due process guarantees, such as the ability to access a court, proceed with civil actions and vindicate their Eighth Amendment rights.

As stated in Daniels v. Williams, 474 U.S. 327, 331, (1986) the Due Process Clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." It provides heightened protection against government interference with certain fundamental rights and liberty interests. Reno v. Flores, 507 U.S. 292, 301–302 (1993).

Those cases addressing substantive due process claims recognize that there are certain rights so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." Palko v. Connecticut, 302 U.S. 319, 325-26 (1937). These rights are more fundamental and profound than the several liberty interests that have been deemed sufficient to trigger the requirements of procedural due process. Consequently, the fundamental rights protected by substantive due process are shielded from adverse state actions regardless of the procedures used by the state. See Washington v. Glucksberg, 521 U.S. 702, 721 (1997). Substantive due process provides a "guarante[e] more than fair process," 521 U.S. at 719.

Fundamental rights include those guaranteed by the Bill of Rights in the United States Constitution as well as certain liberty and privacy interests implicit in the due process clause and in the penumbra of constitutional rights. See Glucksberg, 521 U.S. at 720. These special liberty interests have been held to include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." Id. (citations omitted).

In order to prevail on the substantive due process prong of a constitutional argument, Plaintiffs are required to identify a fundamental right that is "objectively, deeply rooted in this Nation's history and tradition." Glucksberg, 521 U.S. at 720–21 (internal quotation marks omitted). Here, the Plaintiffs are being denied the ability to appear in court

and the ability to exercise all of their other civil rights, including the right to seek a remedy for the RIDOC's negligence, intentional conduct and violation of their federal rights. These are protections granted to them by the United States Constitution.

This Civil Death Act, by its plain language, violates those protections provided to the Plaintiffs by the Bill of Rights. This is not a case like Turner v. Safely, 482 U.S. 78 (1987), where the prison is placing a reasonable limitation on a right by a prisoner through a prison regulation or because of a security need. This is a case where the Civil Death Act purports to eliminate all rights a prisoner would have under the Constitution for the time the prisoner is serving a sentence of life at the ACI. There cannot possibly be a legitimate reason to remove from a prisoner each-and-every one of their civil rights. This in effect allows the state to treat the Plaintiffs as it deems fit, with Plaintiffs having zero recourse for its actions, or actions of related or unrelated third parties. Accordingly, the statute is unconstitutional under substantive due process grounds running afoul of the federal constitution.

Other courts have reached this conclusion in addressing civil death statutes. In Bilello v. A. J. Eckert Co., 42 A.D.2d 243, 246 (NY 3rd App Div. 1973) the Court, addressing a similar civil death statute as ours in New York, stated that because it "prohibits appellant from prosecuting his appeal, the statute is unconstitutional as violative of the Fifth and Fourteenth Amendments of the United States Constitution." Noting that it left the Appellant with no meaningful opportunity to be heard, the court called the statute a "relic of medieval fiction" and an "outdated and inscrutable common law concept." (Citations omitted).

Similarly in McCuiston v. Wanicka, 483 So. 2d 489, 491 (Fla. 2d 1986), the Court held that a Florida statute that suspended the civil rights of persons convicted, imputing civil death while they were incarcerated, violated the prisoner's rights to due process under article

1, section 21, of the Florida Constitution, which guaranteed access to the courts to "all persons." In doing so, it stated that: "The courts of this state should scrutinize carefully any actions taken by the legislature which may place impermissible burdens on the exercise of the right of access to the courts. . . . In the absence of an overpowering public necessity, the legislature is without power to abolish such a right without providing a reasonable alternative. . . Any restrictions must be liberally construed in favor of the constitutional right. . . 'The law abhors the denial of access to the courts for any other reason than a wilful abuse of the processes of the court.'" Id. at 492. (citations omitted).

The statute clearly violates the Plaintiffs' rights to substantive due process and should be declared unconstitutional on this ground.

The motion to dismiss should be denied on this ground as well.

VI. CONCLUSION

The motion to dismiss the complaint or to abstain should be denied in all respects.

PLAINTIFFS,
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CERTIFICATE OF SERVICE

I hereby certify that I filed the within document via the ECF filing system and that a copy is available for viewing and downloading by counsel of record for Plaintiffs on this 5th day of December, 2019.

/s/ Sonja L. Deyoe