UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JANE DOE, **JANE DOE 2**, **JANE DOE 3**, **JANE DOE 4**, **JANE DOE 5**, **JANE DOE 6**, **JANE DOE 7**, and **JANE DOE 8**, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CHARLES D. BAKER, Governor of the Commonwealth of Massachusetts; **MASSACHUSETTS DEPARTMENT OF CORRECTION**; **THOMAS TURCO**, Commissioner of the Massachusetts Department of Correction; and **PAUL HENDERSON**, Superintendent of the Massachusetts Correctional Institution at Framingham,

Defendants.

Civil Action No. 1:14-cv-12813-DPW

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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Jane Doe, Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe 5, Jane Doe 6, Jane Doe 7, and Jane Doe 8, individually and on behalf of all others similarly situated, (collectively, "Plaintiffs") hereby respond to the motion of Defendants Charles D. Baker, Massachusetts Department of Correction ("DOC"), Thomas Turco, and Paul Henderson (collectively, "Defendants") to dismiss the case as moot ("Motion"). For the reasons stated herein, Plaintiffs respectfully request that the Court dismiss the case upon a finding that it would be fair, reasonable, and adequate to do so in light of the recent amendments to Massachusetts General Laws Chapter 123, Section 35 ("Section 35"). Alternatively, Plaintiffs respectfully request that the Court deny the Motion in all respects.

INTRODUCTION

Defendants contend that recent amendments to Section 35 have rendered this case moot by removing any express mention of the Massachusetts Correctional Institution at Framingham ("MCI-Framingham"). Yet, at the same time, Defendants insist that the language in amended Section 35 could *permit* commitments to MCI-Framingham if the Department of Public Health ("DPH") or the Department of Mental Health ("DMH") certifies the prison as a "secure facility" for such commitments. This case is only moot if Defendants are wrong that, in amending Section 35 to close the doors to MCI-Framingham, the Legislature also permitted those doors to be thrown open at any time.[1]

Amended Section 35 prohibits civil commitment to MCI-Framingham, not just today but permanently. The amended statute provides that a woman civilly committed under Section 35 can be sent to an inpatient treatment facility or, under certain circumstances, to a "secure facility for women" approved by the DPH or DMH. As demonstrated below, a correctional institution,

[1] Because this is a class action, Plaintiffs cannot agree to dismiss the case unless the Court finds that dismissal would be fair and reasonable to the class. *See* Fed. R. Civ. P. 23(e). Dismissal would be fair and reasonable if the Court construes the revised statute in accordance with its plain meaning and the intent of the Legislature to permanently prohibit civil commitment of women to MCI-Framingham.

such as MCI-Framingham, is not a "secure facility" pursuant to the amended language of Section 35. Indeed, the manifest purpose of amending Section 35 was to *end* the practice of imprisoning civilly committed women at MCI-Framingham, not to provide a back-door channel to do so in the future. For these reasons—and not because Defendants have submitted an affidavit stating that MCI-Framingham is "currently" not under consideration for housing civilly committed women[2]—this case is moot.

If Section 35 does not preclude DPH or DMH from designating MCI-Framingham as a "secure facility" for the treatment of civilly committed women, then the case is not moot and dismissal would be erroneous. This is not the first time the Commonwealth has claimed to end the practice of incarcerating civilly committed women at MCI-Framingham. In 1987, the Commonwealth announced a halt to sending civilly committed women to MCI-Framingham, but commitments soon resumed.[3] Nor is this the first class action challenging the civil commitment of women to MCI-Framingham under Section 35. *See Hinckley v. Fair*, No. C.A. 88-064 (Mass. Sup. Ct. Nov. 30, 1990) (settlement agreement mandating creation of a range of community treatment programs to eliminate the need for MCI-Framingham). Despite countless public statements, good intentions, and official reports decrying imprisonment of women solely because of a disease, budget cuts or spikes in Section 35 petitions have inevitably caused the Commonwealth to fall back on the option of imprisoning civilly committed women at MCI-Framingham. In light of this history, and the ongoing opioid crisis, the Court should dismiss this case *only if* it confirms that the amended Section 35 takes MCI-Framingham off the table.

It is long past time to make sure that Defendants cease the civil commitment of women to MCI-Framingham once and for all. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632

[2] *See* Affidavit of Leslie Darcy in Support of Motion to Dismiss Case as Moot Under Fed. R. Civ. P. 12(b)(1) ("Darcy Aff.") ¶ 7.

[3] See Affidavit of Lisa J. Pirozzolo in Support of Plaintiffs' Response to Defendants' Motion to Dismiss ("Pirozzolo Aff."), Ex. B at 3-6 (Letter from DPH Commissioner David Mulligan to Rep. Barbara Gray (July 1, 1992)).

(1953) (The "public interest in having the legality of the practices settled . . . militates against a mootness conclusion.").

BACKGROUND

On January 25, 2016, Governor Baker signed a bill amending Section 35 that, in relevant part, deletes the prior language of Section 35 authorizing the civil commitment of women to MCI-Framingham. *See* Pirozzolo Aff., Ex. A (2016 Mass. Acts ch. 8, sec. 4). The legislation was prompted by, among other things, the Governor's Opioid Working Group recommendation that treatment for persons committed under Section 35 should not take place in a correctional setting.[4] Accordingly, Section 35 now provides that when there is no inpatient treatment space available in a suitable facility approved by DPH or DMH, "or if the court makes a specific finding that the only appropriate setting for treatment for the [woman] is a secure facility, then the [woman] may be committed to . . . a secure facility for women approved by [DPH] or [DMH] . . . ." Mass. Gen. Laws ch. 123, § 35.

Consistent with the plain meaning and purpose of the amended Section 35, Defendants could easily have moved to dismiss this case by arguing that the phrase "secure facility approved by [DPH] or [DMH]" necessarily excludes correctional institutions, and that civil commitments to MCI-Framingham are therefore categorically prohibited. But that is not what the Defendants did. Instead, their artfully worded brief posits that the case is moot simply because Section 35 now requires that any secure facility be approved by DPH or DMH, and these agencies have no *present* intention to approve MCI-Framingham. *See* Defs.' Mem. 11 (citing Darcy Aff. ¶ 7). Defendants fail even to address the essential question of whether DPH may lawfully designate a prison as an approved secure facility, dismissing this as a "hypothetical question" that need not

[4] *See* Affidavit of Bryan F. Bertram in Support of Motion to Dismiss Case as Moot Under Fed. R. Civ. P. 12(b)(1) ("Bertram Aff."), Ex. A at 4 (Recommendations of the Governor's Opioid Working Group (June 11, 2015)).

be decided because MCI Framingham "is not presently under consideration for such a designation." Defs.' Mem. 11.

If Section 35 does not categorically bar DPH or DMH from approving MCI-Framingham, then it is merely Defendants' present and voluntary choice not to place women in MCI-Framingham, rather than the change in law, that has caused the recent discontinuation of commitments to MCI-Framingham. Defendants' strained interpretation of Section 35 gives them complete freedom to resume the practice of sending women to MCI-Framingham at any time simply by announcing that DPH or DMH has "approved" the prison as a "secure facility." If Defendants' strained interpretation of Section 35 is correct, the case is not moot.

ARGUMENT

I. THIS CASE IS MOOT BECAUSE MCI-FRAMINGHAM CANNOT QUALIFY AS A "SECURE FACILITY" UNDER THE AMENDED SECTION 35

Defendants seeking to dismiss a case as moot have a "heavy burden" of establishing "that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000). The wrongful behavior at issue here—the imprisonment of civilly committed women at MCI-Framingham—can be reasonably expected to recur unless the law has been altered to outlaw it. *See Schall v. Martin*, 467 U.S. 253, 256 n.2 (concluding that changes in general statutory scheme did not moot challenge where contested provision remained the same). The key issue here is whether the amended Section 35 precludes commitments to MCI-Framingham or whether it can be interpreted to permit such placements if DPH or DMH certify MCI-Framingham as a "secure facility."

Under Massachusetts law, a "statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the

language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Commonwealth v. Coggeshall*, 46 N.E.3d 19, 22 (Mass. 2016). Applying these principles, Section 35 prohibits the civil commitment of women to MCI-Framingham or any other correctional institution.

A. AMENDED SECTION 35 DOES NOT AUTHORIZE DPH OR DMH TO "APPROVE" A PRISON AS A "SECURE FACILITY"

The amendments to Section 35 removed the provision authorizing civil commitment of women to MCI-Framingham if no suitable DPH approved facilities were available.[5] The relevant portion of the statute now states:

> If [DPH] informs the court that there are no suitable facilities available for treatment licensed or approved by [DPH] or [DMH], or if the court makes a specific finding that the only appropriate setting for treatment for the [woman] is a secure facility, then the [woman] may be committed to . . . a secure facility for women approved by [DPH] or [DMH] . . . .

Mass. Gen. Laws ch. 123, § 35. Section 35 does not define the term "secure facility," and, if taken out of context, there could be some uncertainty about its meaning. However, for example, the statute has always distinguished a "facility" from an institution run by DOC. Section 35 defines "facility," saying that "unless the context clearly requires otherwise," it is "a public or private facility that provides care and treatment for a person with an alcohol or substance use disorder." *Id.* Section 35 then says that "commitment shall be for the purpose of inpatient care in public or private facilities approved by" DPH. *Id.* The prior version of the statute contained the same language regarding commitment for the purpose of inpatient care, and authorized commitment to MCI-Framingham (or, for men, to a DOC prison in Bridgewater ("MCI-

[5] Previously, the statute read: "The [woman] may be committed to [MCI-]Framingham, if a female, if there are not suitable facilities available under [Mass. Gen. Laws ch.] 111B." Mass. Gen. Laws ch. 123, § 35 (effective July 1, 2014).

Bridgewater")) only if no such "suitable facilities" were available. *See* Mass. Gen. Laws ch. 123, § 35 (effective July 1, 2014). The statute thus differentiates between correctional institutions and "facilities approved by" DPH. The amended statute deletes the authority to commit a woman to MCI-Framingham, substituting instead the phrase "secure facility." Nothing in the context of Section 35 suggests that a "secure facility" could include MCI-Framingham. Because MCI-Framingham has never been referenced as a "facility," neither can it be a "secure facility."[6] Indeed, if Defendants' view is correct, the statute would have simply been amended to provide that women should be placed in MCI-Framingham only if it was approved by DPH or DMH.

The conclusion that the amendments foreclose civil commitments to MCI-Framingham is reinforced by the repeal of the provision in the prior version of Section 35 that expressly allowed a woman to remain at MCI-Framingham for voluntary treatment after the period of commitment expired. Both the former and current versions of Section 35 provide that a "person shall, upon release, be encouraged to consent to further treatment and shall be allowed voluntarily to remain in the facility for such purpose." *E.g.*, Mass. Gen. Laws ch. 123, § 35. Previously, the statute expressly allowed voluntary treatment at both MCI-Bridgewater and MCI-Framingham; however, the amended statute repealed the reference to MCI-Framingham and references only MCI-Bridgewater.[7] *See id.* This further demonstrates the intent to permit civil commitments in MCI-Bridgewater but not MCI-Framingham.

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[6] This is consistent with the common understanding of a "secure facility." *See* Elizabeth A. Beane & James C. Beck, *Court Based Civil Commitment of Alcoholics and Substance Abusers*, 19 Bull. Am. Acad. Psychiatry & L. 359, 361 (1991) (Section 35 men "are sent to a secure state facility. There is no comparable facility for women, and they go either to state prison or to an unsecured state facility.").

[7] The fifth paragraph of Section 35 reads: "Nothing in this section shall preclude a facility, including [MCI-]Bridgewater, from treating persons on a voluntary basis." *Id.* The prior version said: "Nothing in this section shall preclude any public or private facility for the care and treatment of alcoholism or substance abuse, including the separated facilities at [MCI-]Bridgewater and [MCI-]Framingham, from treating persons on a voluntary basis." Mass. Gen. Laws ch. 123, § 35 (effective July 1, 2014).

Perversely, interpreting "secure facility" to include a prison would mean that when the Legislature amended Section 35 to substitute "secure facility" for MCI-Framingham, it did not eliminate civil commitment to MCI-Framingham, but rather *expanded* the statute to allow civil commitments to any female correctional institution, so long as it was approved by DPH or DMH. This would fly completely in the face of the whole purpose of the amendment. The Legislature did not intend to ensure that MCI-Framingham meet DPH or DMH standards; it wanted to end the practice of sending women to a correctional setting for treatment of a disease.[8] *See infra*.

Interpreting "secure facility" to include correctional institutions would also have the absurd effect of stripping away protections against mixing civilly committed women with sentenced prisoners. Under the old version of Section 35, both men committed to MCI-Bridgewater and women sent to MCI-Framingham had to be "housed and treated separately from convicted criminals." Mass. Gen. Laws ch. 123, § 35 (effective July 1, 2014). Under the amended version of the statute, the commingling prohibition appears only in the clause authorizing commitment of men to MCI-Bridgewater; there is no similar restriction in the clause describing the housing of women in secure facilities. *See* Mass. Gen. Laws ch. 123, § 35. The obvious reason for this change is that there was no longer a risk of commingling because the Legislature has outlawed civil commitments of women to correctional institutions.

Finally, the amended version of Section 35 provides that DPH "shall maintain a roster of public and private facilities available, together with the number of beds currently available and the level of security at each facility, for the care and treatment of alcohol use disorder and substance use disorder and shall make the roster available to the trial court." *Id.* This suggests

[8] Interpreting the Section 35 amendments as being designed to improve treatment at MCI-Framingham by subjecting it to DPH standards would make no sense. All prison substance abuse programs are already required to be "approved" by DPH. *See* Mass. Gen. Laws ch. 111E, § 7.

that "secure" facilities are regular treatment facilities with heightened security, and not correctional institutions, which have no defined limits on bed space.

B. THE LEGISLATURE'S SOLE PURPOSE IN AMENDING SECTION 35 WAS TO END THE PRACTICE OF SENDING CIVILLY COMMITTED WOMEN TO MCI-FRAMINGHAM

The amendments to Section 35 flowed from the recommendation of the Governor's Opioid Working Group, which concluded that civil commitment to correctional institutions was inappropriate and should end. The Working Group reasoned that "[i]t is important that treatment occur in a clinical environment, not a correctional setting, especially for patients committed civilly under" Section 35. *See* Bertram Aff., Ex. A at 8 (Recommendations of the Governor's Opioid Working Group (June 11, 2015)). The Working Group also developed an Action Plan specifically calling for the transfer of women "from the correctional facility at MCI-Framingham to a new facility run by the Executive Office of Health and Human Services." *See* Bertram Aff., Ex. B at 6 (Action Plan to Address the Opioid Epidemic in the Commonwealth (June 22, 2015)).

On October 15, 2015, Governor Baker filed legislation to implement the Working Group's recommendations. *See* Bertram Aff., Ex. C (An Act Relative to Substance Use Treatment, Education, and Prevention, Ma. H. 3817, 189th Gen. Ct. (2015-16)). Governor Baker's description of the legislation in the letter he sent to the members of the General Court unequivocally ruled out the possibility that MCI-Framingham could qualify as a "secure facility." *See id.* at 1-3. He acknowledged that the then-current law permitted women "to be sent to MCI-Framingham as a secure place," and then explained that, "[g]oing forward, women who require treatment in a secure setting may be admitted instead to *new* secure treatment centers approved by" DPH or DMH. *Id.* at 2 (emphasis added). The "new" secure treatment centers referenced here obviously cannot include MCI-Framingham.

The Baker administration also prepared a summary of the proposed legislation that could not have been more clear:

> The legislation improves the quality of treatment that will be provided to women committed under section 35 by eliminating commitments to MCI-Framingham. The legislation provides that women requiring an enhanced level of security may be committed instead to new secure treatment facilities approved by [DPH] or [DMH].[9]

Because the Legislature ultimately enacted the exact changes to Section 35 proposed by Governor Baker, it unquestionably did so based on the Governor's representation that future commitments to MCI-Framingham would not be permissible.

Public statements by the Governor and Legislative leaders when the bill was signed leave no doubt that the amended Section 35 was universally understood to prohibit commitments to MCI-Framingham:

> "With the support of the legislature and Attorney General, our administration is proud to have delivered on a promise that took more than 30 years to fulfill," said Governor Baker. "Now, women with substance use disorder who are civilly committed will not be sent to MCI-Framingham and will have the opportunity to get treatment instead of jail time."[10]
>
> "Addiction is a disease and must be treated as such," said Speaker DeLeo. "By ending the practice of sending civilly committed women to MCI-Framingham we are taking one more step to helping residents – our sisters, mothers, daughters, wives – recover."[11]
>
> "The bill ends the practice of treating women with substance abuse issues like criminals," said Senate President Rosenberg. "We need to treat substance abuse like the disease it is and provide access to treatment in an appropriate setting so these women have an opportunity to get on a path to recovery."[12]
>
> "It's been a long time coming," said State Senator Jennifer Flanagan, D-Leominster, chairwoman of the Joint Committee on Mental Health and Substance Abuse. . . . The new law states that a person who is civilly committed will be sent to a treatment facility at Taunton or Shattuck hospitals. If no beds are available, women will be sent to a secure

[9] *See* Substance Use Legislation Explainer, *available at* http://www.mass.gov/eohhs/docs/dph/stop-addiction/opioid-bill-section-by-section.pdf.
[10] Governor of Massachusetts, *Governor Baker Signs Legislation Ending Civil Commitments at MCI-Framingham for Substance Use Disorder* (Jan. 25, 2016), *available at* http://www.mass.gov/governor/press-office/press-releases/fy2016/bill-signed-ending-civil-commitment-at-mci-framingham.html.
[11] *Id.*
[12] *Id.*

> facility approved by [DPH] or [DMH]. Flanagan said this could be a hospital, but it would not be a prison.[13]

The statements by Governor Baker and the leaders of the General Court are unqualified and unambiguous. Commitments to MCI-Framingham will end because the law now categorically prohibits them, not because they are contingent on the exercise of discretion by DPH and DMH to temporarily suspend them.

C. UNDER THE DOCTRINE OF AVOIDANCE, ANY AMBIGUITY IN SECTION 35 SHOULD BE RESOLVED IN FAVOR OF INTERPRETING IT TO FORECLOSE CIVIL COMMITMENT TO MCI-FRAMINGHAM

The doctrine of avoidance is a tool for choosing between competing interpretations of a statutory text, resting on the reasonable presumption that a legislature did not intend the alternative that raises serious constitutional doubts. *See Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). This case raises substantial questions about the constitutionality of incarcerating civilly committed women in a prison for treatment of a disease. Plaintiffs allege, among other things, that civil commitment to MCI-Framingham for treatment violates due process because it is not reasonably related to the purpose of the confinement. Interpreting Section 35 to bar civil commitment at MCI-Framingham would obviate the need to consider the dubious constitutionality of that practice.

D. IF THE COURT IS UNCERTAIN ABOUT THE PROPER INTERPRETATION OF SECTION 35, IT SHOULD CERTIFY THE QUESTION TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

If the Court believes that the proper interpretation of Section 35 is not sufficiently clear for it to make a definitive ruling, it should certify the question to the Massachusetts Supreme Judicial Court ("SJC"). The SJC permits a federal court to certify a question to it "if there are involved in any proceeding before it questions of law of this [Commonwealth] which may be

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[13] Shira Schoenberg, *Massachusetts stops sending women civilly committed for drug abuse to prison* (Jan. 25, 2016), *available at* http://www.masslive.com/politics/index.ssf/2016/01/massachusetts_stops_sending_wo.html.

determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court." Mass. S.J.C. R. 1:03. In the event that this Court finds that these requirements are met, it may follow the well-established practice in the U.S. Court of Appeals for the First Circuit of certifying appropriate questions to the SJC. *See, e.g.*, *The Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 119-20 (1st Cir. 2010); *In re Engage, Inc.*, 544 F.3d 50, 57-58 (1st Cir. 2008). Certification may be especially appropriate here, where the SJC has held that civil commitment and treatment related cases involving the interpretation of Mass. Gen. Laws ch. 123are matters of "public importance" that warrant an exception to the general mootness rules. *Hashimi v. Kalil*, 446 N.E.2d 1387, 1389 (Mass. 1983).

II. IN THE ALTERNATIVE, IF DEFENDANTS ARE CORRECT THAT SECTION 35 NOW PERMITS DPH OR DMH TO "APPROVE" MCI-FRAMINGHAM AS A "SECURE FACILITY," THEN THE CASE IS NOT MOOT

Because the amended Section 35 prohibits all commitments to MCI-Framingham—regardless of whether DPH or DMH purports to approve MCI-Framingham as a "secure facility"—this Court can dismiss this case as moot on that basis without deciding whether Defendants' recent decision to refrain from approving MCI-Framingham would be sufficient to render the case moot. But if this Court concludes that the term "secure facility" in the amended Section 35 does not exclude prisons, then Defendants' decision not to approve MCI-Framingham at this time is a mere voluntary cessation and does not satisfy their heavy burden to show "that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189-90. *See also Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 52 (1st Cir. 2013); *Lillbask v. Conn. Dep't of Educ.*, 397 F.3d 77, 84 (2d Cir. 2005). Otherwise, the Court would be compelled to leave Defendants "free to return to [their] old ways." *Grant*, 345 U.S. at 632.

Defendants refuse to interpret Section 35 to prohibit DPH or DMH from approving MCI-Framingham as a "secure facility," but they nevertheless argue that the case is moot because the prison is "not presently under consideration for such a designation." Defs.' Mem. 11 (citing Darcy Aff. ¶ 7). Defendants' refusal to disavow any authority under Section 35 to commit women to MCI-Framingham, combined with the Commonwealth's history of civilly committing women to MCI-Framingham despite stated intentions to end the practice, demonstrates that Defendants have failed to meet their heavy burden. *Grant*, 345 U.S. at 633. Defendants' claim to have no current plans to incarcerate civilly committed women is a far cry from the "permanent change" that eliminates harm and moots a case. Defs.' Mem. 9 (quoting *County of L.A. v. Davis*, 440 U.S. 625, 631 (1979)). Rather, it is a classic example of voluntary cessation.

If Section 35 is not interpreted to prohibit incarceration, the likelihood that civilly committed women will soon be incarcerated at MCI-Framingham once more is as strong as the likelihood that the opioid crisis will continue to grow exponentially. The trauma, stigma, and other serious harm that incarceration inflicts on women with substance abuse disorders, as documented in the complaint and motion for class certification, could easily resume. The need for the adjudication of Plaintiffs' claims remains urgent.

A. UNDER DEFENDANTS' INTERPRETATION, THE NEW SECTION 35 DOES NOT ERADICATE THE CHALLENGED CONDUCT

A change in a statute that eliminates the challenged features of the law will ordinarily render a claim moot, at least where there is no indication that the legislature acted in bad faith. *See Town of Portsmouth v. Lewis*, 813 F.3d 54, 59 (1st Cir. 2016). Under Defendants' interpretation of the amended Section 35, however, the statute did not eliminate the prospect of incarceration for civilly committed women—to the contrary, it explicitly provides for it.

A case is not moot when the new law "is sufficiently similar to the repealed [law] that it is permissible to say that the challenged conduct continues[.]" *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993) (deciding challenge to ordinance which had been repealed, where new ordinance did not completely eliminate the challenged conduct). *See also Charles v. Daley*, 749 F.2d 452, 458 (7th Cir. 1984) (challenge to statute not moot where defendants failed to demonstrate that change in statute "irrevocably eradicated the effects" of the challenged law); *Conservation Law Found. v. Evans*, 360 F.3d 21, 26 (1st Cir. 2004) ("No matter how the issue is framed, we have no difficulty concluding that, where a challenged regulation continues to the extent that it is only superficially altered by a subsequent regulation, we are capable of meaningful review."); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982) (reversing dismissal on mootness grounds, where change to county ordinance prohibited the challenged adult-only rental policies and landlord announced new policy; new policy had not "completely eradicated" the effects of the former policy); *Perez v. Perry*, 26 F. Supp. 3d 612, 618-21 (W.D. Tex. 2014) (challenge to a 2011 redistricting plan adopted by the Texas legislature not moot, even where the legislature had repealed the challenged plan, because challenged conduct could resume).

Defendants cannot have it both ways. If they do not concede that the new law prohibits them from authorizing correctional facilities to hold civilly committed women, they cannot claim that it also completely eradicates the challenged harm. And a statute that does not eradicate the challenged harm does not moot the case.

B. DEFENDANTS' STARTLING INSISTENCE THAT THE AMENDED SECTION 35 PERMITS DPH OR DMH TO APPROVE MCI-FRAMINGHAM CASTS SERIOUS DOUBTS ON THEIR ASSERTION THAT SUCH APPROVAL IS MERELY HYPOTHETICAL

Defendants' refusal to endorse the most straightforward and obvious interpretation of Section 35 indicates that there is a real risk that they will take steps—or that they envision that future administrations will take steps—to have MCI-Framingham approved as a secure facility under Section 35. After all, given that the amended law is most naturally read to forever close the doors of MCI-Framingham to civilly committed women, why are Defendants now insisting on an interpretation that would make it possible for them to start sending women to MCI-Framingham once again? *See United States v. N.Y.C. Transit Auth.*, 97 F.3d 672, 676 (2d Cir. 1996) (rejecting mootness where defendants' refusal to sign settlement agreement "foreshadow[ed] the eventual abandonment" of their new interpretation of challenged policy).

The very fact that Defendants say that approval of correctional facilities for sectioned women is not "presently" under consideration, Def. Mem. 11 (citing Darcy Aff. ¶ 7), implies they have not foreclosed that possibility. *See Ogeechee-Canoochee Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, No. 606CV102, 2007 WL 1376364, at *4 (S.D. Ga. May 7, 2007) (Plaintiff sued private timber company and U.S. Army Corps of Engineers to stop timber harvest; case not moot where Corps voluntarily retracted exemption that allowed harvest, and where private company settlement agreement "emphasized the word 'presently' . . . implying that it will, in the future, intend to pursue the same harvest."). Defendants' unconvincing assurance that the creation of new treatment beds, "obviat[es] any lingering need to even contemplate using MCI-Framingham," Def. Mem. 11, is a far cry from a reliable guarantee never to do so.

Notably, Defendants are careful not to say anything that might imply doubt about the constitutionality of civil commitment to MCI-Framingham. Under controlling law, a Defendant's refusal to acknowledge the wrongfulness of the challenged conduct is a reason to conclude the case is not moot. In *Evans*, for example, the plaintiffs' challenge to a government

"framework" for managing scallop fishing for failure to comply with notice and comment requirements was not mooted by the adoption of a superseding framework that did comply. 360 F.3d at 26-27. The defendants failed to show that the challenged conduct would not resume because they continued to deny that notice and comment were required; their agreement to provide notice and comment "does not suggest a change of heart as to whether the process was legally required." *Id.* at 27. *See also In re Center for Auto Safety*, 793 F.2d 1346, 1351-53 (D.C. Cir. 1986) (the "refusal to admit the illegality of its past conduct heightens the probability that the agency will once again fail to meet statutory deadlines in the future."); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1187 (11th Cir. 2007) ("under controlling law, a defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains.") (citing *Grant*, 345 U.S. at 632, and other cases); *Perez*, 26 F. Supp. 3d at 618 (challenge to 2011 redistricting plan that had been repealed not moot where "Defendants had never conceded the illegality of any of the conduct and had steadfastly maintained that the 2011 plans contained no legal deficiencies.").

C. UNDER DEFENDANTS' INTERPRETATION OF SECTION 35, THERE IS A STRONG LIKELIHOOD THAT CIVIL COMMITMENTS TO MCI-FRAMINGHAM WILL RECUR

Defendants point to the creation of 43 new treatment beds and plans for an additional 30 beds, Defs.' Mem. 6, as "obviating any lingering need to even contemplate using MCI-Framingham." Defs.' Mem. 11 (citing Darcy. Aff. ¶¶ 4-6). Defendants have no crystal ball with which to predict the need for Section 35 beds, however, and all available evidence indicates that existing capacity will once more be overrun, as it has in the past.

The introduction of 43 new treatment beds in January and February of 2016, *see* Darcy Aff. ¶¶ 4-6, did not end commitments to MCI-Framingham, which continued to receive and

house sectioned women through April 2016.[14] Even assuming that the additional 30 planned beds come on line in the summer of 2016, as Defendants predict (which is far from a certainty given that Defendants do not claim that funding has been appropriated), the growing demand is likely to overwhelm the capacity. Opioid-related deaths in Massachusetts have shown sharp, unrelenting growth since 2010. *See Data Brief: Opioid-related Overdose Deaths Among Massachusetts Residents*, Massachusetts Department of Public Health (May 2016), *available at* http://www.mass.gov/eohhs/gov/departments/dph/stop-addiction/current-statistics.html (accessed May 11, 2016). Furthermore, as of July 1, 2016, a new statute will require that anyone who comes to an emergency room suffering from an apparent overdose be evaluated for substance abuse and offered a referral to a treatment center, *see* Mass. Gen. Laws ch. 111, § 51 ½ (effective July 1, 2016), which will only increase the demand for treatment beds.

Even with the change in Section 35, Defendants still rely on strained interpretations of the statute to justify incarceration for civil commitments. Despite their claim that "[t]he term [dual commitments] is no longer meaningful, as Section 35 commitments to MCI-Framingham are impermissible," Defs.' Mem. 2 n.1, Defendants continue to use MCI-Framingham to confine women who are dually committed, i.e. held under Section 35 and also subject to bail in a pending criminal case.[15] Furthermore, Defendants recently opened a new 40-60 bed unit for Section 35 men at the Plymouth County Correctional Facility even though the only correctional facility authorized under Section 35 is MCI-Bridgewater. *See* Pirozzolo Aff., Ex. D (Memorandum of Understanding Between Massachusetts Department of Correction and the Plymouth County Sheriff's Department). Defendants rationalize sending civilly committed men to Plymouth

[14] *See* Pirozzolo, Aff. Ex. C ("Fast Stats" provided by Defendants' counsel to Plaintiffs). Women held solely on the basis of civil commitment – "straight" civil commitments – were incarcerated at MCI-Framingham at least through April 15, 2016.

[15] *See* Pirozzolo Aff., Ex. C (Fast Stats). The SJC has held that where a person is civilly committed to a treatment facility under Mass. Gen. Laws ch. 123A, he cannot be housed in a prison, even if he is simultaneously serving a criminal sentence or subject to a bail order. *See Comm'r of Corr. v. McCabe*, 576 N.E.2d 654, 657-58 (Mass. 1991).

County on the grounds that "the crisis of opiate abuse . . . and the lack of suitable public and private treatment facilities" has caused MCI-Bridgewater to be filled to capacity. *Id.* at 1.

Defendants' continued reliance on prison for some civil commitments makes it reasonable to expect that, if Section 35 is not interpreted to outlaw commitments to prison, then DPH or DMH would turn to MCI-Framingham for straight civil commitments when the need arises. And nearly 30 years of history show that demand for treatment beds is likely to outpace the creation of new ones. In 1987, the Commonwealth announced a halt to sending civilly committed women MCI- Framingham.[16] And again, in 1992, in the wake of the *Hinckley* settlement agreement, the Commissioner of Public Health declared that the Commonwealth had developed the capacity to place all civilly committed women in appropriate treatment facilities, "thus eliminating the need for commitment to MCI[-]Framingham entirely." *See* Pirozzolo Aff., Ex. B at 4 (Letter from DPH Commissioner David Mulligan to Rep. Barbara Gray (July 1, 1992)). But by 1998, civil commitments to MCI-Framingham had resumed, starting with only five women, but increasing to 157 by 2005.[17] As the need for treatment continued to grow, so did commitments to MCI-Framingham—even after the creation of additional community treatment beds. The opening of the Women's Addiction Treatment Center in 2007 resulted in a tripling of the number of civil commitments overall, and commitments to MCI-Framingham increased from 221 in 2007 to 310 in 2012.[18] In short, the addition of treatment beds increased demand for Section 35.

Defendants' claim that there is no risk of future civil imprisonment at MCI-Framingham, even if Section 35 does not prohibit it, rings hollow. Successive administrations have attempted

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[16] *See* Bertram Aff., Ex. A at 4 (Recommendations of the Governor's Opioid Working Group (June 11, 2015)).
[17] *See* Pirozzolo Aff., Ex. E at 5 (Commonwealth of Massachusetts Department of Correction Advisory Council, Final Report (Oct. 25, 2005)).
[18] Pirozzolo Aff., Ex. F (2012 statistics from the Department of Public Health, Bureau of Substance Abuse Services, "Moving Beyond Prisons: Creating Alternative Pathways for Women." Wellesley Centers for Women, Massachusetts Women's Justice Network (2012-13)).

to end the incarceration of women for substance use treatment, but with only temporary success. In 1989, the Governor's Special Advisory Panel on Forensic Mental Health recommended that "only those who are involved with the criminal justice system should be evaluated or treated in correctional settings" under Section 35.[19] In 2005, the Governor's Corrections Advisory Council also recommended against committing women to MCI-Framingham under Section 35.[20] In 2008 and again in 2011, an independent consultant retained by DOC recommended that Massachusetts discontinue civil commitments to MCI-Framingham "as soon as possible."[21] These good intentions have failed again and again in the face of overwhelming demand for more treatment beds.

Defendants' assertions that the additional treatment beds will eliminate the need to rely on MCI-Framingham are unfounded. Defendants have failed to establish to any degree of certainty, let alone with absolute clarity, that there can be no reasonable expectation that they will not approve civil commitments to MCI-Framingham. In *United States v. Concentrated Phosphate Exp. Ass'n*, the Court rejected the defendants' assertion of mootness based on their "statement that it would be uneconomical for them to engage in any further joint operations," declaring that "[s]uch a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes." 393 U.S. 199, 203 (1968); *see also Halet*, 672 F.2d at 1308 ("A promise to refrain from future violations . . . is not sufficient to establish mootness.") (citing *Grant*, 345 U.S. at 633). Furthermore, regardless of Defendants' intentions, future administrations could revert to incarcerating civilly committed women, which further counsels against mootness. *See Nozewski Polish Style Meat Products v.*

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[19] *See* Commonwealth of Massachusetts, *Governor's Special Advisory Panel on Forensic Mental Health, Final Report* (Sept. 1989) at 33, *available at* https://archive.org/download/finalreport1989mass/finalreport1989mass.pdf.
[20] *See* Pirozzolo Aff., Ex. E at 5-6 (Commonwealth of Massachusetts Department of Correction Advisory Council, Final Report (Oct. 25, 2005)).
[21] *See* Pirozzolo Aff., Ex. G at 78 (Analysis of Health Care Costs in the MA Department of Correction, MGT of America, Final Report (Dec. 2011)).

Meskill, 376 F. Supp. 610, 611 (D. Conn. 1974) (concession by the state of the unconstitutionality of a challenged statute, and submission of a consent judgment permanently enjoining its enforcement, did not moot the case, since the concession would not necessarily be binding on future state officials).

III. THE COURT SHOULD EXERCISE EQUITABLE DISCRETION TO ADJUDICATE THE CASE

Defendants urge the Court to exercise equitable discretion to dismiss this case even if it is not moot. Defs.' Mem. 12. Relying on *Catholic Bishops*, *supra*, and *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 18 n.3 (1st Cir. 2002), Defendants suggest that there is no "good reason to expend judicial resources" on this case because "MCI-Framingham no longer houses civilly committed women" and the Commonwealth intends to send such women to treatment facilities. Defs.' Mem. 12.

Leaving aside that there are still civilly committed women at MCI-Framingham, albeit "dual" commits, and the fact that MCI-Framingham has been free of "straight" civils for less than a month, the long history of the Commonwealth's failed attempts to end the practice demonstrates the need for the Court to resolve the issue conclusively. *See Grant*, 345 U.S. at 632 (The "public interest in having the legality of the practices settled . . . militates against a mootness conclusion."). Without a definitive resolution to this matter, uncertainty about Section 35 would cast a "continuing and brooding" shadow over the lives of women subject to possible incarceration for treatment of their disease. *See Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008).

This is not the first class action challenging the civil commitment of women to MCI-Framingham. In *Hinckley*, the plaintiffs also relied on the Commonwealth's promise to end the practice, but success proved ephemeral. Plaintiffs should not have to "face the hassle, expense,

and injustice of constantly relitigating their claims without the possibility of obtaining lasting relief." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 324 (5th Cir. 2009). It is past time to make sure this practice ends forever.

CONCLUSION

Plaintiffs submit that it would be fair and reasonable under Federal Rule of Civil Procedure 23(e) for the Court to dismiss this case, provided that it concludes that Section 35 prohibits Defendants from designating MCI-Framingham as a "secure facility approved by" DPH or DMH. Otherwise, Defendants' Motion should be denied.

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Respectfully submitted,

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