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## **ACLU OF RI POSITION: AMEND**

### **TESTIMONY ON 23 – H 5883, ACTS RELATING TO COURTS AND CIVIL PROCEDURE – ABUSIVE LITIGATION May 16, 2023**

The ACLU of Rhode Island urges amendments to this bill, which authorizes courts to issue restrictive filing orders to protect victims of domestic abuse from abusive litigation.

Any legislation addressing the topic of “abusive litigation” must navigate key constitutional limits in light of the fundamental right of access to the courts enshrined in our state Constitution’s Declaration of Rights as well as the U.S. Constitution. In a number of respects, the ACLU of Rhode Island believes this bill does so, but we also believe the legislation needs to be tightened up in a few key ways in order to fully comport with that constitutional principle.

The R.I. Supreme Court has addressed the topic of abusive litigation on a number of occasions. *See, e.g., Laurence v. R.I. Department of Corrections*, 68 A.3d 543 (R.I. 2013). While the courts have inherent authority to prevent repeat or vexatious filers, that authority is limited and must be “rarely imposed.” As the Court noted in *Laurence*: “[C]ourts may place reasonable limits on the filings of litigants who abuse the judicial system . . . [but] such a sanction should be drawn narrowly. . . [B]road filing restrictions against *pro se* plaintiffs should be approached with particular caution.” (internal citations and quotation marks omitted)

Up to a point, this legislation appears to navigate those strictures – by giving parties an opportunity to be heard before restrictive orders are entered, requiring specific findings on the record, and allowing future filings to take place once reviewed by a judge for frivolousness. But we believe some serious gaps that need to be filled remain.

First, the bill appears to be overly solicitous in allowing the imposition of restrictions, where merely one filing can trigger an “abusive litigation” hearing if other standards concerning the litigant and the defendant’s alleged involvement in a previous instance of domestic violence are met. Specifically, under the legislation, that involvement between the parties need not include a *final* judicial determination of, or consent order acknowledging, previous domestic violence-related conduct. Instead, the bill’s restrictions can be triggered by:

- Entry of a no contact order, based on a pending criminal *charge*, pursuant to § 12-29-4;
- A court determination of *probable cause* for a domestic violence charge; or even just
- A *signed affidavit* from domestic violence or sexual assault advocates or other third parties that the person has been abused by the litigator.

This last category is most concerning because of the breadth of the people who can make the determination, as it includes individuals, in the case of counselors and advocates, who frequently have no source of information other than merely the assertions of one party. The absence of any requirement of a definitive determination of domestic violence is concerning. Because a court already has the inherent power to address frivolous or abusive filings, something more conclusive should be required before the special conditions contained in this bill are imposed on a litigant to initiate or proceed with litigation.

Second, we note that one of the stand-alone factors allowing a court to rebuttably presume that the litigation is vexatious is if the “same or similar issues” have been litigated within the past five years. But in a custody context, for example, this would seemingly include every single case, ignoring longstanding court standards for reviewing custody orders. Thus, the mere presence of legitimate past related litigation – which would not be at all uncommon in many situations – could turn the court filing into “abusive litigation” without any finding of actual past abusive litigative conduct.<sup>1</sup>

Third, the bill appears to give the court broad powers to not only dismiss the case before it and to impose monetary sanctions against the litigator, but also to impose potentially burdensome restrictions on *future* filings. It is critical to stress that these restrictions are not limited in the bill to only further litigation against the party who was the subject of the abusive litigation. As worded, the bill allows the restrictions to apply to any filing in *any* new case. This is extremely problematic.

As the Supreme Court explained in *Laurence*, overly broad prohibitions on future litigation impermissibly infringe on a citizen’s right of access to the courts. Specifically, the Court emphasized that “[a]cross the board restrictions to court access should be issued only when the abuse is so continuous and widespread as to suggest no reasonable alternative.” The Court also specifically required that before any limitation can be issued, it “must be supported by specific findings” *and* the “court must develop a record showing such widespread abuse of the judicial system as to warrant such a broadcast prohibition.”

We appreciate the bill’s attempt to balance the rights of litigants with the rights of domestic violence victims to be free from abusive litigation, but we believe the specific concerns expressed above about the breadth of the bill in some of its standards need to be addressed in order to make that balance a constitutionally proper one. The committee’s consideration of these comments is appreciated.

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<sup>1</sup> In that regard, we would suggest that because of the low standards for issuance of these orders, a potential unintended consequence is that an abuser could use the law to control and intimidate a victim. It is a common phenomenon where the victim has been abused without seeking help for a very long time, that the first time they attempt to defend themselves, the abuser calls the police on them, in an attempt to further control them and keep them from defending themselves in the future. Because the bill lacks a requirement of a final determination of domestic violence, and just one event can be the basis for a hearing, the opportunity is ripe for its attempted use by an abuser hoping to keep their victim from using the courts for protection.