Statement of Samuel D. Zurier in Support of a Constitutional Convention:

I appreciate the opportunity to present this statement concerning the value of holding a Constitutional convention, five possible topics for a convention to consider, and a suggestion concerning the format of this Commission's proceedings and report.

I. The Case For Holding A Constitutional Convention

This November's ballot will include a question asking voter approval to hold a Constitutional convention. A group called RI Citizens for Responsible Government ("RICRG") organized to oppose a convention, sending out a Letter endorsed by three valuable Rhode Island organizations that promote our fundamental liberties (the Rhode Island branches of the American Federation of Labor, the American Civil Liberties Union and Planned Parenthood). While I am grateful for the important contributions these organizations have made to protect our liberties over the years, I believe the Letter's argument is seriously flawed, both in substance and in the way it speaks to us as voters. For the reasons I will now explain, I believe that the most recent (1986) Rhode Island Constitutional Convention demonstrates how this process can expand our fundamental rights and bring needed reforms to our government.

A. The Potential Risks of a Constitutional Convention

The Letter's first theme is that a Constitutional convention is "a significant threat to our civil rights," a phrase the letter essentially repeats at its beginning and end. To prove that a convention "is likely to lead to disastrous results," the Letter cites a single example from the 1986 convention, namely a proposal to amend the Rhode Island Constitution to establish that life begins at conception. As a strong supporter of a woman's right to choose, I agree that such an amendment, if approved, would have been disastrous. The Letter neglects to say, however, that any proposal from a Constitutional convention does not become official unless and until it is approved by a majority of the voters. The proposed anti-abortion amendment never became law because it was rejected by a popular vote of 102,633 (for) to 197,520 (against) as recorded in the Official Record. In short, the Letter's principal identified threat to civil rights utterly failed when presented to the voters, a crucial fact that undercuts the Letter's argument, but regrettably is not presented for the reader's consideration. I respectfully submit that this unfortunate form of argument is, at best, incomplete.

B. The Potential Benefits of a Constitutional Convention

More generally, the 1986 convention presented fourteen proposed amendments to the voters, who approved eight and rejected six (including the anti-abortion proposal). Among those approved was the creation of our Ethics Commission and the codification of shoreline access rights. I assume RICRG's members would agree that these amendments improved our State government and were well worth a one-time investment of $2 million as part of a multi-billion-dollar budget. More generally, I find it significant that the Letter does not cite a single voter-approved 1986 amendment as a step backward for Rhode Island. The Letter's failure to discuss the ultimate outcome of the 1986 Constitutional Convention, particularly as it relates to the overwhelming rejection of the anti-abortion proposal, reflects a dim view of our ability and

responsibility as voters. I believe it is more accurate to say that the voters' rejection of the anti-abortion proposal and approval of ethics reform and shoreline access rights are properly viewed as a victory for civil rights and government reform, rather than a threat to either.

C. The Limits of Alternative Ways to Amend the Constitution

The Letter also argues that "We Already Have Effective Means of Changing Governance," noting that the General Assembly has the authority to approve specific proposed Constitutional amendments for voter consideration. While this represents a theoretical safety valve that occasionally works, it is at best an exaggeration to call it "Effective." To my knowledge, the last time the General Assembly took this step was in 2004 with separation of powers, while many proposals for additional amendments are introduced unsuccessfully year after year. For example, a Constitutional right-to-education proposal has passed year after year after year in the Rhode Island Senate, only to fail in the Rhode Island House of Representatives, depriving voters of this opportunity. For that matter, our current Constitution limits the fundamental right to vote by prohibiting same-day registration. In response, two of the Letter's sponsors (the ACLU and Planned Parenthood) joined the Let RI Vote coalition to place a Constitutional amendment on the ballot to remove this barrier. Despite the 28-member coalition's massive effort, the resolution failed to gain General Assembly approval.

To conclude, the opponents and their letter show a disturbing lack of trust in the voters of Rhode Island, discounting our ability to select from a menu of proposed Constitutional amendments, approve the ones that will benefit our State and disapprove the ones that will not. Having a Constitutional Convention will, to coin the ACLU's phrase, let RI vote on improvements to our government.

II. Suggested Possible Amendments For A Convention To Consider

A. A Judicially Enforceable Right To Education (Article XII)

It might surprise many Rhode Islanders to learn that our Constitution does not already contain such a right; however, the Supreme Court has interpreted Rhode Island's Constitution to place sole (or "plenary") authority for educational policy in the General Assembly. According to SchoolFunding.Info 26 state courts (including Massachusetts, Connecticut, New Jersey and New York) have enforced a constitutional right to education, while an additional six state courts have recognized such a judicially enforceable right in their state's constitution.

In the case of Massachusetts, the 1993 Supreme Judicial Court decision was followed promptly by the 1993 Massachusetts Education Reform Act, which laid the foundation for what many consider to be the country's leading public education system.

I believe such a right, could overcome the political challenges limiting our ability to provide the best possible public education for our children. Prior to my election to the Senate, I represented the Woonsocket School Committee in a lawsuit seeking to establish this Constitutional right, but unfortunately the courts dismissed the lawsuit in Woonsocket School Comm. v. Chafee, 89 Aif the voters were allowed the opportunity, they would approve this

amendment by a wide margin. I am frustrated by the General Assembly's inability to allow the voters to decide an important issue that could have wide support and, in my opinion, would grant Rhode Island's children a precious and essential Constitutional right.

B. Same Day Voter Registration (Article II, Section 1)

Article II, Section 1 of our Constitution imposes a 30-day residency requirement to register to vote, the maximum allowed under federal law. According to Vote.org, 30 states currently allow same-day voter registration. As noted by the Let RI Vote Coalition, Rhode Island's 30-day requirement "block[s] thousands of otherwise eligible residents from the ballot box."

C. **Ending Lifetime Supreme Court Tenure (Article X, Section 5)**

According to a Ballotpedia article, 46 states and the District of Columbia have fixed terms for state supreme court justices, subject to the opportunity for reappointment or re-election if the judge has not reached the mandatory retirement age. Rhode Island is the only state in the country whose judges receive lifetime tenure without a mandatory retirement age. According to a second Ballotpedia article, 31 states require the retirement of judges at ages between 70 and 75, depending on the state. From the same source, Vermont has a mandatory retirement age of 90, and two other states (Arkansas and North Dakota) permit judges to serve past the ages of 70 and 73, respectively, only if they agree to lose their retirement benefits

While many Rhode Island Supreme Court justices have served with distinction past the age of 70 or 75, I am confident that our bar contains many talented lawyers who could serve on that Court if they had the opportunity. By allowing for more turnover in our Supreme Court, we can increase the opportunity for a more diverse bench, and for the introduction of new ideas and approaches to our State's legal system.

D. Non-Plurality Voting Systems (Article IV, Section 2)

In high school civics, we traditionally learn that the essence of democracy is majority rule. Rhode Island's Constitution requires the winner of a plurality of votes to be elected, regardless of how small that plurality is. We have had a number of 3-way races in our State's history in primaries and general elections, in which the winning candidate receives fewer than 40% of the votes, and in which the two losing candidates each claim (with some merit) that they could have easily been the majority winner in a 2-way race. Repealing Article IV, Section 2 would allow (but not require) the General Assembly to consider legislation to establish a non-plurality voting system, such as ranked choice voting.

A December 19, 2023 Senate Study Commission report provides a national survey of non-plurality voting systems, providing analysis of the policy advantages and disadvantages of certain alternatives.

E. Creating A Remedy For Constitutional Torts

A fundamental principle of our government is the rule of law, under which everyone's legal rights are protected by our courts. As Chief Justice Marshall stated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803),

> where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

In *Bandoni v. State*, our Supreme Court rejected this fundamental principle. As a result of the 1986 Constitutional Convention, Rhode Island's voters approved a victim's rights provision, which included the right to address the court concerning the impact they suffered from a crime before the perpetrator was sentenced. In the *Bandoni* case, the State failed to honor this constitutional right of the Bandoni's, who were the victims of a case of criminal driving while intoxicated. The Bandonis brought a civil lawsuit, claiming the government negligently failed to allow them the right to address the Court. The State moved to dismiss, arguing that the Bandonis lacked a case because the General Assembly had not enacted legislation to authorize a lawsuit. The Bandonis argued that they had to have a right under the general principles of the rule of law, regardless of whether the General Assembly enacted enabling legislation.

Sadly, our Supreme Court dismissed the case, essentially holding that the government can violate our Constitutional rights with impunity unless the General Assembly passes legislation to hold it accountable. In contrast, in the Bivens case, 403 U.S. 388 (1971), the United States Supreme Court recognized an implied right of action to sue for what have come to be known as Constitutional torts. For many years, the American Civil Liberties Union has advocated for the passage of enabling legislation, but the General Assembly has repeatedly failed to act.

III. This Commission's Report

This Commission will prepare a report to educate voters about the constitutional convention ballot question. The 2014 Bipartisan Preparatory Commission's Report was a terse document which did not provide voters with much information about the proposals citizens brought forward for possible amendments. I encourage this Commission to provide the voters with a more robust report which (at least in its electronic version) can provide links to specific proposals and testimony this Commission hears.

Thank you for your service and for your consideration.

Sincerely,

Rhode Island Senate
District 3