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February 10, 2025

EMAIL ONLY
Hon. Robert E. Craven
Chairperson, House Judiciary Committee
Rhode Island General Assembly
Email: rep-craven@rilegislature.gov; bob@robertecraven.com

RE: SUPPORT FOR 2025-H 5223 -- *THE RHODE ISLAND CIVIL RIGHTS ENFORCEMENT ACT*

Dear Chairperson Craven,

I am a longstanding member of the American Association for Justice, the Rhode Island Association for Justice ("RIAJ"), American Bar Association, the Rhode Island Bar Association ("RIBA"), the RIAJ Board of Governors, and the RIBA House of Delegates. I have been a practicing attorney and member of the bar of this state for over forty-one (41) years and during the entirety of that time I have been a cooperating attorney with the Rhode Island ACLU and have had an active civil rights practice including numerous cases successfully resolved by decision or consent judgement. I also previously taught a course in Civil Rights and Civil Liberties at Bryant University for 10 years.

I am sending this letter to seek your support for passage of the Rhode Island Civil Rights Enforcement Act (copy enclosed), the purpose of which is to provide a remedy for any harm caused due to a violation of rights secured by the Constitution and laws of the State of Rhode Island. I am aware of the dire need for this legislation because I am in the trenches day in and day out litigating numerous civil rights cases, and I can tell you the need for this bill is very real.

1. The reason that it is needed and that its passage is absolutely essential is that since the Rhode Island Supreme Court ruled in *Bandoni v. State,* 715 A.2d 580 (R.I. 1998) that there is no right of action to seek relief and compensation for a violation of rights secured by the Constitution of the State of Rhode Island ***unless the right is self-executing***, numerous state and federal court decisions have expanded that reasoning to all of our important civil rights and liberties protected under the Constitution of the State of Rhode Island, including freedom of speech, freedom of assembly, due process, freedom from unreasonable search and seizure, and freedom from cruel and unusual punishment, to name a few.[1]

[1] **Rhode Island constitutional rights and protections held to be unenforceable in a civil action**. *Bandoni v. State,* 715 A.2d 580 (R.I. 1998) (no right of action to seek relief and compensation for a violation of rights and protections secured by the Constitution of the State of Rhode Island unless the right is self-executing; rights of victims of crime guaranteed in Article I, Section 23 not self-executing); *see also Folan v. State Dep't of Child., Youth, and Families*, 723 A.2d 287, 292 (R.I. 1999) (Article 1, § 2, anti-discrimination clause); *Smiler v. Napolitano*, 911 A.2d 1035 (R.I. 2006) (Article 1, § 5 guarantee of entitlement to remedies for injuries and wrongs and right to justice); *A.F. Lusi Const., Inc. v. Rhode Island Convention Ctr. Auth*., 934 A.2d 791, 798 (R.I. 2007) (Article 3, § 7 guarantee that public officials and employees must adhere to the highest standards of ethical conduct, respect the public trust and the rights of all persons, be open, accountable and responsive, avoid the appearance of impropriety and not use their position for private gain or advantage); *Senra v. Town of Smithfield*, 715 F.3d 34, 41 (1st Cir. 2013) Article 3, § 7 guarantee that public employees shall hold their positions during good behavior clause); *Doe Next Friend Doe v. City of Pawtucket*, 374 F. Supp. 3d 188, (D.R.I. 2019) partially vacated on other grounds *Doe v. Pawtucket Sch. Dep't*, 969 F.3d 1 (1st Cir. 2020) (Article 1, § 5 guarantee of entitlement to remedies for injuries and wrongs and right to justice); *Doe v. Brown Univ*., 253 A.3d 389, 401 (R.I. 2021) (Article 1, § 2, due process clause); *Felkner v. R. I. Coll*., 203 A.3d 433, 447 (R.I. 2019) (Article 1, § 21, freedom of speech and right to assemble); *Zab v. R.I. Dept. of Corrections*, 269 A.3d 741 (R.I. 2022) (Article 1, § 5 guarantee of entitlement to remedies for injuries and wrongs and right to justice); *Hagopian v. City of Newport*, No. CV 18-283 WES, 2021 WL 4742701, at *1 (D.R.I. Oct. 12, 2021) (Article 1, § 6 freedom from unreasonable searches and seizures clause); *Fosu v. Univ. of R.I.*, 590 F. Supp. 3d 451, 460 (D.R.I. 2022) (Article 1, § 2 due process clause); *Melise v. Salisbury*, No. 1:17-CV-0490-MSM-PAS, 2023 WL 2387677 (D.R.I. Mar. 7, 2023) (Article 1, § 8 freedom from cruel and unusual punishment clause); *Ricci v. Rhode Island*, No. 120-CV-00543-MSM-PAS, 2023 WL 4686025, at *11 (D.R.I. July 21, 2023) (Article 1, § 2 due process clause and Article 1, § 6 freedom from unreasonable searches and seizures clause); *Parente v. Wall*, No. 1:16-CV-0055-MSM-PAS, 2023 WL 8879023, at *6 (D.R.I. Dec. 22, 2023) (Article 1, § 2 due process clause and Article 1, § 8 freedom from cruel and unusual punishment clause); *Kurland v. City of Providence by & through Treasurer*,

2. As a consequence, there is no longer an "implied right of action" to seek civil relief for a violation of the rights and protections set forth in the Constitution of the State of Rhode Island.

3. Accordingly, at the current time, the rights guaranteed under the Constitution and laws of the State of Rhode Island, aside from possibly declaratory or injunctive relief which is largely discretionary with the court, ***are little more than suggestions or aspirational ideals.***

4. While Rhode Islanders can seek relief for violations of their ***federal*** civil rights and liberties under 42 U.S.C. Sec. 1983, the enforcement statute passed by Congress over 150 years ago to enforce federal constitutional rights, that statute is of limited benefit because the Rhode Island Constitution contains additional rights not protected under the federal constitution—such as the rights of victims of crime under Art. 1, Sec. 23, the right to a fair and prompt remedy for wrongs under Art 1. Sect. 5, and fishery and shoreline rights under Art. 1, Sec. 17 to name a few. The federal enforcement statute also frequently leaves injured parties without a remedy because it does not apply to conduct by a state government or of the federal government and also due to the availability of governmental and individual immunities.[2] In addition, Congress could repeal or limit the scope of the federal enforcement statute at any time.

No. 18-CV-440-MSM-LDA, 2024 WL 81305 (D.R.I. Jan. 8, 2024) (Article 1, § 2 due process clause, Article 1, § 6 freedom from unreasonable searches and seizures clause, Article 1, § 21 freedom of speech and right to assemble clauses)*; Murray v. Cmty. Coll. of Rhode Island*, No. CV 23-469 WES, 2024 WL 1214569, at *2 (D.R.I. Mar. 21, 2024) (Article 1, §2 due process, Article 1, §21 freedom of speech); *Johnson v. Sheridan*, No. 1:19-CV-00283-MSM-PAS, 2024 WL 1975855 (D.R.I. May 3, 2024) (Article 1, §2 equal protection, Article 1, § 6 freedom from unreasonable searches and seizures clause and excessive force).

[2] **Individual qualified immunity barring remedies for harms caused by violation of constitutional rights and protections**. Where a court finds that qualified immunity applies, a situation which has occurred frequently and is occurring in increasing frequency, an injured party will be left without a remedy even where there is a court finding that their civil rights were violated. Some of the more egregious cases are set for below, but they are innumerable. This Legislation would change that and provide a remedy in such situations:

Kisela v. Hughes, 138 S. Ct. 1148, 1154 (2018) (Tucson police encountered a woman named Amy Hughes having a mental health episode and hitting a tree with a knife. Without warning, and though his companion officers believed they could diffuse the situation without firing, an officer shot her four times through a chain-link fence, and then handcuffed her. The Supreme Court found the officer entitled to qualified immunity, holding only that there was no clearly established precedent that would have told Officer Kisela that firing at Hughes amounted to unconstitutional excessive force, in part because the most similar prior case involved an officer who shot someone from the top of a hill, not from behind a fence).

Jessop v. City of Fresno, 936 F.3d 937, 942 (9th Cir. 2019) (Ninth Circuit dismissed a suit alleging that Fresno police officers stole over $225,000 in cash and rare coins during the search of a person's home. While the court noted that the act was "morally wrong," it protected the officers from suit—and prevented the victim from recovering what had been stolen—simply because there was no prior case where officers had stolen property in precisely the same circumstances.).

De Boise v. Taser Int'l, Inc., 760 F.3d 892, 898 (8th Cir. 2014) (St. Louis police were called to subdue an actively delusional Black man, Samuel De Boise, who had run naked onto his lawn. Rejecting safer alternatives—and even though the naked man obviously was not carrying any weapon—the officers fired a taser at De Boise repeatedly until he died. The Eighth Circuit threw out his family's lawsuit on the basis of qualified immunity, finding prior cases prohibiting repeated tasing not sufficiently similar.).

Dukes v. Deaton, 852 F.3d 1035 (11th Cir. 2017) (Dukes was asleep in her boyfriend's apartment when police officers began a military-style assault on the home based on a tip that her boyfriend was seen with a "small quantity of a green leafy substance." Without providing any warning, a police officer threw a flashbang grenade through the bedroom window, hitting Dukes and causing severe burns to her arms and legs. The Eleventh Circuit concluded that throwing an explosive device into an occupied bedroom was not a clearly established constitutional violation, and her case was dismissed.).

Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010). (In 2007, Brian Kelly was arrested for videotaping a police officer during a traffic stop. Although courts around the country had held that the First Amendment protects such recording, the Third Circuit had

5. ***I suspect most Rhode Islanders would be appalled by the above inconvenient truths.***

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not yet, and it dismissed Kelly's suit on qualified immunity grounds—*without addressing whether Kelly's rights had been violated. With the constitutional question left open, the issue continued to arise*. *See, e.g., True Blue Auctions v. Foster*, 528 F. App'x 190 (3d Cir. 2013).)

Fields v. City of Philadelphia, 862 F.3d 353, 361–62 (3d Cir. 2017) (In 2012, Philadelphia police pinned Amanda Geraci against a wall to prevent her from filming police at a protest. A year later, Philadelphia police arrested Richard Fields and seized his iPhone for photographing a raid on a house party. In the ensuing lawsuits, the Philadelphia Police Department conceded there was a First Amendment right to record police—a right codified in the department's official policies. Still, the Third Circuit dismissed the suits against the officers because, under its previous decision, the right was not "clearly established." Although the Third Circuit ultimately ruled that the Constitution does protect the right to videotape the police, *the earlier qualified immunity decisions held the question open for nearly a decade*. Those wrongly arrested for recording the police during that period have no legal redress even though, as the Third Circuit recognized, their constitutional rights were violated.).

Jamison v. McClendon, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at *25 (S.D. Miss. Aug. 4, 2020) (Clarence Jamison was a Black man driving a Mercedes convertible in South Carolina pulled over by police allegedly because the temporary tag on his car was "folded over to where [the police officer] couldn't see it." Jamison was then subjected to two hours of an armed police officer badgering him, pressuring him, lying to him that police had a tip that drugs were in the car, and then searching his car top-to-bottom for drugs, followed up with a canine search when that physical search came up empty, even though a background check performed came back clean and the police officer had no reasonable suspicion that Jamison had committed any wrongdoing. Even though the court found that Jamison's Fourth Amendment rights were violated, the court ruled that "[g]iven the lack of precedent that places the Constitutional question 'beyond debate,' Jamison's claim cannot proceed" and dismissed the case because the police officer was "entitled to qualified immunity as to Jamison's prolonged detention and unlawful search claims.").

Karen M. Blum, Professor Emerita and Research Professor of Law, Suffolk University Law School, a recognized expert in civil rights litigation and qualified immunity, described the problem as follows:

> The doctrine of qualified immunity applied to state civil rights claims under Rhode Island law mimics the doctrine invented and applied by the United States Supreme Court to federal Section 1983 claims. 42 U.S.C. §1983, enacted originally in 1871 as the Ku Klux Klan Act, was intended to provide a civil remedy under federal law for persons whose constitutional rights have been violated by state actors. But the Supreme Court [of the United States] has manufactured a defense of "qualified immunity" that makes recovery against an officer very difficult, even when the officer has violated a person's constitutional rights. The Court requires a showing that the right violated is one that was "clearly established," such that *every* reasonable officer would understand that the conduct amounted to a constitutional violation. Most courts require a plaintiff to produce a case in which the Supreme Court or Court of Appeals or the highest court of the relevant state has held unconstitutional conduct involving virtually identical facts. The requirement places an overwhelming burden on plaintiffs. It often results in "one free pass," where the officer who has violated a person's constitutional rights is absolved of liability because there was no case on point. The Court has made this burden even more difficult to surmount by allowing courts to grant qualified immunity without ruling on the merits of plaintiffs' claims. In this way, the Court has compounded the injury of "one free pass" with the insult of a "continuing free pass" for defendants who violate the Constitution.

Indeed, the doctrine of qualified immunity, which in essence denies a remedy when a constitutional violation has been found but where the right was not "clearly established," directly contravenes the "right to justice" and the entitlement to a remedy guaranteed by [Article I, Section 5 of] the Rhode Island Constitution.

Governmental immunities barring recovery. In addition, the Supreme Court of the United States has created similarly insurmountable limits for a plaintiff who wants to sue the local government employer for an officer's unconstitutional conduct. Although the entity is not able to raise qualified immunity, the Supreme Court held in a 1978 case, *Monell v. Department of Social Services*, that to recover from a local government under Section 1983, the plaintiff must show that the wrongdoing was caused by an *official policy or custom*. In most cases, a plaintiff would have to demonstrate a pattern of very similar constitutional violations and show that policymakers had knowledge of such incidents and failed to address the problem.

6. Accordingly, if Rhode Island Constitutional protections are going to mean anything, the General Assembly must enact an enforcement statute, much like the Congress did when it enacted 42 U.S.C. Sec. 1983.

7. Currently, 23 states either have an enforcement statute or an implied right of action under their state constitutions to provide civil remedies for individuals who suffer injury due to a violation of their constitutional rights.

8. After obtaining a lot of input, I drafted this proposed legislation to correct this to ensure innocent victims have a remedy for harm sustained on account of a violation of their state created rights.

9. **The Act's purpose is simple**: to provide civil remedies and compensation for any harm caused due to a violation of rights secured by the Constitution and laws of the State of Rhode Island and thereby also deter future violation of such rights. This ensures that, consistent with the admonition in Article I, Section 5 of the Rhode Island Constitution, every right shall have a remedy**.**

10. **The premise of the bill is also simple**: it is the state and other governmental entities and their political and/or administrative subdivisions, not innocent parties, that should bear the cost of any harm caused by a violation of their state-created rights.

11. ***This bill does not create any new rights***. It merely provides a **means by which to seek a remedy for a violation of *existing state-created rights*,** utilizing essentially the same language employed in the federal civil rights enforcement statute, 42 U.S.C. Sec. 1983.

12. There are no tricks here—what you see is what you get; the enforcement language creating the right to a civil remedy for violation of state created rights used in the proposed act closely tracks the language from the federal enforcement statute, 42 U.S.C. Sec. 1983.

13. ***There is no reason not to support this bill and no one in your constituency who can intelligently and in good faith justify opposing the bill***.[3]

14. **Given the potential adverse impact on individual rights as a consequence of recent Supreme Court decisions and other actions and threatened actions at the national level and in other states, it is vital now more than ever that we be proactive in establishing a state mechanism to protect our most cherished state rights and liberties.**

15. The proposed version of the bill this year more closely tracks the language in 42 USC. Sec. 1983 to ensure there is appropriate guidance to the judiciary in interpreting the Act and to ***protect important state created rights such as same sex marriage and reproductive freedom***—the federal constitutional protection for the latter of which no longer exists as a consequence of the Supreme Court decision in *Dobbs v. Jackson Women's Health Org.*, 597

[3] There should be no opposition from law enforcement, correctional, or other governmental unions/employee constituencies as the proposed act does not abrogate any individual immunities. Moreover, AFSCME, Council 94 has endorsed the bill.

While the proposed act does abrogate governmental immunities and may therefore provoke opposition by the League of Cities and Towns or RIPEC due the fear of potential adverse "budgetary" implications because of the obligation to pay an anticipated increase in claims of innocent victims, such potential adverse impact is under their control and can easily be avoided by proper selection, hiring, training, education, supervision, and discipline of their employees and agents and implementation and enforcement of constitutionally compliant policies and procedures as required by law. ***Innocent victims do not have a similar ability to take advance prophylactic action to avoid infringement of their constitutional rights by the government***. Moreover, in any event, there should be no significant adverse budgetary impact because there is no reason to believe there will be a material increase in the number of civil rights claims above those currently being brought under 42 U.S.C Sec.1983. This is particularly true because the intent of the bill is to also ***deter*** violations of constitutional rights and protections and thereby prevent governmental liability for civil damages.

U.S. 215 (2022)(overturning *Roe v. Wade*) and to extend the scope to include protection against the actions of any governmental entity and/or its agents.

16. Accordingly, if passed, this bill would ***provide protection against the actions of ANY governmental entity and/or its agents—including another state or the federal government—***which violate or seek to violate the rights of residents and other individuals within the State of Rhode Island.

17. This includes protection of state created rights such as ***the right to organize for purposes of political, social, religious, or labor purpose--***the latter of which has been threatened at the federal level by decisions of the Supreme Court and recent executive actions undermining the independence of and politicizing numerous federal agencies, in particular the National Labor Relations Board.

18. This bill would also protect state created rights such as ***the right to free speech and expression and access to information without censorship,*** which has been threatened or curtailed by actions in other states banning books and recently at the federal level by limitations imposed on the posting and dissemination of previously public information***,*** and ***the right to be free from unreasonable search and seizure***, in particular, from the threatened mass, suspicionless round-up and detention of individuals merely suspected of being undocumented (which in and of itself is not a state or federal crime).

19. The bill has widespread support and no known opposition. Supporters include:

The Rhode Island Laborers' District Council.
RI AFL-CIO
AFSCME, Council 94
IBEW LU 99
IUPAT District Council 11
BuildRI
NEMCA
RI ACLU
RIAJ
Centers for Justice
Institute for Justice

20. Finally, although the bill did not get out of committee in either chamber in 2024, there was no expressed opposition to the bill, either publicly or privately, to my knowledge.

For all the foregoing reasons, I strongly ***support*** passage of this legislation.

Very truly yours,

Richard A. Sinapi
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RAS/ras
Enclosure
cc: Hon. K. Joseph Shekarchi, Speaker of the House (via email only) (rep-shekarchi@rilegislature.gov)
Members of House Judiciary Committee (via email only) (HouseJudiciary@rilegislature.gov)