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ACLU OF RHODE ISLAND POSITION PAPER ON QUESTION 2, THE ETHICS COMMISSION CONSTITUTIONAL AMENDMENT
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This proposed constitutional amendment would repeal the state Constitution's so-called "speech in debate" clause, and give the R.I. Ethics Commission broad powers to investigate and adjudicate the activities of state legislators in representing their constituents. The ACLU of Rhode Island appreciates the arguments offered by those in favor of this proposed amendment. However, we must reluctantly oppose it because of its potentially serious adverse effects on the electoral process.

In essence, the "speech in debate" clause provides certain limited immunity to state legislators for actions they take as part of their core legislative duties, such as speaking, promoting and voting on legislation. The clause is an important protection for elected officials from harassment for their debate and votes on controversial issues. This proposal could significantly impact their ability to properly represent their constituents and, more significantly, the ability of constituents to elect legislators able to represent them to the fullest.

The Ethics Commission currently has the constitutional authority to adopt a legally enforceable code of ethics. When combined with this amendment, the Commission would have virtually limitless authority to decide what constitutes a "conflict of interest" or ethical misconduct when it comes to both legislators' votes and their participation in the legislative process. Eliminating the Constitution's "speech in debate" protection would thus give an unelected administrative agency substantial authority to decide the types of issues that elected

legislators could debate and vote on, no matter how attenuated or questionable the purported "conflict of interest" might seem.

The ACLU's concerns about the broad power this amendment would bestow upon the Commission are highlighted by actual efforts in the past to significantly broaden the definition of "conflict of interest" to cover a vast array of political activity. While in office, Governor Donald Carcieri proposed a sweeping expansion of the definition that, to give just one example, would have made it illegal for a lawyer-legislator who performs criminal defense work to vote on just about any criminal justice legislation. The proposal also broadly defined the term "conflicts of interest" to encompass an array of non-financial interests. As we argued then, those changes could have significantly affected the voters' ability to elect individuals they felt best represented their interests. In practical terms, legislators could be barred from discussing or debating the issues about which they had the most expertise.

In the same vein, the Ethics Commission has discussed on more than one occasion whether to significantly narrow the so-called "class exemption" – allowing public officials to vote on matters that similarly affect a large number of other people – in response to suggestions like those made by the Governor. No recent changes to that exemption have been made, but that prospect – with its similar potentially large impact on the ability of General Assembly members to participate in a wide range of discussion and votes – remains a distinct possibility. By binding future legislatures to an administrative agency's unbridled determinations as to what constitutes "unethical" deliberations or voting, this constitutional amendment could have a significant civil liberties impact on the ability of legislators to properly represent their constituents and, even more significantly, on the ability of constituents to elect legislators who will be able to represent them to the fullest.

It is important to emphasize the limited reach of the "speech in debate" clause when it comes to allegedly protecting legislative misconduct. As the Rhode Island Supreme Court pointed out in the case that has led to calls for this constitutional amendment: "Activities that remain unprotected by this immunity include, but are not limited to: speeches delivered outside of the legislature; political activities of legislators; undertakings for constituents; assistance in securing government contracts; republication of defamatory material in press releases and newsletters; solicitation and acceptance of bribes; and criminal activities, even those committed to further legislative activity."

Unfortunately, in approving this amendment for the ballot, the General Assembly rejected alternative language that would have carved out an exemption to ensure some level of continued protection for legislators when engaging in public discussion at the State House.

Finally, it's worth noting that the General Assembly's passage of this amendment came at a price. Without any compelling reasons, the Ethics Commission recently agreed to adopt regulations that bar members of the public from filing any ethics complaint against a candidate for office within ninety days of a general or special election. This leaves Rhode Islanders without any redress for ethics violations during the time of year when the ability to hold public officials – and those who seek to become public officials – accountable is perhaps at its most critical. While there may be legitimate differences of opinion as to whether Question 2 was worth that concession, the ACLU does not think it was.

Because this amendment, though clearly well-intentioned, has the potential to cause great mischief and chill legislative speech and legislator-constituent relations, the ACLU opposes Question 2.

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