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STATE OF RHODE ISLAND
SUPREME COURT OF RHODE ISLAND

CODY-ALLEN ZAB,	:	
Plaintiff	:	
v.	:	**SU-2019-0459-A**
RHODE ISLAND DEPARTMENT OF CORRECTIONS, PATRICIA COYNE-FAGUE, MATTHEW KETTLE, and GLOBAL TEL*LINK CORPORATION,	:	**CA: PM-2017-4195**
***Defendants*.**	:	
	:	
JOSE R. RIVERA,	:	
Plaintiff	:	
v.	:	**SU-2019-0462-A**
STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS By and through its Director PATRICIA COYNE-FAGUE, in her official capacity,	:	**CA: PC-2017-0433**
***Defendants*.**		

ON APPEAL FROM THE RHODE ISLAND SUPERIOR COURT

BRIEF OF STATE DEFENDANTS/APPELLEES

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INTRODUCTION

This consolidated appeal stems from the Superior Court's straightforward application of *Gallop v. Adult Correctional Institutions, et al.*, 182 A.3d 1137, 1139 (R.I. 2018) to dismiss tort lawsuits filed by two civilly dead inmates.[1] Rhode Island's so-called civil-death statute, R.I. Gen. Laws §13-6-1, and this Court's decision in *Gallop*, bar inmates sentenced to life at the Adult Correctional Institutions ("ACI") from bringing negligence claims in Superior Court. Plaintiffs' sole basis for appeal is their contention that such an application of the civil death statute is unconstitutional. However, the Legislature has ample discretion to restrict the State's worst criminal offenders from seeking monetary damages in a tort suit while serving life sentences for their heinous crimes. As this Court previously recognized, Rhode Island's civil death statute is a "sanction" derived from a history of criminal punishment dating back to the Greeks. *Gallop*, 182 A.3d at 1140-41; *Bogosian v. Vaccaro*, 422 A.2d 1253, 1254 (R.I. 1980). Such a sanction directed at inmates who have received life sentences easily falls within the Legislature's broad discretionary authority to punish crime and shape state tort law; as this Court already

[1] The Appellants/Plaintiffs Cody-Allen Zab and Jose Rivera ("Plaintiffs") appeal the Superior Court's dismissal of their respective civil lawsuits against the Defendants/Appellees State of Rhode Island Department of Corrections ("DOC") and its Director, Patricia Coyne-Fague, in her official capacity (collectively "Defendants" or "the State"). Matthew Kettle was never served, and is consequently not a party to this action.

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determined, "[r]epeal is the province of the Legislature." *Gallop*, 182 A.3d at 1141.

In arguing that Rhode Island's longstanding civil death statute is unconstitutional, Plaintiffs rely heavily on policy arguments contending that the civil death statute is outdated and on extra-jurisdictional cases from decades ago interpreting other states' law. Rhode Islanders certainly can debate the wisdom of the civil death statute; in fact, they have been doing so for each of the last several years when bills were filed in the General Assembly that would have repealed the civil death statute but that the General Assembly declined to pass. As this Court has already recently stated, that is the province of the Legislature.

Much of Plaintiffs' Brief takes issue not with how the civil death statute was applied to dismiss Plaintiffs' negligence lawsuits in the cases currently before this Court, but rather with how it *could hypothetically* be applied in other circumstances to prevent inmates from bringing federal claims to vindicate their constitutional rights. Similarly, the Rhode Island Federal District Court recently cited what it described as "dicta" from *Gallop* to reach the conclusion that this Court has interpreted the civil death statute as preventing inmates from bringing federal constitutional claims in state court. *See Lombardi v. Mckee*, 1:19-cv-00364, ECF 18 ("While it is true that the [Rhode Island Supreme Court] did not state explicitly that the Act bars federal claims in state court, neither did it qualify its broad statement in any way suggesting a carve-out for federal claims.").

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Consistent with the Supremacy Clause, Defendants do not interpret the civil death statute or this Court's precedent as holding that civilly dead inmates cannot bring federal constitutional claims. For that reason, Defendants moved for summary judgment on Zab's federal 42 U.S.C. §1983 Eighth Amendment claim on the basis that the claim failed on the merits under federal law, not based on the civil death statute. As such, affirming the Superior Court's decision in these cases simply means holding that the civil death statute permissibly bars inmates sentenced to life from bringing negligence suits for monetary damages under state law; it does not in any way mean that inmates cannot bring federal constitutional claims. Particularly as the State traditionally enjoys sovereign immunity, Plaintiffs cannot have a fundamental constitutional right to sue the State for a tort.

Especially after reading the Briefs of Plaintiffs and the Amicus, it is important to pause for a moment to recall what this case is about. Rivera slipped and fell. Zab, on his own initiative, touched a heating pipe that he knew may be hot. Both inmates are suing the State for monetary damages based on their incidents. There are no allegations that Rivera or Zab have been mistreated or abused in any way. No one in this case but Plaintiffs and their Amicus have suggested that the civil death statute can be used to prevent these inmates from contesting the conditions of their confinement or vindicating their basic constitutional rights. For all the history recounted in the Amicus Brief, Amicus did not identify a single instance in the civil

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death statute's century-plus existence in which the statute was applied by a court in this state to prevent inmates from bringing federal constitutional or statutory claims. In fact, Plaintiffs' Brief acknowledges that civilly dead inmates routinely exercise their federal constitutional rights.[2]

Most of Plaintiffs' and Amicus' objections against the civil death statute derive from their concern that it *could* be applied in a way in which it was not applied in the cases now before this Court and has never been applied by a court in this State. Since certain language in *Gallop* has been construed by some — including Plaintiffs in this case and the Federal Court in a pending case — to mean that this Court believes that the civil death statute bars federal constitutional and statutory claims, it would benefit all parties involved for this Court to take this opportunity to clarify that this Court does not interpret the civil death statute as barring inmates from bringing federal claims and vindicating their basic federal constitutional rights, but that prohibiting these inmates from collecting monetary damages for simple torts under state law while serving their life sentences is a policy decision well within the Legislature's purview and is constitutional. After all, it is this Court that is the final arbiter of the interpretation of state law. *See LaPlante v. Honda N. Am., Inc.*, 697

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[2] Plaintiffs recount how they enjoy procedural due process rights attendant to the interception of their mail and can bring and collect damages in 42 U.S.C. §1983 claims. *See* PB p.44-45. Clearly, by their own admissions, Plaintiffs have not been deprived of all their rights, including the right to bring 42 U.S.C. §1983 claims.

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A.2d 625, 628 (R.I. 1997) ("it is the task of this Court as the final arbiter on questions of statutory construction to interpret the meaning of the language employed").

BACKGROUND AND STATEMENT OF FACTS

A. History of the Civil Death Statute: Rhode Island's Civil Death Statute Has Only Been Applied to Bar State Law Claims

Rhode Island General Laws § 13-6-1, sometimes known as the "civil death statute," provides:

> [e]very person imprisoned in the adult correctional institutions for life shall, with respect to all rights of property, to the bond of matrimony and to all civil rights and relations of any nature whatsoever, be deemed to be dead in all respects, as if his or her natural death had taken place at the time of conviction. However, the bond of matrimony shall not be dissolved, nor shall the rights of property or other rights of the husband or wife of the imprisoned person be terminated or impaired, except on the entry of lawfully obtained decree for divorce.

This Court examined the civil death statute in *Bogosian v. Vaccaro*, 422 A.2d 1253 (R.I. 1980). In that case, an inmate sentenced to life attempted to invoke the civil death statute to nullify an agreement into which he had entered. This Court rejected the inmate's argument and held that the inmate was not civilly dead at the time when he entered the agreement. *Id.* at 1254. The Court recognized the trial court's determination that the civil death statute was intended to be a limitation on rights of a prisoner serving a life sentence "rather than a shield that would insulate him or her from civil liability." *Id.* This Court likewise described the civil death

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statute as a "sanction" derived from a broader world history of limiting the rights of criminals, noting 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." *Id.* at 1254, n.1.[3]

This Court more recently interpreted and applied the civil death statute in *Gallop*, 182 A.3d at 1139. The plaintiff in that case, who was an inmate sentenced to life, brought a state law negligence action alleging that he was injured while incarcerated at the ACI. *Id.* This Court affirmed the trial justice's determination that R.I. Gen. Laws § 13-6-1 divested the Superior Court of the authority to hear the merits of the plaintiff's state law negligence claim. *Id.* at 1141. Accordingly, this Court held that the plaintiff's ability to pursue his claim was "extinguished by operation of law once his conviction became final." *Id.* This Court concluded that the "trial justice prudently and accurately dismissed the case," and affirmed the decision. *Id.* at 1143. Notably, this Court soundly rejected Gallop's policy arguments about the wisdom of the civil death statute, which included many of the same types of policy arguments Plaintiffs raise now, and recognized that "[r]epeal is the province of the Legislature." *Id.* at 1141.

---

[3] Amicus notes that the civil death statute was mentioned in *In re Micaela C.*, 769 A.2d 600 (R.I. 2001), which involved the termination of parental rights. This Court did not make any rulings regarding the civil death statute in that decision, which does not reference any arguments regarding the constitutionality of the civil death statute.

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Although Gallop had attempted at the eleventh hour to amend his complaint to include a federal claim, the trial justice did not grant the motion to amend because it would have drastically altered the nature of the case on the eve of trial. *Id.* at 1144-45. As such, the trial justice did *not* rule that the civil death statute would bar a federal claim; the plaintiff simply had failed to timely plead one. Gallop nonetheless argued to this Court that it would be improper *if* the civil death statute was applied to bar him from pursuing a *federal* claim: "[b]efore this Court, plaintiff argues that: . . . (2) the trial court erred because the civil death statute in Rhode Island, to the extent that it impairs a person's capacity to sue under 42 U.S.C. § 1983, is invalid under the Supremacy Clause of the United States Constitution; (3) any state law that precludes access to state remedies available to litigate claims for alleged violations of any federal rights under color of law is invalidated by § 1983. . . ." *Id.* at 1139.

However, this Court did not reach those questions because the only issue properly before this Court regarding the civil death statute was whether the trial justice correctly determined that the civil death statute bars a civilly dead inmate from pursuing a *state law negligence action*, which this Court answered in the affirmative. Consistent with longstanding jurisprudence counseling against unnecessarily deciding constitutional questions that are not properly before the Court, *see, e.g., State v. Lead Indus. Ass'n, Inc.*, 898 A.2d 1234, 1239 (R.I. 2006), this Court deliberately did not opine on the hypothetical question of whether the civil

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death statute would bar a federal claim *if* the plaintiff were allowed to amend his complaint to include one. *Gallop*, 182 A.3d at 1144-45. This Court remanded the case for the trial justice to issue a formal ruling regarding whether the plaintiff could amend his complaint to include a federal claim. *Id.* at 1145.

On remand, the trial justice formally denied the motion to amend, not based on the civil death statute.[4] Gallop again appealed and this Court determined that the trial justice did not abuse her discretion in denying the motion based on Gallop's delay in seeking to amend. *Gallop v. Adult Corr. Institutions*, 218 A.3d 543, 550 (R.I. 2019) ("*Gallop II*") ("the only issue before this Court is whether the trial justice abused her discretion when she denied plaintiff's motion for leave to file a second amended complaint"). *Gallop II* makes crystal clear that this Court has *never* ruled that the civil death statute bars federal claims and has never indicated it would refuse to consider federal constitutional arguments properly before it. In *Gallop II*, this Court expressly explained that its decision in *Gallop* was limited to affirming the application of the civil death statute to dismiss plaintiff's state law negligence claim because "plaintiff's various federal and constitutional claims were raised for the first time in the proposed second amended complaint and were not properly before the trial justice." *Id.* at 547. As such, no federal claims were pending before the Court

[4] If it would be helpful to the Court, the State is happy to provide a transcript of the hearing on the motion to amend on remand.

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in *Gallop* and Gallop's argument that it would be unconstitutional *if* the civil death statute barred such claims was irrelevant. *Id.* at 550 ("Before this Court in *Gallop*, plaintiff argued that the civil death statute is invalid under the Supremacy Clause 'to the extent it impairs a plaintiff's capacity to sue under 42 [U.S.C. §] 1983 and other civil statutes'—statutes that he failed to name. However, there were no federal civil rights claims before the trial justice when she dismissed the complaint, and none before this Court in *Gallop*."). Gallop's inability to pursue a federal claim was entirely due to his failure to timely plead one, not due to the civil death statute. Additionally, this Court noted that Gallop never argued that it would be unconstitutional to apply the civil death statute to state law negligence claims. *See id.* at 546.

This Court's decision in *Gallop II* leaves no doubt that the *only* matter related to the civil death statute decided in *Gallop* is that the civil death statute requires dismissal of a *state law negligence* claim brought by an inmate sentenced to life. Indeed, if this Court in *Gallop* had determined that the civil death statute likewise bars federal claims as Plaintiffs suggest, then it would have been pointless for the Court to remand the case for the trial justice to determine whether Gallop could amend his complaint to add a federal claim.

Given this Court's clear statements that it was not passing upon the viability of Gallop's unpled federal claim, it is difficult to understand how Plaintiffs can now

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represent to this Court, just as the *Lombardi* plaintiffs did to the Federal Court, that "[t]his Court has held that the Civil Death Act deprives life prisoners of most of their commonly held civil rights, and, *chillingly, that the Act removed the authority of the Superior Court to hear any claims brought by these prisoners. Gallop v. Adult Correctional Institutions*, 182 A.3d 1137 (R.I. 2018)." Plaintiffs' Brief ("PB"), p.9 (emphasis added).[5] This Court in *Gallop II* took pains to make clear that *Gallop* does *not* stand for that proposition because no federal claim was properly before the Court.

This Court has also considered the civil death statute in the context of a prior appeal filed by Zab regarding a decision of the Family Court denying his motion to "seal the record" of his prior marriage. *Zab v. Zab,* 203 A.3d 1175 (R.I. 2019) ("*Zab I*"). In that case, Zab argued that the record of his prior marriage should be "sealed"

[5] In reaching the conclusion that this Court would apply the civil death statute to bar a federal claim, Plaintiffs and the Federal Court focus on certain dicta in *Gallop* where the Court indicated that Gallop had failed to produce any authority for the proposition that a state court is bound to hear a §1983 claim when the plaintiff is civilly dead. *See Gallop*, 182 A.3d at 1144 ("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"). As an initial matter, this Court clearly did not decide that question, but only observed that the plaintiff had failed to produce legal authority to support his position. Indeed, the Court noted that "[t]he plaintiff's generic assertions are unaccompanied by jurisdictional support, *which will be necessary on remand*," further emphasizing that the Court did not decide the issue. *Id.* (emphasis added). Additionally, when read in context, it is clear the Court was addressing Gallop's doubtful argument that the specific language of 42 U.S.C. §1983 somehow encompasses state tort claims, not the type of Supremacy Clause considerations being raised by Plaintiffs now.

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because he is civilly dead, and thus was prohibited from entering into the marriage. *Id.* This Court cited *Gallop* and determined that Zab's case, which involved a decision related to state family law, should be dismissed because he is civilly dead. *Id.* Like *Bogosian*, that case was an instance where the civilly dead inmate was attempting to use the civil death statute to his benefit. *Zab I* also did not involve a federal constitutional claim. Ironically, a short time after attempting to use the civil death statute to try to invalidate his marriage in *Zab I*, Zab filed his Motion for Summary Judgment in this case, arguing that the civil death statute is unconstitutional. *See also infra* Argument, Section E (discussing estoppel).

Notably, the Rhode Island Federal District Court recently analyzed and upheld the constitutionality of Rhode Island's civil death statute in a different lawsuit filed by Zab. In that case, which will be discussed further *infra*, Zab and the woman he wished to marry (who was different than the woman he previously married who was a party to *Zab I*) challenged the statute's restriction on the ability of inmates sentenced to life to marry. *See Ferreira v. Wall*, No. CV 15-219-ML, 2016 WL 8235110 (D.R.I. Oct. 26, 2016). The Federal Court affirmed the constitutionality of the civil death statute and held that it was consistent with United States Supreme Court precedent.

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B. Plaintiffs Are Civilly Dead Inmates Whose State Law Tort Claims Were Dismissed Pursuant to the Civil Death Statute, Consistent with this Court's Precedent

On April 9, 2008, Zab was sentenced to life imprisonment for setting fire to the home of a 95-year-old man in an attempt to recoup a drug debt. *Zab I* 203 A.3d 1175 (R.I. 2019). The 95-year-old man, who was not Zab's intended victim, died as a result. *Id.* Plaintiff pled guilty to first-degree murder and other charges. *Id.* He is currently serving a life sentence at the ACI. Joint Appendix ("Appx."), 196-97.

On June 4, 2007, Rivera was convicted on multiple counts of sexual assault and simple assault against three developmentally disabled women. *State v. Rivera*, 64 A.3d 742, 743 (R.I. 2013); *State v. Rivera*, 987 A.2d 887, 897 (R.I. 2010). On August 7, 2007, Plaintiff was sentenced to life in prison plus sixteen years. *Rivera*, 64 A.3d at 744. Rivera's appeal challenging his sentence was later denied by this Court. *Rivera*, 987 A.2d at 897. Rivera also filed a motion to reduce his sentence, the trial justice's denial of which was affirmed by this Court. *Rivera*, 64 A.3d at 748-49.

It is undisputed that both Rivera and Zab are inmates sentenced to life at the ACI, and thus civilly dead pursuant to R.I. Gen. Laws § 13-6-1. *See* PB, p.10.[6] Both

[6] This Court can also take judicial notice of these court rulings and the fact that Plaintiffs are inmates at the ACI sentenced to life. *See In re Victoria L.*, 950 A.2d 1168, 1175 (R.I. 2008) ("the decision to take judicial notice of prior judgments is well supported").

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inmates filed the lawsuits that are the subject of this appeal during their incarceration. Specifically, Rivera filed a negligence lawsuit based on an allegation that he slipped and fell at the ACI. Appx.352. He did not plead any federal claims or contend that the Defendants engaged in intentional conduct or violated his constitutional rights in any way. Appx.352-54. Zab filed a lawsuit asserting a state law negligence claim and a federal Eighth Amendment claim under 42 U.S.C. §1983, both related to Zab's allegation that he touched a heating radiator pipe. Appx.5-9. Zab did not allege that anyone forced him to touch the pipe and did not deny knowing that the pipe he touched was a heating pipe that may be hot, but he argued that it posed a "random hazard" because it was not always hot. *See* Appx.64; *see also* Appx.74 (citing Warden's affidavit describing how it is widely known among inmates that the heating pipes may be hot and should not be touched).

In *Rivera*, the State filed a Motion for Judgment on the Pleadings asserting that the civil death statute requires dismissal of Rivera's negligence claim. *See* Appx.360-68. In *Zab*, the State filed a Motion for Summary Judgment arguing that the civil death statute likewise requires dismissal of Zab's negligence claim.[7] Significantly, the State did not move for summary judgment on Zab's federal §1983

[7] Shortly before Defendants filed their Motion for Summary Judgment, Zab filed his own Motion for Summary Judgment solely seeking to strike the Defendants' affirmative defense based on the civil death statute. Defendants objected to Zab's Summary Judgment Motion. Both parties' motions raised overlapping issues and were heard and decided together.

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Eighth Amendment claim based on the civil death statute. Rather, the State argued that Zab's allegation that he hurt himself when he touched a hot pipe that he knew may be hot does not constitute cruel and unusual punishment as a matter of law. *See* Appx.68-77. The State also argued that Zab's federal §1983 claim for damages is barred by *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), which holds that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Pontbriand v. Sundlun*, 699 A.2d 856, 868 (R.I. 1997) (Governor not amendable to suit in his official capacity "because he is not a person within the contemplation of 42 U.S.C. § 1983"). Additionally, the State argued that Zab's Eighth Amendment claim for injunctive relief was moot because DOC had already taken measures to prevent inmates from touching the pipes. *See* Appx.74-77 (describing how pipes are necessary to heat the facility but how DOC gave warnings and wrapped the pipes to try to prevent inmates from touching them and re-covers the pipes when inmates pick off the covering).

In a consolidated hearing, the Superior Court issued a bench decision entering judgment for the State in both cases. Applying *Gallop*, the Superior Court determined that it "is divested of the authority" to hear Plaintiffs' negligence claims, noting that "[t]he legislature can set limitations on tort law." Appx.341. After discussing how Plaintiffs' state law tort claims were barred by the civil death statute

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and *Gallop*, the Superior Court then turned to Zab's §1983 Eighth Amendment claim and determined that it failed on the merits:

> *The 1983 action has a different problem. . . . in the 1983 action, Mr. Zab's action, the State is not a person, and the State has already cited* ***Will v. Michigan****,* a 1989 case, and so Mr. Zab's case against the Department of Corrections for negligence rights already fails as he has no right of action against the - - unless he is suing a person. He has no right to recover damages. His constitutional arguments therefore fail on that count. *The Court is also concerned with mootness in some of his claims*[.]

Appx.342 (emphasis in italics added). Particularly when viewed in light of the arguments the State raised to the Superior Court, it is apparent that the Superior Court applied *Will v. Michigan* and mootness to resolve Zab's Eighth Amendment claim and applied *Gallop* and the civil death statute to the Plaintiffs' negligence claims. The Superior Court's written order granted the State's motion, which had expressly moved for summary judgment on Zab's state law negligence claim based on the civil death statute, and on the §1983 claim because it failed on the merits under federal law. *See* Appx.299-300. This appeal followed.

Shortly before the Superior Court hearing in these cases, Plaintiffs' counsel as a cooperating attorney with the ACLU, filed a federal lawsuit on behalf of other civilly dead inmates asking the federal court to declare that Rhode Island's longstanding civil death statute is unconstitutional.[8] *See Lombardi v. Mckee*, 1:19-

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[8] Ironically, the ACLU as an Amicus in this case notes that the "state courts are the 'final interpreters of state law'" and urges this Court to decide this case on state

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cv-00364. In that case, the State filed a Motion to Dismiss arguing that the civil death statute does not bar, and has never been applied to bar, federal claims, and that the Legislature has discretion to restrict civilly dead inmates from bringing tort claims under state law. In objecting to that Motion to Dismiss, the federal plaintiffs argued that "in the face of *Gallop I*, *Gallop II*, *Zab I*, and *Zab II* [the subject of this current appeal], it is clear that the Rhode Island Courts are unable to hear the Plaintiffs' claims that the Civil Death Act violates Federal Law." 1:19-cv-00364, ECF 10-1, p.14. The plaintiffs told the Federal Court that this Court has held that civilly dead inmates cannot bring a federal claim in state court. *Id.*, p.12 ("Rhode Island Courts have been very clear they have no power to adjudicate [state and federal claims by civilly dead inmates]"), p.20 (asserting that *Gallop* "clearly states the Superior Court is deprived of jurisdiction to hear these [federal] claims").

The Federal Court recently issued a decision granting in part and denying in part the State's Motion to Dismiss. Central to the Court's decision that the federal plaintiffs could proceed with their case was the Federal Court's conclusion that this Court has indicated that the civil death statute bars inmates from bringing *federal* claims. *See Lombardi*, No. CV 19-364 WES, 2021 WL 1172715, at *5 (D.R.I. Mar. 29, 2021) ("The Court agrees with Plaintiffs that the language of the Civil Death

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constitutional grounds, *see* Amicus Brief ("AB"), p.23-24, despite having filed a lawsuit asking the Federal Court to decide these same issues under federal law while these instant cases were pending in State court.

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Act, and the clear holdings and dicta of the [Rhode Island Supreme Court] and state court trial justices, renders all of their underlying [state and federal] claims futile if brought in state court."); *id.* ("While it is true that the [Rhode Island Supreme Court] did not state explicitly that the Act bars federal claims in state court, neither did it qualify its broad statement in any way suggesting a carve-out for federal claims."). Having concluded that this Court would apply the civil death statute to bar inmates from bringing federal claims, the Federal Court determined that the plaintiffs had stated a claim that the civil death statute violates the United States Constitution and could proceed with their lawsuit, which remains pending.[9] *See id.*

QUESTIONS RAISED

1. May the General Assembly constitutionally restrict criminal offenders who have received life sentences from pursuing monetary damages for negligence claims under State tort law as punishment for their crimes?

2. Should judgment enter for the Defendants on Zab's 42 U.S.C. §1983 claim where the claim fails on the merits under federal law and where Zab failed to raise *any* arguments on appeal disputing that his Eighth Amendment claim fails as a matter of law under federal law?

STANDARD OF REVIEW

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

[9] The Federal Court's analysis focused on interpreting the civil death statute assuming it would be applied by this Court to bar federal claims. The Federal Court did not separately analyze whether it would implicate any federal constitutional issues if the civil death statute did not bar federal claims.

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any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." R.I. Super. R. Civ. P. 56(c). The nonmoving party must present competent evidence "from which a jury could draw reasonable inferences sufficient to create a genuine issue of material fact." *Gliottone v. Ethier*, 870 A.2d 1022 (R.I. 2005). This Court "reviews the granting of a summary judgment motion on a de novo basis," applying the "same standards that apply to the trial justice[.]" *Avilla v. Newport Grand Jai Alai LLC*, 935 A.2d 91, 95 (R.I. 2007).

A motion for "judgment on the pleadings under Rule 12(c) of the Superior Court Rules of Civil Procedure 'provides a trial court with the means of disposing of a case early in the litigation process when the material facts are not in dispute after the pleadings have been closed and only questions of law remain to be decided.'" *Nugent v. State Pub. Defender's Office*, 184 A.3d 703, 706 (R.I. 2018) (quoting *Chase v. Nationwide Mut. Fire Ins. Co.*, 160 A.3d 970, 973 (R.I. 2017)). A court's review of "[a] Rule 12(c) motion is tantamount to a Rule 12(b)(6) motion, and the same test is applicable to both." *Chariho Reg'l Sch. Dist. v. Gist*, 91 A.3d 783, 787 (R.I. 2014) (quoting *Collins v. Fairways Condos. Ass'n*, 592 A.2d 147, 148 (R.I. 1991)). When reviewing the grant of such a motion, this Court applies the same standard as the hearing justice. *Chase*, 160 A.3d at 973.

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ARGUMENT

A. Rhode Island's Civil Death Statute is Presumed Constitutional

Analysis of Rhode Island's civil death statute begins with the bedrock principle that courts "will presume legislative enactments of the General Assembly to be constitutional and valid, and will so construe legislative enactments if such a construction is reasonably possible. If more than one construction is possible, courts shall always adopt the construction that will avoid unconstitutionality." *In Re: Advisory Opinion to House of Representatives*, 485 A.2d 550, 552 (R.I. 1984) (internal citations omitted). In *Gorham v. Robinson*, this Court held that a party challenging the constitutionality of a statute has the burden of proving beyond a reasonable doubt that the statute in question is "repugnant to a provision in the constitution" and that a court should "approach constitutional questions with great deliberation, exercising [its] power in this respect with the greatest possible caution." 186 A. 832, 838 (R.I. 1936) ("All laws regularly enacted by the Legislature are presumed to be constitutional and valid."). More recently, this Court has reemphasized that "all laws regularly enacted by the Legislature are presumed to be constitutional and valid," that courts reviewing the constitutionality of statutes must "make every reasonable intendment in favor of the constitutionality of the legislative act," and that it "will not invalidate a legislative enactment unless the party challenging the enactment can prove beyond a reasonable doubt that the statute in

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question is repugnant to a provision in the Constitution." *City of Pawtucket v. Sundlun*, 662 A.2d 40, 45 (R.I. 1995); *see also State v. Germane*, 971 A.2d 555, 573 (R.I. 2009) ("One who challenges the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that the challenged statute violates either the Rhode Island or the United States Constitution").

In "passing on the constitutionality of a statute, the Court exercises its power to do so with the greatest possible caution. To be deemed unconstitutional, a statute must palpably and unmistakably be characterized as an excess of legislative power." *Cherenzia v. Lynch*, 847 A.2d 818, 822 (R.I. 2004) (internal citations and quotations omitted). Plaintiffs' Brief acknowledges this standard and the high hurdle they must overcome to prevail in this case. *See* PB, p.13 ("Unless the party challenging the statute's constitutionality can 'prove beyond a reasonable doubt that the act violates a specific provision of the constitution or the United States Constitution, this Court will not hold the act unconstitutional.' *Mackie v. State*, 936 A.2d 588, 596 (R.I. 2007).").

B. <u>Rhode Island's Civil Death Statute Should Not Be Interpreted to Bar Federal Claims</u>

Strictly speaking, the issue of whether the civil death statute could be interpreted as barring federal claims is not before this Court since the statute was not applied to bar a federal claim in this case, and indeed has *never* been applied that way by a Rhode Island court in any case. Nonetheless, the Briefs of the Plaintiffs

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and the Amicus focus on arguing that such an application of the civil death statute would be unconstitutional. *See* PB, p.13 ("the Civil Death Act, as interpreted by this Court, removes from Appellants . . . all avenues they have to ask the State Courts to enforce the protections they are granted under the Rhode Island Constitution, the United States Constitution and at the common law"); PB, p.31 ("At the extremes, such an interpretation of punishment literally allows RIDOC, and all other persons or entities at the ACI to do whatever they want to the Appellants' [sic], perhaps short of killing them, irrespective of how harsh, severe, or bizarre, and leave Appellants' [sic] with no state court redress."). Significantly, Plaintiffs acknowledge that "[*i]f the holding in Gallop was so limited to saying that Gallop could not bring a personal injury action, then this might be a very different argument*, but, in its holding this Court made it explicitly clear that Gallop lost his ability to be heard by the Superior Court as the Civil Death Act removed its jurisdiction to hear Gallop's claims." PB, p.36 (emphasis added).

Given Plaintiffs' acknowledgement that their arguments are based on their assumption that *Gallop* bars civilly dead inmates from brining *any* claims, and given that the Federal Court in a pending case has reached the same conclusion based on what it has termed dicta in *Gallop*, Defendants urge the Court to take this opportunity to provide much-needed clarity and confirm once and for all that the civil death statute does not bar an inmate from bringing federal claims in any court. Once that

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issue is addressed, it resolves most of the concerns and arguments presented by Plaintiffs and simplifies this appeal.

The confusion around the scope of the civil death statute is understandable given its wording and the fact that the statute, which has been in place for over a century, does not expressly identify what "civil rights" it is restricting. *See Bowles v. Habermann*, 95 N.Y. 246, 247 (1884) (noting that "[i]t is difficult to ascertain precisely what the Legislature meant by the words 'civil rights'" and interpreting a civil death statute as limiting the right to bring a tort suit but not completely restricting the ability to appear in court). The meaning of "civil rights" is not readily defined; Britannica Encyclopedia for instance notes that civil rights "vary greatly over time, culture, and form of government and tend to follow societal trends[.]" *See* https://www.britannica.com/topic/civil-rights.

Defendants believe that when read in context and in light of this Court's consistent practice of interpreting duly enacted statutes in a manner that renders them constitutional and not inconsistent with other laws, it is clear that the General Assembly could not, and did not intend to, enact a state law purporting to remove every single human and constitutional right from inmates sentenced to life as Plaintiffs suggest. In fact, if the reference to "civil rights" was intended to remove every constitutional and fundamental right, then it would have been entirely superfluous to separately delineate that "property" and "matrimony" rights were

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restricted. *See* R.I. Gen. Laws § 13-6-1 (restricting rights "with respect to all rights of property, to the bond of matrimony and to all civil rights . . . "); *see also Roberts v. City of Cranston Zoning Bd. of Review*, 448 A.2d 779, 781 (R.I. 1982) ("No sentence, clause or word should be construed as unmeaning and surplusage, if a construction can be legitimately found which will give force to and preserve all the words of the statute."). As such, it is clear that the Legislature intended the civil death statute's reference to "civil rights" to remove some but not all rights.

This Court staunchly adheres to the principle that courts "will presume legislative enactments of the General Assembly to be constitutional and valid. . . . If more than one construction is possible, courts shall always adopt the construction that will avoid unconstitutionality." *In Re: Advisory Opinion*, 485 A.2d at 552 (internal citations omitted). Similarly, this Court has held that "when a statute can be interpreted as having two meanings, only one of which is constitutional, we will construe the statute under its constitutional meaning." *Smiler v. Napolitano*, 911 A.2d 1035, 1038 (R.I. 2006) (citing *Rhode Island State Police v. Madison*, 508 A.2d 678, 683 (R.I.1986)). This Court has always been "cognizant of the fact that our judicial role is to interpret and apply statutes and not to legislate * * *." *Id.* (quoting *Lacey v. Reitsma*, 899 A.2d 455, 458 (R.I. 2006)). Moreover, Rhode Island courts "presume[ ] that the General Assembly knows the state of existing relevant law when it enacts or amends a statute." *Balmuth v. Dolce for Town of Portsmouth*, 182 A.3d

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576, 587 (R.I. 2018); *cf. Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("This canon [of adopting the interpretation of a statute that avoids unconstitutionality] is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."). This Court has also held, "we are obligated to construe conflicting statutes so that, if at all reasonably possible, they both may stand and be operative. In accomplishing this objective, the underlying purpose of this court should be to determine the intention of the Legislature." *Blanchette v. Stone*, 591 A.2d 785, 787 (R.I. 1991); *Cocchini v. City of Providence*, 479 A.2d 108, 110 (R.I. 1984) ("If a conflict does exist, it is not irreconcilable, and that being so, we shall attempt to construe the two enactments in such a manner as to give full effect to each.").

As this Court has already recognized, the intent of the Legislature in enacting Rhode Island's civil death statute was to impose a sanction limiting the rights of the narrow group of inmates who have received life sentences. *See Gallop*, 182 A.3d at 1140-41; *Bogosian*, 422 A.2d at 1254 n.1. The Legislature is presumed to have been aware of pre-existing federal law, including the Supremacy Clause, when it passed the civil death statute. *See also Haywood v. Drown*, 556 U.S. 729 (2009) (holding that under the Supremacy Clause, state could not enact a jurisdictional statute restricting ability to bring 42 U.S.C. §1983 claims against correctional officers in State Court). Given this Court's rule of interpreting statutes so as to avoid a conflict between laws and adopting a construction that avoids unconstitutionality, the civil

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death statute should not be interpreted to restrict federal rights that the Legislature clearly did not have the ability to restrict.[10] *See Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (1998) ("[w]e do not * * * interpret a legislative enactment literally when to do so would produce a result at odds with its legislative intent. * * * Rather, we will give the enactment what appears to be the meaning that is most consistent with its policy or obvious purpose") (internal quotations omitted). No Rhode Island Court has ever adopted such an interpretation of the civil death statute. After over a century[11] of the civil death statute having been in existence, unchallenged and repeatedly applied by courts in this State, the civil death statute should not be

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[10] Plaintiffs turn this precedent on its head by arguing that the Legislature knowingly enacted a law that conflicted with the state constitution: "The full text of Article 1 § 5 of the R.I. Constitution was originally enacted as Article 1 § 2 of the Rhode Island Constitution in 1842, well before the codification of the Civil Death Act in 1909 and its apparent enactment in 1857. The Legislature knew of the provisions of the state constitution at the time this statute was enacted and passed it despite the fact that, on its face, the Act strips the Appellants of their most basic State Constitutional rights." PB, p.21. Consistent with this Court's precedent, the statute should *not* be interpreted in this manner that assumes that the Legislature knowingly passed an unconstitutional law.

[11] Amicus notes that the civil death statute dates back to 1852 and that as far back as 1838 the law provided that "in case of imprisonment for life, such prisoner's estate shall be divided among his heirs at law and distributed in the same way as though he were dead." AB, p.9. It is not entirely clear why the Amicus believes that the adoption of the civil death statute in 1852 rather than 1909 is relevant to the constitutionality of the civil death statute as applied in this case. If anything, this only shows that the civil death statute is an even more longstanding state law and it does not alter the Amicus' acknowledgment that the statute was revised and retained by the Legislature multiple times throughout the 20th century, including as recently as 1956.

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interpreted in a manner that would suddenly bring it into conflict with federal law. Indeed, in one case cited by the Amicus that mentions the civil death statute, this Court expressly described how the Court should be very hesitant to suddenly invalidate a longstanding statute:

> Thus, although the validity of prison labor contracts has never been before our courts, it has been repeatedly recognized by Legislatures during a period of certainly 68 years. *During all that time it has never been publicly questioned until the present suit was brought. While such protracted, continuous, and thorough acquiescence is not conclusive, it is a strong argument;* and the settled opinion and practice of many Legislatures is entitled to serious consideration before it is overthrown, even though it has not the authority of a judicial decision.

Anderson v. Salant, 38 R.I. 463, 96 A. 425, 430 (1916) (emphasis added).

As recounted by the Amicus, the civil death statute was included through various iterations of the General Laws over the years. AB, p.4 ("The legislative note records that the Civil Death Statute was adopted in 1909, amended or revised in 1915, 1923, 1938, and 1956[.]"). It has been Rhode Island law for well over a century and during that time has been mentioned or applied multiple times by this Court in various different decades. The Legislature has also recently repeatedly declined to advance bills that would repeal it, including after the *Gallop* decision was issued. *See* 2020 H 544; 2020 S2414; 2019 H5491; 2019 S0235; 2018 H7466; 2018 S2269; 2017 H5721; 2017 S0415; *see also Barber v. Vose*, 682 A.2d 908, 915-16 (1996) ("In [*Greico V. Langlois, 240 A.2d 595 (R.I. 1968)*] we interpreted that legislative inaction as evidencing clear legislative approval of the interpretation we

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had previously given to § 42-56-24…”). This history further militates against suddenly reversing course and adopting Plaintiffs’ suggestion that the civil death statute should now for the first time in its history be interpreted as barring federal claims and conflicting with federal law.

Historically, courts interpreting the reach of civil death statutes have sometimes grappled with determining which rights are implicated by such statutes in light of other laws and evolving historical circumstances, and typically determined that such statutes restricted some but not all rights. *See Kanter v. Barr*, 919 F.3d 437, 459, n.9 (7th Cir. 2019) (Barrett, J., dissenting) (describing how modern version of civil death “was more modest than the ancient version because the convict retained some rights”). In a case involving the Second Amendment, now-Supreme Court Justice Barrett discussed how courts over time have interpreted broadly-worded civil death statutes as not removing every single human and legal right, but rather a narrower class of rights and privileges: “But here, defining the precise impact of ‘civil death’ on a felon sentenced to life is not as important as underscoring that the impact was no longer complete destruction of rights and death to the law.” *See id.* That history demonstrates that civil death statutes need not be interpreted as eradicating each and every right of an inmate as Plaintiffs advocate, and instead should be interpreted, consistent with legislative intent, to impact a narrower realm of rights that the Legislature could permissibly curtail.

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This Court today need not define every single right the civil death statute restricts or how it applies in the myriad of hypothetical circumstances imagined by the Amicus or Plaintiffs — such issues are best resolved in the context of specific cases rather than in what would amount to a hypothetical advisory opinion. For purposes of resolving this case and providing much-needed clarity, this Court need only affirm that the application of the civil death statute in *Gallop* and in these cases to bar a state law negligence claim is constitutional and clarify that the statute does not restrict federal rights.

C. The Civil Death Statute Should Not be Declared Unconstitutional Based on Hypothetical Concerns That Are Irrelevant to How It was Applied in This Case

Although this case provides an important opportunity to clarify *Gallop* and make clear that *the civil death statute does not even apply to federal claims*, it would respectfully be improper for the Court to do what Plaintiffs urge, namely declare this State's longstanding civil death statute to be unconstitutional based on Plaintiff's hypothetical concern that it *could* be interpreted and applied in an unconstitutional manner to bar a federal claim in a different, future case. These cases on appeal are not a general referendum on the civil death statute; they are tort cases in which the civil death statute was applied in one way only: as a defense to the particular negligence claims raised by the two Plaintiffs. Accordingly, just as in *Gallop* and *Gallop II*, this Court should not consider any arguments that the civil death statute

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should be invalidated because it would be unconstitutional *if* it were applied to bar a federal claim.

This Court has been clear that courts should not resolve constitutional questions unless absolutely necessary: "this [C]ourt will not decide a constitutional question raised on the record when it is clear that the case before it can be decided on another point and that the determination of such question is not indispensably necessary for the disposition of the case." *State v. Berberian*, 98 A.2d 270, 270-71 (R.I. 1953). As this Court has summarized:

> [a] constitutional rule of strict necessity long has been recognized in this jurisdiction. Most often it has manifested itself in our reluctance to adjudicate constitutional questions when a case is capable of decision upon other, non-constitutional grounds. *See, e.g., Caron v. Town of North Smithfield,* 885 A.2d 1163, 1165 (R.I. 2005) (mem.) ("[T]his Court has on many occasions held that it will not decide a case on constitutional grounds if it otherwise can be decided."); *In re Court Order Dated October 22, 2003,* 886 A.2d 342, 350 n. 7 (R.I. 2005) ("[W]e are quite reluctant to reach constitutional issues when there are adequate non-constitutional grounds upon which to base our rulings."); *State v. Berberian,* 80 R.I. 444, 445, 98 A.2d 270, 270–71 (1953) ("It is, however, well settled that this court will not decide a constitutional question raised on the record when it is clear that the case before it can be decided on another point and that the determination of such question is not indispensably necessary for the disposition of the case."). It is the related policy of strict necessity that requires this Court to refrain from deciding constitutional matters unless unavoidable.

Lead Indus. Ass'n, Inc., 898 A.2d at 1239. Many of Plaintiffs' arguments about why they contend the civil death statute is unconstitutional should not be considered because they are irrelevant to the sole constitutional issue properly before this Court:

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whether the General Assembly can bar inmates who are in state custody at the ACI and who have received life sentences from pursuing tort damages for negligence claims in state court. Although this Court can use this case as an opportunity to clarify the dicta in *Gallop* and address many of Plaintiffs' arguments by making clear that the civil death statute should not be interpreted as barring federal claims, it would be improper to invalidate the entire civil death statute based on constitutional issues that have nothing to do with how the civil death statute was applied in these cases and are not properly before the Court.

D. Rhode Island's Legislature Has Ample Discretion to Constitutionally Restrict Offenders Who Have Received Life Sentences from Pursuing Tort Damages Under State Law

Undisputedly, this Court has already held that the civil death statute requires dismissal of state law negligence claims brought by civilly dead inmates. *See Gallop,* 182 A.3d at 1143 ("trial justice prudently and accurately dismissed the [negligence] case" based on the civil death statute). Plaintiffs can only succeed in this appeal by demonstrating that such an application of the civil death statute is unconstitutional "beyond a reasonable doubt." *City of Pawtucket*, 662 A.2d at 45. Defendants will address Plaintiffs' constitutional arguments in turn.

1. The Supremacy Clause is Inapplicable

The civil death statute was not applied to dismiss any federal claim in this case. As such, Plaintiffs' argument that it would violate the Supremacy Clause *if* the

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civil death statute had been applied to bar a federal claim is not implicated. *See* PB, p.14 ("Rhode Island General Laws § 13-6-1 is unconstitutional under the Supremacy Clause as it prevents Appellant Zab from bringing an action in State Court under 42 U.S.C. § 1983"); *see also Gallop II*, 218 A.3d at 550.

As described above, the State moved for summary judgment on Zab's 42 U.S.C. §1983 Eighth Amendment claim because it failed on the merits under federal law for multiple reasons. *See* Appx.68-77, 186-92; *see also supra Background,* Section B. In both its briefing and during the hearing, the State expressly stressed that it was not moving for summary judgment on this federal claim based on the civil death statute. *See* Appx.148-49, 329. The Superior Court accepted the State's arguments and granted the State's Motion, citing *Will v. Michigan* and mootness. Appx.342. The Superior Court's grant of summary judgment to the State on Zab's federal claim should be affirmed, particularly as Plaintiffs have not raised *any* arguments to this Court to dispute that Zab's Eighth Amendment claim fails as a matter of law under federal law and that judgment on that claim properly entered for Defendants. *See Terzian v. Lombardi*, 180 A.3d 555, 557 (R.I. 2018) ("We have consistently made it clear that, under our raise-or-waive rule, '[e]ven when a party has properly preserved its alleged error of law in the lower court, a failure to raise and develop it in its briefs constitutes a waiver of that issue on appeal and in proceedings on remand'" (quoting *McGarry v. Pielech*, 108 A.3d 998, 1005 (R.I.

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2015)).

2. <u>It Does Not Constitute Cruel and Unusual Punishment Under the Eighth Amendment and Article I, Section 8 to Prevent Plaintiffs From Suing for Tort Damages</u>

Cruel and unusual punishment involves the unnecessary and wanton infliction of pain or punishment that is grossly disproportionate to the severity of the crime. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). "A finding of gross disproportionality is hen's-teeth rare, especially outside the capital punishment milieu." *United States v. Blodgett*, 872 F.3d 66, 72 (1st Cir. 2017). Zab burned down the home of a 95-year-old man, murdering him. *Zab,* 203 A.3d at 1176. Rivera was convicted of multiple counts of sexual assault against three developmentally disabled women. *Rivera*, 64 A.3d at 743. The civil death statute was applied by the Superior Court in these cases to prevent Plaintiffs from suing for monetary damages under state tort law. Such a "sanction" cannot be said to be a grossly disproportionate punishment for murdering a 95-year-old-man or sexually assaulting multiple developmentally disabled women. Plaintiffs have permissibly received a sentence of incarceration and loss of freedom for the rest of their lives, along with the concomitant restrictions on liberties that come with a lifetime imprisonment — that is a far more severe punishment than losing the ability to sue for damages in state court under state tort law. Indeed, in some states, Plaintiffs' crimes may be punished by execution. If the

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death penalty or a life sentence is not "barbaric" and disproportionate for Plaintiffs' crimes, neither can be a restriction on suing for monetary damages.[12]

The Legislature was well within its purview to determine that offenders serving life sentences should not be able to benefit from the State's tort laws and seek damages while serving their life sentences. Plaintiffs' suggestion that they could be abused or mistreated because of the civil death statute or that it puts "the actions of the state toward Appellants beyond reproach from the State Courts" is baseless and irrelevant to the circumstances of this case. *See* PB, p.18, 33-34. Plaintiffs and other inmates are free to file lawsuits to vindicate their federal rights, but here neither Plaintiff asserted a federal constitutional claim except for Zab's Eighth Amendment claim that was dismissed on the merits.

3. The Civil Death Statute Does Not Violate Due Process

a. *Inmates Sentenced to Life Do Not Have a Fundamental Right to Bring A State Law Negligence Claim*

Plaintiffs argue that the civil death statute should be subject to strict scrutiny and deemed unconstitutional because it restricts civilly dead inmates from exercising fundamental rights, but the only "right" at issue in this case is the ability to pursue a negligence claim for damages. Negligence claims do not form the basis for a

[12] As the civil death statute was in place long before Plaintiffs committed their crimes, they were on notice that if they received life sentences they would be subject to the sanction of the civil death statute.

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constitutional action. *See Daniels v. Williams*, 474 U.S. 327, 333 (1986) ("injuries inflicted by governmental negligence are not addressed by the United States Constitution"). Plaintiffs fail to identify any binding authority that they have an unfettered fundamental right to pursue a state law negligence action seeking damages in state court. Especially as the State historically has sovereign immunity, Plaintiffs cannot identify any fundamental right to sue the State for a tort.

"In order to prevail on the substantive due process prong of his constitutional argument, [plaintiff] was required to identify a fundamental right which is objectively, deeply rooted in this Nation's history and tradition." *Germane*, 971 A.2d at 583-84 (internal citations omitted). This Court has noted that "it should be borne in mind that the United States Supreme Court has indicated that it is reluctant to expand the doctrine of substantive due process by recognizing new fundamental rights." *Id.* (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended")); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality) (Supreme Court's "insistence that the asserted liberty interest be rooted in history and tradition is evident"). This Court "is similarly reluctant to recognize heretofore unarticulated fundamental rights." *Germane*, 971 A.2d at 583-84. Additionally, the United States Supreme Court has recognized that even if a

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fundamental right is implicated, it may be validly restricted for inmates as long as the restriction relates to reasonable "penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Similar to the situation in *Germane*, "[t]he record in this case is significantly devoid of a 'careful description' by [Plaintiffs] of any fundamental . . . interest of his that was allegedly violated." *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)) ("holding that individuals asserting a substantive due process claim must set forth 'a careful description of the asserted fundamental liberty interest'"). In *Germane*, this Court determined "we are not convinced that persons who have been convicted of serious sex offenses have a fundamental right to be free from the registration and notification requirements set forth in the Sexual Offender Registration and Community Notification Act, even if those requirements are intrusive and remain in place indefinitely." *Id.* Similarly, Plaintiffs fail to establish that restricting the ability of inmates sentenced to life to seek monetary damages for a tort in state court implicates a deeply-rooted historical right, especially in light of the deep-rooted historical tradition of sovereign immunity that up until recently prevented anyone from suing the State for a tort. *See also infra* Section 4.

Even if a tort claim may be viewed as a species of "property" interest, the United States Supreme Court has recognized that "it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible

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federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. State of Cal.*, 444 U.S. 277, 282 (1980). In *Martinez*, the United States Supreme Court had "no difficulty in accepting California's conclusion that there is a rational relationship between the state's purposes and the statute," which provided absolute immunity to parole officers. *Id.* The Supreme Court continued: "Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to defeat a tort claim arising under state law." *Id.* Similarly, in another case, the United States Supreme Court held that "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity." *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979). The same considerations apply here. Enacting the civil death statute, which serves as a defense to state law tort claims, is a state policy decision well within the province of the Legislature.[13]

[13] Plaintiffs argue that their procedural due process rights were infringed because they did not receive "process" prior to being restricted from filing their tort lawsuits and, according to them, deprived of "property." *See* PB, p.41-43. Plaintiffs do not cite any binding authority for the proposition that a potential tort lawsuit constitutes a property right entitled to procedural due process protections, particularly when the

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Significantly, in *Daniels v. Williams*, the United States Supreme Court expressly held that claims of common negligence by prison officials do not implicate the Due Process Clause. 474 U.S. 327, 332 (1986). The Court rejected the notion that the protections of the Fourteenth Amendment "are triggered by lack of due care by prison officials." *Id.* at 333. The Court affirmed that negligence matters are properly left to state tort law and that "[i]t is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." *Id.* Similarly, the Court noted, "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Id.* Even though

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alleged injury occurred after the plaintiff was already subject to the civil death statute, which includes a restriction on property rights. The United States Supreme Court has noted that even if a "property" interest in a claim exists, the State's creation of a statutory defense to it, such as the civil death statute here, is an aspect of the State's definition of the "property interest." *See Martinez*, 444 U.S. at 282 n.5. In any event, Plaintiffs' argument is meritless because the civil death statute is a sanction that accompanies a life sentence and was the law of this State prior to when Plaintiffs committed their crimes or had their alleged accidents. It is a collateral consequence of the life sentences that they received in accordance with this State's criminal laws and after a right to present a defense. Once Plaintiffs were finally duly convicted (or pled), the civil death statute applied to them by its terms and no need for a separate hearing was needed. It also does not appear that Plaintiffs raised the procedural due process arguments they are now making to the Superior Court, and as such the argument is waived. *See State v. Figuereo*, 31 A.3d 1283, 1289 (R.I. 2011) ("This Court staunchly adheres to the 'raise or waive' rule, which requires parties to raise an issue first in the trial court before raising it on appeal.").

the plaintiff in *Daniels* argued that he did not have an adequate remedy for his injury under state tort law because the state could assert sovereign immunity as a defense to his tort claim, the Court nonetheless declined to find that the alleged negligent injury implicated Due Process protections. *Id.* at 328; *see also Paul v. Davis*, 424 U.S. 693, 701 (1976) (declining to view the "Fourteenth Amendment [as] a font of tort law to be superimposed upon whatever systems may already be administered by the States."). The same is true here; state law provides that the Defendants may assert the civil death statute as a defense to Plaintiffs' tort claims for negligence; that is a matter of state law that does not implicate Due Process protections.

The Legislature likewise has discretion to frame state tort law under Rhode Island's similar due process provision. This Court has remarked that "in our examination of the constitution, we must look to the history of the times and examine the state of affairs as they existed when the constitution was framed and adopted." *Sundlun*, 662 A.2d at 45. Notably, when Article I, Section 2 of the Rhode Island Constitution was amended in 1986 to include the due process and equal protection language, just six years after this Court issued a decision related to the civil death statute in *Bogosian*, the civil death statute had already been the law in Rhode Island for many decades.[14] The Framers are presumed to have been aware of this, and their

[14] Amicus broadly posits that the civil death statute may not have been enforced prior to *Bogosian* but it is unclear what the basis is for such a contention. The statute was

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amendment to Article I, Section 2 should not be interpreted as conflicting with longstanding law, particularly when the Framers did not indicate that their amendment was intended to invalidate a longstanding, pre-existing law. *See Shelter Harbor Fire Dist. v. Vacca*, 835 A.2d 446, 449 (R.I. 2003) ("repeals by implication are not favored").

Plaintiffs also broadly argue that inmates have a federal right to access the courts, but gloss over the particulars of how the United States Supreme Court has framed that right. Plaintiffs cite *Bounds v. Smith,* 430 U.S. 817 (1977) (abrogated in part), which considered inmates' right to access the courts, but the Supreme Court later recognized that "[n]early all of the access-to-courts cases in the *Bounds* line involved attempts by inmates to pursue direct appeals from the convictions for which they were incarcerated, or habeas petitions." *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (internal citations omitted). The Court further noted that it has "extended this universe of relevant claims only slightly, to 'civil rights actions'—i.e., actions under 42 U.S.C. § 1983 to vindicate 'basic constitutional rights.'" *Id.*[15] As such, the

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clearly on the books and it cannot be concluded that it was not enforced just because Amicus did not locate a case during that time period where it specifically arose.

[15] Plaintiffs cite *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974), PB p.26, but *Wolff* says nothing about any federal right to sue for a state law tort. The other caselaw cited by Plaintiffs consists of non-binding lower court decisions from decades ago; certainly none overrule the United States Supreme Court's pronouncements in *Lewis*.

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United State Supreme Court was careful to cabin the federal right of access to the courts to habeas petitions and actions to vindicate basic federal constitutional rights, neither of which is implicated by these common law negligence cases. *See id.* at 355 ("*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration."). Similarly, the Supreme Court in *Procunier v. Martinez* determined that inmates must be "afforded access to the courts *in order to challenge unlawful convictions* and to seek redress for violations of their *constitutional* rights." 416 U.S. 396, 419, (1974) (emphasis added), overruled in part by *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Defendants' interpretation of the civil death statute is entirely consistent with these cases, which provide that there is a right to access the courts to vindicate basic federal constitutional rights, but that does not encompass a right to bring every conceivable suit including trip and fall tort actions.

Plaintiffs also rely on *Boddie v. Connecticut*, 401 U.S. 371, 390 (1971) to argue that Plaintiffs have a fundamental right to access the courts. However, this

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Court has already emphasized that *Boddie* was a divorce case and "is limited strictly to its own facts." *Jones v. Aciz*, 289 A.2d 44, 54 (R.I. 1972). Indeed, this Court has highlighted the language in *Boddie* where the United States Supreme Court made clear, "we wish to re-emphasize that we go no further than necessary to dispose of the case before us. . . . We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter." *Id.* (quoting *Boddie*, 401 U.S. at 382-83 (1971)).

Plaintiffs fail to cite binding authority that inmates sentenced to life have a similar fundamental right to have unfettered access to state courts to file common law negligence actions and seek damages.[16] *See also Boucher v. McGovern*, 639

[16] Rather than citing binding precedent, Plaintiffs and Amicus rely on a variety of non-binding decisions from other states, mostly issued in the early 1970s, interpreting those states' versions of civil death statutes. These cases are inapposite because they are non-binding, distinguishable, rely heavily on policy arguments that this Court has found are best left for the Legislature, and pre-date the Supreme Court's clarification in *Lewis* regarding the specific types of cases encompassed in the right to access the courts. For instance, *Davis v. Pullium*, 484 P.2d 1306, 1308 (Ok. 1971) involved interpreting Oklahoma law and is readily distinguishable as it involved a plaintiff on parole who had been released from prison seven years earlier and who was gainfully employed as a gas station attendant when he suffered a personal injury. *Mehdipour v. Wise*, 65 P.3d 271 (Ok. 2003) is likewise

A.2d 1369, 1379 (R.I. 1994) (upholding legislative enactment that replaced a common law right of action and finding that "although the right of access to the courts is an aspect of the right to petition the government . . . such right does not entail absolute authorization to assert any possible type of claim."); *infra* Section 4 (discussing Article I, Section 5). In sum, Plaintiffs fail to identify any fundamental right implicated by applying the civil death statute as a defense to a state law tort claim.

b. The Civil Death Statute is a Rational Means of Sanctioning Inmates Who Receive Life Sentences

Where, as here, an act does not implicate a fundamental right, the "Court's role at this juncture is simply to determine whether 'a rational relationship exists

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distinguishable because the statute applied to all felons, not just the narrow set of inmates sentenced to life. Even Oklahoma courts were not all in agreement; just a few years before *Mehdipour*, a different Oklahoma court had upheld and applied that state's civil death statute based on its conclusion that the statute should not be interpreted to bar constitutional claims. *See Welborn v. Wallace*, 18 P.3d 1079, 1081 (Ok. Civ. App. 2001). *McCuiston v. Wanicka*, 483 So. 2d 489, 490 (Fla. Dist. Ct. App. 1986) likewise dealt with a broader statute that applied to all felons, not just the narrow class of inmates sentenced to life, and appeared to bar any type of civil claim. *Bush v. Reid*, 516 P.2d 1215 (Ak 1973) involved a parolee and the Court interpreted the statute as broadly barring all types of civil claims. *Bilello v. A. J. Eckert Co.*, 42 A.D.2d 243, 246 (NY 3rd App Div. 1973) involved a workers' compensation claim that arose prior to the plaintiff's incarceration. *Thompson v. Bond*, 421 F.Supp. 878 (W.D.Mo. 1976), similarly involved a law that applied to all inmates, not just those sentenced to life, and stemmed from concerns about frivolous litigation. At base, this Court is free to interpret Rhode Island's civil death statute in accordance with this State's principles of statutory interpretation and none of the extra-jurisdictional cases relied on by Plaintiffs or the policy judgments contained therein are binding, or even persuasive.

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between the provisions of [the statute] and a legitimate state interest.'" *Germane*, 971 A.2d at 584 (quoting *State v. Garvin*, 945 A.2d 821, 824 (R.I.2008)). "This standard sets a rather low bar for constitutionality, and [plaintiff] 'bears the substantial burden of demonstrating that no rational relationship exists between [the statute] and some legitimate state interest.'" *Id.* (quoting *Garvin*, 945 A.2d at 824). "[T]o make out a violation of substantive due process, [challengers] must establish that the challenged provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* (internal citation and quotation marks omitted).

It is well settled that "[t]he State clearly has an interest in punishment and deterrence." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983); *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 52 (1st Cir. 2009) (recognizing "legitimate state interests in the punishment and deterrence of unlawful conduct"); *see also Breest v. Helgemoe*, 579 F.2d 95, 101 (1st Cir. 1978) ("the state's interest in the imposition of the legislatively established punishment for this serious crime is strong."). Punishment is intended to advance the goals of deterrence and retribution, among others. *Simmons v. Galvin*, 575 F.3d 24, 44 (1st Cir. 2009) (noting "the traditional aims of punishment—retribution and deterrence"); *United States v. Cole*, 622 F. Supp. 2d 632, 637 (N.D. Ohio 2008) ("Courts . . . choose a sentence that reflects the seriousness of the offense (retribution), promotes respect for the law

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(retribution, general deterrence), provides just punishment for the offense (retribution), affords adequate deterrence to criminal conduct (general deterrence) . . .").

Courts "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." *Solem v. Helm,* 463 U.S. 277, 290 (1983). As this Court has recognized, the General Assembly "has the power to define criminal offenses, to prescribe sentences for the violation thereof, and to provide for the imposition of such sentences and the methods of applying same. . . . The policy questions raised . . . and the question whether this statute is wise or unwise, are not for this court to determine." *Hazard v. Howard*, 290 A.2d 603, 606 (R.I. 1972).

The civil death statute has been in place for well over a century and has been characterized by this Court as a "sanction," derived from a history of criminal punishment dating back to the Greeks. *Gallop*, 182 A.3d at 1140-41; *Bogosian*, 422 A.2d at 1254. When examining the civil death statute, this Court remarked that "[t]he loss of civil status as a form of punishment is a principle that dates back to ancient societies. The ancient Greeks were among the first to divest criminals of their civil rights, including the right to appear in court, vote, make speeches, attend assemblies, and serve in the army. The rationale behind the enactment of civil death legislation was originally based on the principle that a person convicted of a crime

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was dead in the eyes of the law." *Gallop*, 182 A.3d at 1140–41 (internal citations and quotations omitted).

As applied in this case, and in accordance with *Gallop*, R.I. Gen. Laws § 13-6-1 imposes upon inmates sentenced to life a loss of the ability to bring a negligence claim for monetary damages in state court. Such a restriction can reasonably be regarded as a sanction that further punishes these inmates who have received life sentences and imposes an additional deterrent. Rivera and Zab committed unspeakable crimes, are housed in state-run facilities where they receive food, medicine, and shelter at taxpayers' expense, and are now attempting to collect money from taxpayers' coffers because they respectively slipped and touched a hot pipe while serving their life sentences. It is not irrational for the Legislature to determine that a criminal who set fire to the home of a 95-year-old-man and killed him should not be permitted to pursue monetary damages from the State for touching a hot pipe. Similarly, it is not irrational for the Legislature to determine that a man who sexually assaulted multiple developmentally disabled women should not be able to require the State to pay him monetary damages for slipping and falling. Such a punishment is even more rational given that these inmates are entrusted to the care of the State, which is already providing for these inmates' medical care and other needs. The wisdom of such punishment is not for Defendants or, respectfully, this Court, to question. It is enough that the restriction serves a punitive purpose and is

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rationally related to the State's undeniable interest in punishing and deterring serious crime. This of course does not mean that the State is free to intentionally neglect or abuse these inmates or that these inmates would have no recourse if that were to happen; the Defendants in these cases have only invoked the civil death statute as a defense to negligence claims.

4. The Civil Death Statute Conforms with Article I, Section 5 of the Rhode Island Constitution.

Plaintiffs also argue that the civil death statute runs afoul of Article I, Section 5 of the Rhode Island Constitution by restricting their ability to sue for an alleged tort. Article I, Section 5 has "been most frequently employed by an indigent litigant to justify the prosecution" of an appeal despite failure to pay a cost or fee. *See Kennedy v. Cumberland Engineering Co., Inc*, 471 A.2d 195, 201 (R.I. 1984) (Murray, J., dissenting). This Court has held that this provision "should not be interpreted to bar the Legislature from enacting any laws that may limit a party from bringing a claim in our courts. There are instances in which the Legislature permissibly placed reasonable limits or burdens on the parties' right to have their claims adjudicated by the courts." *Kennedy*, 471 A.2d at 198.

Plaintiffs attempt to analogize the present case to *Kennedy*, which held that a certain class of products liability claims could not be entirely barred. 471 A.2d at 198. That case is clearly distinguishable from the present case. In *Kennedy*, the Court held that "[t]he statute constitutes special class legislation enacted solely for

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the benefit of specially defined defendant(s)." *Id*. Also, in *Kennedy*, *every* ordinary citizen was precluded from seeking a remedy for a certain type of injury and this Court was troubled that citizens "may be absolutely barred from court through no carelessness or fault of their own." *Id.* at 200. By contrast, R.I. Gen. Laws § 13-6-1 does not impact every ordinary citizen and does not protect a class of defendants like the statute in *Kennedy*, rather it serves to punish a small group of inmates *because* of a very serious "fault of their own." Additionally, in *Kennedy*, the Court determined that the statute at issue was "irrational," but here this Court has already twice recognized that the rational purpose of sanctioning criminals was the impetus for the civil death statute. *See Gallop*, 182 A.3d at 1140-41; *Bogosian*, 422 A.2d at 1254 n.1.

In *Cok v. Read*, 770 A.2d 441, 444 (R.I. 2001), this Court recognized that a restriction on filing lawsuits could be imposed as a "sanction." Unlike in *Cok* though, the restriction applied to Plaintiffs was not merely applied by a trial court as a sanction for filing frivolous lawsuits in a particular case, it was punishment duly enacted by the Legislature for committing offenses that garner a life sentence. Moreover, the civil death statute does not act as an "across the board" bar on filing *any* type of lawsuit, it was only invoked in this case as a defense to negligence claims. For these reasons, *Laurence v. Rhode Island Department of Corrections*, where this Court struck down a trial justice's decision to ban an inmate sentenced to

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life from "proceed[ing] as a pro se litigant in virtually any cases in our courts" as punishment for filing frivolous lawsuits is likewise distinguishable. 68 A.3d 543, 548 (R.I. 2013) (noting that ban entered by trial court did not "exclude criminal cases or cases in which plaintiff might be named as a defendant").

Significantly, Article I, Section 5 is not self-executing and its "purely aspirational language" and reference to "laws" "suggests that further legislative action is necessary to effectuate this provision's goals." *Smiler*, 911 A.2d at 1039 n.5; *see also* Art. I, Sec. 5 (referencing having "recourse to the laws"). Amicus acknowledges this as well, stating that "the Court has made clear that Article 1, §5 is not self-executing." AB, p.26. This Court, in a decision post-dating *Kennedy*, has noted that "the purely aspirational language of the provision, indicated by the repeated use of 'ought,' lends substantial support to the conclusion that this constitutional provision is announcing a laudable principle and not a workable rule of law." *Smiler*, 911 A.2d at 1039 n.5. Just as in *Smiler*, the fact that Article I, Section 5 is not self-executing means that a "necessary precondition to plaintiffs' claim" is missing. *See id.* (holding that Article I, Section 5 could not be used to invalidate the Recreational Use Statute).

In the same year the civil death statute was codified, this Court recognized the Legislature's broad authority to pass legislation shaping the confines of access to courts and remedies for injury. *See Henry v. Cherry & Webb*, 73 A. 97, 106-07 (R.I.

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1909). Statutes of limitation and the tort cap are examples. This Court has refused to apply Article I, Section 5 to aid an indigent litigant where doing so would "clearly fly in the face of the express language of the statute and would clearly constitute unreasonable judicial legislation." *Kennedy*, 471 A.2d at 201 (Murray, J., dissenting) (quoting *Jones v. Aciz*, 289 A.2d 44, 52 (R.I. 1972)); *see also Gallop*, 182 A.3d at 1143 (discussing how civil death statute does not impact subject matter jurisdiction but instead represents a Legislative choice that would make it constitute error for the Superior Court to consider plaintiff's negligence claim). As far back as 1881, this Court refused to interpret Article I, Section 5 as creating *new* substantive limitations on the courts or the Legislature. *See Perce v. Hallett*, 13 R.I. 363, 364 (1881).[17] Instead, this Court considered how Article I, Section 5 derived from the Magna Carta and similar historical provisions and interpreted it as not intended to prohibit fees that were historically allowed. *Id.* The concept of civil death likewise has deep historical roots dating back to ancient times. Consistent with how this Court has previously interpreted Article I, Section 5, it should not be read as conflicting with the civil death statute when civil death historically co-existed with

[17] The Amicus' citation to *Chesapeake Utilities Corp. v. Hopkins*, 340 A.2d 154, 156 (Del. 1975) is entirely inapposite. Significantly, Delaware did not have a civil death statute and the Delaware Court was simply rejecting the notion that it should be implied from the common law. The Court recognized that "[s]tatutes suspending the civil rights of imprisoned felons are penal" but simply declined to imply the existence of a statute the Delaware legislature never enacted.

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the historical provisions from which Article I, Section 5 was first derived. Plaintiffs also notably acknowledge that this "right" they claim they have to file negligence lawsuits is "not enumerated by the Constitution." PB, p.41.

Plaintiffs' contention that they somehow have a state constitutional right to pursue their negligence claims in this case is also unfounded because the ability to pursue tort claims against the State as Plaintiffs seek to do here derives from a *statute* waiving the State's sovereign immunity for torts, not the state constitution. "[H]istorically, under the common law, the state, as well as a municipality, enjoyed sovereign immunity, which could be waived only by the state's deliberate and explicit waiver." *Torres v. Damicis*, 853 A.2d 1233, 1237 (R.I. 2004) (quoting *Graff v. Motta*, 695 A.2d 486, 489 (R.I. 1997)). In Rhode Island, the State was recognized as enjoying this immunity at common law, notwithstanding the existence of Article I, Section 5 of the Rhode Island Constitution. In other words, a total restriction on suing the State had long been accepted as constitutional and not deemed to conflict with Article I, Section 5. In 1970, the Legislature enacted R.I. Gen. Laws § 9-31-1, which provided that the State could be held "liable in all actions of tort in the same manner as a private individual or corporation." *Graff*, 695 A.2d at 489. Therefore, the State is only subject to be sued for a common law tort in a case like this because it statutorily waived its immunity to suit in 1970. *See Torres*, 853 A.2d at 1238 ("the Legislature explicitly has waived sovereign immunity as an absolute defense against

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liability for torts committed by governmental entities") (citing R.I. Gen. Laws § 9-31-1).

Accordingly, a plaintiff's ability to sue the State in a tort case like this does not derive from a general state constitutional right to access the courts, but rather from a state statute waiving common law immunity and permitting the suit. "Although § 9–31–1 purports broadly to waive the immunity of the state in all tort actions, [the Rhode Island Supreme Court has] always strictly construed that statute." *Graff*, 695 A.2d at 489. It is well-established that the Court will "presume that the Legislature did not intend to deprive the State of any sovereign power 'unless the intent to do so is clearly expressed or arises by necessary implication from the statutory language.'" *Id.*

When the Legislature waived the State's tort immunity in 1970, it did so against the back-drop of the pre-existing civil death statute. This Court has recognized that "our well-established rules of statutory interpretation require us to harmonize the laws so as to achieve consistency with their general objective scope." *DaPonte v. Ocean State Job Lot, Inc.*, 21 A.3d 248, 253 (R.I. 2011) (internal quotation omitted). This Court has similarly noted that "when the Court is called upon to construe provisions of coexisting statutes, we attempt to follow the rule of statutory construction that provides that statutes relating to the same subject matter 'should be construed such that they will harmonize with each other and be consistent

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with their general objective scope.'" *In re Doe*, 717 A.2d 1129, 1132 (R.I. 1998) (quoting *Blanchette*, 591 A.2d at 786). In *Blanchette v. Stone*, this Court examined two statutes that had been enacted decades apart and rejected an interpretation of one statute that would "partially . . . destroy the purpose and effect" of the earlier statute. 591 A.2d at 786. The Court refused to adopt an interpretation of one statute that would effectively partially repeal an earlier statute, noting that "repeals by implication are generally disfavored." *Id.* at 786-87.[18] The Legislature's 1970 waiver of tort immunity must be read in harmony with the pre-existing civil death statute[19]; especially in light of historical sovereign immunity, the Legislature was free to statutorily limit the right to sue the State, including as a sanction for a criminal offense.

The Legislature has multiple times now in recent years considered repeal of the civil death statute, including after the *Gallop* decision, but each time has declined to enact a repeal. Plaintiffs now invite this Court to legislate in place of the General

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[18] Plaintiffs' argument that "R.I.G.L. § 9-31-1 constituted a full waiver by the state of its defense to those claims by inmates," PB, p.42 n.15 does not make sense. That statute did not waive any defenses except common law sovereign immunity and certainly did not waive the defense of the civil death statute, which pre-existed the passage of R.I. Gen. Laws § 9-31-1 and was not repealed.

[19] The civil death statute is broader than the waiver of tort immunity in the sense that it is not limited to matters involving the State, yet is also more specific because it narrowly provides a punishment with regard to a small, particular group of inmates who have received life sentences.

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Assembly. This Court has already declined that invitation, recognizing that "[r]epeal is the province of the Legislature." *Gallop*, 182 A.3d at 1141.

5. The Civil Death Statute Does Not Treat Similarly Situated Individuals Differently

Plaintiffs also argue that R.I. Gen. Laws § 13-6-1 violates the Rhode Island Constitution's guarantee of equal protection in Article I, Sections 2 and 5, as well as the Fourteenth Amendment of the United States Constitution, and should be examined under strict scrutiny.[20]

An enactment offends equal protection when it treats similarly situated persons disparately, and the court looks to both the nature of the classification and the individual rights at issue in determining if a statute violates equal protection. *Newport Court Club Associates v. Town Council of Town of Middletown*, 800 A.2d 405, 415 (R.I. 2002); *Dowd v. Rayner*, 655 A.2d 679 (R.I. 1995). Not all legislative classifications, however, violate the Equal Protection Clause. *Mackie*, 936 A.2d at 596. In fact, the Legislature has "a wide scope of discretion in enacting laws that affect some classes of citizens differently from others." *Boucher v. Sayeed*, 459 A.2d 87, 91 (R.I. 1983). To be subject to strict scrutiny, the enactment must create

[20] Equal protection under Article I, Section 2 of the Rhode Island Constitution parallels federal equal protection under the Fourteenth Amendment. *See Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 740 (R.I. 1992).

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a suspect classification or impinge on a fundamental right. *Cherenzia* 847 A.2d at 823.

a. *The civil Death Statutes Does Not Create a Suspect Classification or Impinge on a Fundamental Right.*

Inmates sentenced to life are not a suspect class. A suspect classification arises when an enactment creates classifications and discriminates based on characteristics such as "race, alienage or national origin." *City of Cleburne v. Cleburn Living Center*, 473 U.S. 432, 440 (1985). One is only sentenced to life imprisonment because of a conviction for a narrow set of serious offenses, such as murder in the first degree, first-degree sexual assault, or first-degree child molestation. R.I. Gen. Laws §§ 11-23-2, 11-37-3, 11-37-8.2. Unlike suspect classifications, the individuals subject to the civil death statute are in that class because of what they *did*, not because of who they *are*. *See Michael H.*, 491 U.S. at 131 (plurality) (rejecting argument that status of being an illegitimate child is a class entitled to strict scrutiny because "illegitimacy is a legal construct, not a natural trait").

Strict scrutiny is also unwarranted because inmates sentenced to life do not have a fundamental right to unlimited access to the courts to file state law negligence actions. For a right to be fundamental, it must be "an expressly enumerated constitutional right" or an "interest[ ] fundamental to our concept of ordered liberty." *Cherenzia*, 847 A.2d at 823. Plaintiffs argue that the civil death statute "so construed

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by this Court, is unconstitutional under the equal protection clause" because "the Civil Death Act bars the Appellants from exercising their most basic rights," PB, p.17, but as already discussed at length, this Court has never held that the civil death statute applies in that way and the statute was only applied in this case as a defense to a tort claim, not to limit any "basic rights." As already discussed, Plaintiffs fail to establish that an inmate has a fundamental right of unlimited access to the courts to seek monetary damages in state court for common law negligence. *See supra* Sections 3 and 4.

Courts have also recognized that even if an inmate has a constitutional right, it can be curtailed if related to a rational penological reason. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948); *see also Turner*, 482 U.S. at 89. "[W]hile persons imprisoned for crime enjoy many protections of the Constitution, it is also clear that imprisonment carries with it the circumscription or loss of many significant rights. These constraints on inmates, and in some cases the complete withdrawal of certain rights, are justified by the considerations underlying our penal system." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984) (internal citations and quotations omitted). "[T]hese restrictions or retractions also serve, incidentally, as reminders

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that, under our system of justice, deterrence and retribution are factors in addition to correction." *Id.*

b. *The Civil Death Statute is a Rational Means of Punishing the State's Worst Offenders.*

As is the case here, if the statute does not involve either a fundamental right or a suspect classification, it is subject only to "minimal scrutiny" or "rational review." *Dowd*, 655 A.2d at 681. Under that standard, the statute may be declared unconstitutional only if it is "wholly irrelevant" to the State's objective in enacting the statute. *Mackie*, 936 A.2d at 597. A party requesting that a statute be declared unconstitutional because of a violation of equal protection bears a high burden indeed: to negate "every conceivable basis which might support [the classification]." *Id.* (citations omitted).

The United States Supreme Court has likewise been clear: "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. . . . One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911); *see also McGowan v. State of Md.*, 366 U.S. 420, 425 (1961). As the First Circuit previously stated, "[u]nder the rational basis test, the classifications in [a state's] laws come[ ] to us bearing a strong presumption of validity . . . [e]ven foolish

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and misdirected provisions will be upheld." *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003) (internal quotations and citations omitted). Moreover, "[a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* (quoting *Federal Communications Commission v. Beach Communications*, 508 U.S. 307, 315 (1993)). In order to establish an equal protection violation, a plaintiff must show state-imposed disparate treatment compared with others similarly situated "in all relevant respects." *Barrington Cove Ltd. P'ship v. R.I. Hou. & Mortg. Fin. Corp.*, 246 F.3d 1, 8, (1st Cir. 2001).

This Court has recognized that the civil death statute is a "sanction"; imposing this sanction on criminals sentenced to life is well within the Legislature's discretion and easily passes rational review. The hallmark of an equal protection violation is treating similarly situated individuals differently. Inmates sentenced to life in prison are not similarly situated to individuals who have not received a life sentence.

A life sentence is the State's harshest punishment and is the designated penalty for what is commonly recognized as the State's worst criminal offenses. *See State v. Carpio*, 43 A.3d 1, 7 (R.I. 2012) ("At the sentencing hearing, . . . the trial justice concluded that . . . life in prison is a fitting sentence. The trial justice imposed the harshest sentence under the law: life imprisonment without parole for the first-degree murder of a police officer . . . ."); R.I. Gen. Laws §§ 11-23-2. It is reasonable

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for the Legislature to apply the civil death statute to inmates who receive the State's "harshest sentence under the law" and not to others.[21] Unlike an inmate serving a term of years, or multiple consecutive terms of years, inmates serving life sentences have all been convicted of one of the particular criminal offenses that the Legislature has determined can carry with it a life sentence. Those inmates are in a class of their own. Anyone can receive sentence to a term of years for a large variety of offenses and for various lengths of time; only criminals who have committed a crime that is classified as eligible for a life sentence can be subject to the civil death statute. Sentencing is inexact and the punishment designated for a particular crime is a matter of much discretion. *See Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955).[22] The Legislature was well within its discretion to conclude that the civil death statute should accompany the small class of what are commonly

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[21] Rhode Island's approach is consistent with how the civil death statute was historically applied. Civil death was associated with capital punishment, but then came to be seen as an incident of life sentences in the wake of a shift away from employing capital punishment for felonies. *See Kanter*, 919 F.3d at 459 (Barrett, J., dissenting).

[22] It is unclear whether the civil death statute would apply to Rhode Island inmates temporarily transferred out of state. Since Rhode Island retains ultimate jurisdiction over these inmates and since their initial sentence was to a life term "at the ACI," there is reason to believe such inmates are subject to the civil death statute. This Court need not resolve that issue today. Even if the civil death statute did not apply to out-of-state inmates, that would not violate equal protection because such inmates are housed out-of-state and thus are not similarly situated to inmates at the ACI in all material respects.

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recognized as the most egregious offenses that are eligible for life sentences but, but not to other crimes and sentences.

c. *The Federal Court Already Rejected the Argument that the Civil Death Statute Violates Equal Protection.*

Notably, Zab previously filed suit in federal court arguing that the civil death statute's prohibition on civilly dead inmates marrying violates equal protection. *See Ferreira v. Wall*, No. CV 15-219-ML, 2016 WL 8235110 (D.R.I. Oct. 26, 2016). As the Federal Court summarized: "[t]he issue in this case is the constitutionality of Rhode Island's 'civil death' statute, R.I. Gen. Laws § 13-6-1." *Id.* at *1. The Federal Court rejected Zab's argument and determined that the civil death statute does not violate the Equal Protection Clause. In that case, the Federal Court recognized that "this Court must read Section 13–6–1 'in a light favorable to seeing it as constitutional.'" *Id.* at *2 (quoting *Rhode Island Medical Soc. v. Whitehouse*, 66 F. Supp. 2d 288, 305–306 (D.R.I. Aug. 30, 1999)). The Federal Court noted that "[r]eviewing courts also must 'grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.'" *Id.* (quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983)).

Analyzing the civil death statute under that deferential standard, the Federal Court recognized that the civil death statute is a punishment within the Legislature's power to prescribe:

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> Although there is no Rhode Island legislative history available that would shed light on the purpose of Section 13–6–1, the Supreme Court of Rhode Island has indicated that the provision "was intended to be a limitation on the assertion of any rights by a prisoner serving a life sentence." *Bogosian v. Vaccaro*, 422 A.2d 1253, 1254 (R.I. 1980). As an additional deprivation of rights for a specific class of prisoners, the Statute is within Rhode Island's authority to impose such punishment. *See Johnson v. Rockefeller*, 365 F. Supp. 377, 380 (S.D.N.Y. Oct. 9, 1973) aff'd without opinion sub. nom., *Butler v. Wilson*, 415 U.S. 958, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1973) (noting that "deprivation of physical liberty is not the sole permissible consequence of a criminal conviction" and declining to "pass upon the wisdom of penal legislation aimed at deterrence or even retribution").

Ferreira, 2016 WL 8235110, at *2.

Additionally, the Federal Court noted that the civil death statute could only be held to violate equal protection if it was "repugnant to the Constitution":

> Generally, regulations that restrict otherwise constitutionally protected interests in the prison context are reviewed under a reasonableness standard. *Amatel v. Reno*, 156 F.3d 192, 196 (C.A.D.C. 1998) (quoting *Turner v. Safley*, 107 S.Ct. 2254, 2265, 482 U.S. 78, 89, 96 L.Ed.2d 64 (1987)) (noting that courts are directed to "uphold a regulation, even one circumscribing constitutionally protected interests, so long as it 'is reasonably related to legitimate penological interests.' "). It is noted however, that the challenged prohibition against inmate marriages in *Safley* was a prison regulation, not a state statute and, as such, it did not enjoy the presumption of constitutionality accorded to statutes formally enacted by a state's legislature. In order to successfully mount a challenge of the Statute's constitutionality, the Plaintiffs have the burden to establish that the Statute is repugnant to the Constitution. *Eaton v. Jarvis Products Corp.*, 965 F.2d 922, 931 (10th Cir. 1992); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 45 (R.I. 1995).

Ferreira, 2016 WL 8235110, at *3.

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The Federal Court observed how "the Supreme Court concluded in *Safley* that a regulation impinging on inmates' constitutional rights is 'valid if it is reasonably related to legitimate penological interests.'" *Ferreira*, 2016 WL 8235110, at *3 (quoting *Safley*, 482 U.S. at 89). Accordingly, the Federal Court upheld the civil death statute, which "imposes an additional punishment on a select category of prisoners," as related to the State's penological interests and not violative of equal protection. *Id.* at *4.

Notably, in *Ferreira* the Federal Court upheld the constitutionality of the civil death statute even though it impinged on the right to marry, which is a fundamental right. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) ("the right to marry is a fundamental right inherent in the liberty of the person."). The United States Supreme Court also summarily affirmed a decision upholding the constitutionality of a civil death statute that barred inmates sentenced to life from marrying. *See Butler v. Wilson*, 415 U.S. 953 (1974); *see also Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) ("(v)otes to affirm summarily . . . are votes on the merits of a case . . . lower courts are bound by summary decisions by this Court until such time as the Court informs (them) that (they) are not." (internal citations and quotations omitted)). In *Safley*, the Supreme Court reaffirmed the ongoing validity of *Butler*, which "involved a prohibition on marriage only for inmates sentenced to life

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imprisonment; and, importantly, denial of the right was part of the punishment for crime." 482 U.S. at 95-97.

Accordingly, both the United State Supreme Court and a Rhode Island Federal Court have determined that the Legislature may constitutionally enact civil death statutes that bar inmates sentenced to life from marrying as an additional punishment for their crime, even though marriage is a fundamental right. The right asserted in this case — to file a negligence claim in state court seeking monetary damages — has received no such similar recognition as a fundamental human right. If the United States Supreme Court has held that it is constitutional for the civil death statute to take away a "fundamental right inherent in the liberty of the person" as punishment for a crime, so much more so may the civil death statute constitutionally bar inmates sentenced to life from seeking monetary damages in state court for common law negligence — a "right" that has not been recognized as fundamental or inherent.

E. <u>Zab's Arguments Contesting the Constitutionality of the Civil Death Statute Are Barred by Estoppel and Claim Preclusion</u>

This is the third case involving Zab and the civil death statute. After having previously challenged the constitutionality of this statute in *Ferreira* and lost, and after having previously attempted to invoke the statute to his benefit in *Zab I* and

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lost, Zab should be precluded and estopped from now challenging its constitutionality. *See* Appx.146-48.

"Res judicata, or claim preclusion, bars the relitigation of all issues that were tried or might have been tried in an earlier action. Usually asserted in a subsequent action based upon the same claim or demand, the doctrine precludes the relitigation of all the issues that were tried or might have been tried in the original suit, as long as there is (1) identity of parties, (2) identity of issues, and (3) finality of judgment in an earlier action." *Reynolds v. First NLC Fin. Servs., LLC*, 81 A.3d 1111, 1115 (R.I. 2014). In determining the scope of claim preclusion, the Rhode Island Supreme Court has "adopted the broad 'transactional' rule" by which res judicata "precludes the relitigation of all or any part of the transaction, or series of connected transactions, out of which the [first] action arose." *Id.* at 1116 (internal quotations omitted). Additionally, judicial estoppel is an equitable doctrine intended "to protect the integrity of the judicial process * * * by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *Gaumond v. Trinity Repertory Co.*, 909 A.2d 512, 520 (R.I. 2006) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)). In *Gaumond*, this Court determined that the "plaintiff

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will not now be permitted to prevent production of previous versions of the very document that he brought to light and sought to use to his benefit." *Id.*

As discussed above, in a recent case initiated by Zab, he "argued that the marriage record should 'be sealed as if it never existed' because, in accordance with G.L. 1956 § 13-6-1, 'all lifers are civilly dead' and, thus, are prohibited from entering into the bond of matrimony." *Zab,* 203 A.3d at 1175. Zab touted his civil death as the very reason he should obtain the relief he sought in that prior action. Applying this Court's "broad" transactional rule for claim preclusion, Zab's civil death was "part of the transaction, or series of connected transactions, out of which the first action arose." *Reynolds*, 81 A.3d at 1117. During that litigation, Zab put the issue of his civil death squarely before this Court, yet did not raise any of the constitutional arguments he now asserts claiming that the civil death statute is unconstitutional. Instead, he did the opposite and affirmatively asserted the civil death statute as the reason he should obtain the relief he sought in that case. *See Russell v. Zoning Bd. of Review of the Town of Tiverton*, 219 A.2d 475, 476-77 (R.I. 1966) ("petitioners were precluded from raising any question as to the validity thereof because by asking for such relief they necessarily admitted the validity of the very ordinance upon which they relied and they cannot raise the issue in this proceeding"). Accordingly, judicial estoppel and claim preclusion apply to bar Zab from raising arguments regarding the constitutionality of the civil death statute that he could have raised

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when he recently brought the issue of his civil death before this Court, especially because his present arguments directly contradict with the position he took in that prior case when he attempted to use the civil death statute to his own advantage.

Additionally, after having brought a federal lawsuit to challenge the constitutionality of the civil death statute in *Ferreira* and lost, claim preclusion should apply to bar Zab from now taking a second bite at the apple. To the extent Plaintiffs argue that in the prior case Zab could only raise constitutional arguments related to how the statute was *being applied in that case*, namely to restrict his ability to marry, that point is instructive for this case where Plaintiffs are raising arguments about the civil death statute's constitutionality that have nothing to do with how it was applied in this case, i.e., solely as a defense to a tort claim.

CONCLUSION

In conclusion, the State respectfully requests this Court affirm.

Respectfully submitted,

DEFENDANTS-APPELLEES,
Rhode Island Department of Corrections,
Director Patricia Coyne-Fague in her
official capacity only,

By:

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CERTIFICATION OF COMPLIANCE WITH RULE 18(B)

1. This Brief contains 17,529 words, excluding the parts exempted from the word count by Rule 18(b).2.

2. This Brief complies with the font, spacing, and type size requirements stated in Rule 18(b).

/s/ Katherine Connolly Sadeck

CERTIFICATION OF SERVICE

I, the undersigned, hereby certify that I electronically filed this document with the Rhode Island Supreme Court and electronically served a true copy of this document, on this 2nd day of June, 2021, to those indicated below:

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