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TO: The Bill of Rights & Voting Committee of the Constitutional Modernization Comission

FROM: Wilson Huhn on behalf of the ACLU of Ohio

DATE: November 12, 2015

RE: Revision of Article V, Section 6, Voting Rights of Persons with Disabilities

My name is Wilson Huhn. I have had the privilege of working with children and young adults as a teacher and coach my entire adult life. Some of my experiences may help to shed light on the proposed amendments to Article V, Section 6 of the Ohio Constitution.

Specifically, I taught Special Education as a Teacher's Aide at the Benhaven School for Autistic and Brain-Damaged Children (1969-1971); taught Constitutional Law at The University of Akron School of Law, and published extensively in that field (1984-2015); organized and coached a multitude of adaptive recreation programs in eastern Cuyahoga County for persons with special needs (1983-present); and served on the board of the ARC of Greater Cleveland (2003-2009) and the Ohio A.C.L.U. (2010-present). In addition, my wife, Dr. Nancy Wollam-Huhn, and I organized a number of local Ohio chapters of the National Tuberous Sclerosis Association (1980s).

Perhaps the most relevant experience I have had is that I have helped many persons with developmental delays to register to vote and to speak with the representatives of different political campaigns. I bring the perspective of a constitutional scholar, a special needs teacher and father, and a person concerned with helping fellow citizens with developmental delays to become more informed about political issues and candidates.

The Centrality of the Right to Vote.

The right to vote is a vitally important right. In the landmark Equal Protection case of *Yick Wo v. Hopkins* (1886), the Supreme Court stated that the right to vote "is regarded as a fundamental political right, because preservative of all rights." The right to vote is the hallmark of a citizen. It springs from the natural right of the individual to govern himself or herself: "Governments are instituted among men, deriving their just powers from the consent of the governed."

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The Constitutionality of This Provision Under Substantive Due Process and Equal Protection.

The Supreme Court of the United States has made it clear that the right to vote is a fundamental right, and that this right may be denied only by laws that are narrowly drawn to serve a compelling governmental interest. The provision under consideration does not relate simply to the process of conducting an election, such as voter identification or determination of residency, but rather involves a complete disqualification from voting, similar to a poll tax or a property qualification. Accordingly, under both Due Process and Equal Protection the constitutionality of this provision will be evaluated under the strict scrutiny test. For this provision to be constitutional the State of Ohio must have a compelling interest in denying these groups of people the right to vote, and the law must be the least restrictive means of achieving that compelling interest.

The Constitutionality of This Provision Under Procedural Due Process.

The Constitution prohibits the government from depriving individuals of life, liberty, or property without due process of law. The right to vote is unquestionably a "liberty" interest; it is arguably the most important right, because "preservative of all rights." Accordingly, the government must give a person adequate notice and a fair hearing before depriving that person of the right to vote. Adequate notice would require the text of the law to be clear enough for citizens to obey it and public officials to enforce it. A fair hearing requires the government to give the individual the opportunity to be heard at a meaningful time and in a meaningful manner.

Consequence of Deleting the Provision.

If Article V, Section 6 were deleted the legislature would still retain the power to establish procedures for denying the vote to persons who are incapable of exercising that right. While the right to vote is fundamental, it is not absolute … just as the rights to freedom of speech, freedom of religion, and the right to privacy are not absolute. People have the right to be free of arbitrary restraints, but they may be institutionalized against their will if they pose a danger to others, or placed under guardianship if they cannot care for themselves. Like a constitutional provision, however, statutory provisions and official procedures denying certain citizens the right to vote would have to pass strict scrutiny and the requirements of procedural due process.

"Right" or "Privilege"?

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It will not make any practical difference whether the Constitution is amended to refer to the "right" to vote or a "privilege" to vote. The term "privilege" is an archaic term that meant the same as what we now call a "right." Under Due Process and Equal Protection the strict scrutiny test will still apply, and under Procedural Due Process the person will be entitled to adequate notice and a fair opportunity to be heard. However, the connotation of the word "privilege," at least to modern ears, is something contingent that the government may summarily terminate, such as the Food Stamp program or Social Security. For that reason it might be more appropriate for the revision to simply use the term "right" in referring to voting.

Cognitive Tests Bear Little Relevance to the Ability to Perform.

Traditionally, an "idiot" was a person with an IQ of 25 or below. (Henry Goddard, 1910). Today this same population is referred to as persons with a "profound" cognitive impairment. However, IQ scores are now considered to be of limited use in assessing a person's level of disability. We are far more concerned with a person's ability to live independently, which depends upon assessment of a broad scope of behaviors: daily living skills, communication skills, and social skills. Professional educators, psychologists, and social workers all agree that these qualities are more important for both rational decision-making and quality of life than raw measurements of IQ. It stands to reason that these adaptive skills are also more important for voting. Any legal disability on voting must reflect vastly more factors than the results of a cognitive examination.

Political Discussions with Persons with Special Needs.

The participants in my political discussion programs have a wide range of intellectual and adaptive abilities. None, in my estimation, are in the "profound" category of intellectual impairment; as with the general population of persons with developmental delays, most of them are "mildly" or "moderately" affected, and a few are at the top of the "severe" category. Almost all of them are registered to vote and most of them are eager and proud to exercise the franchise.

It was fascinating to see how they conducted themselves in discussions with political representatives – particularly the questions they asked. They raised very concrete, practical concerns: "Where will I live after my parents are gone?" "How will I pay my bills if I can't write a check?" "Where will I work?" "How will I get to work?"

Our oldest child exemplifies the concrete, practical approach to life that so many of his peers exhibit. His tested IQ is about 50 – moderate to severe impairment. Yet he lives independently, leads a very active social life, works part-

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time, and takes flying lessons. At the age of 18 he could not read, but today at the age of 35 he reads at about a third or fourth grade level. His reading, listening, and viewing habits have evolved over time; his favorite television personality used to be "Barney," but now it's "Dr. Phil." He is very concerned about children who are abused, and loves helping children with special needs. He volunteers in that capacity for several community programs.

Persons with developmental delay have a vivid understanding of the public policies that affect them. Like all of us they are influenced by the media, family, and friends. But the vast majority of them are fully capable of intelligently and independently exercising the precious right to vote. For this reason the Ohio Constitution and Ohio law must vigorously protect their right to vote.

Election Fraud.

On the other hand, thousands of Ohio citizens cannot knowingly and voluntarily vote because of profound intellectual impairment, serious and uncontrolled mental illness, or advanced dementia. It would be wrong to allow a person or organization to commit election fraud by casting votes in place of those persons. The Committee's path is not an easy one – steering between the invasion of personal choice that would occur if disabled but competent Ohio citizens are denied the right to vote, and preventing the invasion of personal rights and election fraud that could occur if the votes of incompetent Ohio citizens were converted by others.

Abraham Lincoln's Remarks on Equality.

The Declaration of Independence states, "All men are created equal." Abraham Lincoln reflected on this principle in his speech of June 26, 1857:

> I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal – equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness. … This they said, and this meant."

In crafting this provision of the Ohio Constitution it is necessary to keep that principle uppermost in mind – that all persons are endowed with the same inalienable right to choose who our leaders will be and what policies they will

pursue. Some persons are utterly incapable of exercising that right; but that is no excuse for denying that right to others.

Recommendation.

I would recommend that Article V, Section 6 simply be abolished, and that no attempt be made to replace it. All persons have an inalienable right to vote; that right is not absolute, but any exceptions to that right must be closely circumscribed. As noted above, the Ohio Legislature would still have the power to adopt laws authorizing the courts to declare individuals incompetent to vote.

If the Committee chooses to replace the existing language of Article V, Section 6, with another provision, then I would recommend that the Committee closely track the language that was proposed in the 1970s: "The General Assembly shall have power to deny the [right to vote and] privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency." The United States Constitution would automatically place the burden of proof on the government to prove incompetency to vote, and the requirement of adjudication would prevent poll workers from arbitrarily preventing other persons with disabilities from voting. Laws prohibiting election fraud should be adequate to discourage and prevent the conversion of votes from persons who did not knowingly and voluntarily vote.

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November 10, 2015

Richard Saphire
Chair
Bill of Rights and Voting Committee
Ohio Constitutional Modernization Commission
Ohio Statehouse
Columbus, Ohio 43215

Re: DRO concerns regarding committee proposal related to Article V, Section 6

Dear Chair Saphire:

As you know, Disability Rights Ohio (DRO) has been actively following the deliberations of the Bill of Rights and Voting Committee related to voting and people with disabilities, particularly those with intellectual disabilities or elders with advanced dementia. DRO has proposed that the 1851 provision that includes discriminatory and prejudiced language be removed. No other language is necessary. Nonetheless, the committee has indicated a desire to place something in the Constitution that would prevent voters who lack capacity to vote from registering and casting a ballot.

Admittedly, the Committee is working at a disadvantage as concepts in the area of disability rights have changed dramatically in the last half century and particularly since the passage of the Americans with Disabilities Act in 1990. There is little guidance in case law, and the Ohio General Assembly has never fully implemented the current prohibition, leaving speculation, personal experience and anecdotal information to shape the discussion.

As a result, misconceptions have emerged in the Committee's deliberations.

- Whether voters can currently be disqualified at the polls for lack of capacity to vote. This is not supported by the law. Statute requires that challenges of any kind occur 20 days prior to the election, and a hearing must be held to adjudicate any facts that are outside the record of the Board of Elections.

Moreover, the Consent Decree in *Glancy v Morrow County Board of Elections, et al.* specifically prohibits challenges at the polls for lack of capacity to vote.

- Whether certain officeholders must be qualified electors and might be removed if suffering from a lack of capacity to vote.
  While this appears to be supported as a matter of Ohio statute, it is likely that such a scheme could not be sustained under current federal anti-discrimination law (Title I or II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973) or other laws, such as FMLA.

These notions emerged from in discussion of the somewhat narrow language that the committee has decided to consider. Without regard to the question of whether the Ohio Constitution should require an adjudication (a distraction, since the federal constitution certainly requires one when the right to vote is implicated), the language is extremely disquieting because it creates a broad, categorical exclusion of voters who have a disability. This would continue the only categorical exclusion of otherwise qualified electors in the Ohio Constitution, leaving convicted felons with more opportunity to vote than people with dementia or intellectual disabilities. And this is particularly problematic given the failure of the research on "capacity to vote" to discern a meaningful, objective, and valid measure of this concept, as we have documented in our materials before the committee.

I encourage the committee to re-consider the idea that there should be new language to deal with this issue. Alternatively, if the committee insists on a replacement for the current language, it should seriously consider using Article V, Section 4 as a template. This would recognize that understandings of capacity and volition are always evolving, and allow for the General Assembly to deal with the issue if needed.

Thank you for this opportunity to bring this information to the committee.

Respectfully yours,

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chair Richard Saphire, Vice-chair Jeff Jacobson, and Members of the Bill of Rights and Voting Committee**

CC: **Steven C. Hollon, Executive Director**

FROM: **Shari L. O'Neill, Counsel to the Commission**

DATE: **November 10, 2015**

RE: **Definition of Privileges and/or Qualifications of an Elector**

At the September 10, 2015 meeting of the Bill of Rights and Voting Committee, some members raised questions about the meaning and use of the words "privileges," "qualifications," and "elector," in the Ohio Constitution as well as in statutory law. These questions were raised in conjunction with the committee's review and consideration of possible changes to Article V, Section 6 (Mental Capacity to Vote).

This memorandum is an attempt to briefly answer some of these questions, and is being presented to assist the committee in determining areas where future research might be needed.

How does the Ohio Constitution define "privileges" and "qualifications"?

Privileges

Only Article V, Section 4 ("The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony") and Section 6 ("No idiot, or insane person, shall be entitled to the privileges of an elector") reference voting as a "privilege" or indicate that being an elector signifies that one has "privileges." Both of these sections date from the 1851 constitution.

Senior Policy Advisor Steven H. Steinglass has indicated that the word "privilege" is only used five or six times in the 1851 constitution, mostly outside of this context. He said privilege is not a word that runs through the constitution outside of the one article the committee is looking at.

Qualifications

Article V, Section 1 states “every citizen of the United States of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.”

Article XV, Section 4 states “no person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector.”

How does the Revised Code define “privileges” and “qualifications”?

R.C. 3501.01

(H) "Candidate" means any qualified person certified in accordance with the provisions of the Revised Code for placement on the official ballot of a primary, general, or special election to be held in this state, or any qualified person who claims to be a write-in candidate, or who knowingly assents to being represented as a write-in candidate by another at either a primary, general, or special election to be held in this state.

(N) "Elector" or "qualified elector" means a person having the qualifications provided by law to be entitled to vote.

R. C. 3503.07 Qualification for registration.

Each person who will be of the age of eighteen years or more at the next ensuing November election, who is a citizen of the United States, and who, if he continues to reside in the precinct until the next election, will at that time have fulfilled all the requirements as to length of residence to qualify him as an elector shall, unless otherwise disqualified, be entitled to be registered as an elector in such precinct. When once registered, an elector shall not be required to register again unless his registration is canceled.

R. C. 3501.38 General rules for petitions and declarations of candidacy.

All declarations of candidacy, nominating petitions, or other petitions presented to or filed with the secretary of state or a board of elections or with any other public office for the purpose of becoming a candidate for any nomination or office or for the holding of an election on any issue shall, in addition to meeting the other specific requirements prescribed in the sections of the Revised Code relating to them, be governed by the following rules:

(A) Only electors qualified to vote on the candidacy or issue which is the subject of the petition shall sign a petition. Each signer shall be a registered elector pursuant to section 3503.01 of the

Revised Code. The facts of qualification shall be determined as of the date when the petition is filed.

At the committee's September meeting, committee member Doug Cole identified one statute, Ohio Revised Code 1907.13, "Qualifications of County Court Judges," that references being an "elector." It states, in part: "A county court judge, at the time of filing a nominating petition for the office or at the time of appointment to the office and during the judge's term of office, shall be a qualified elector and a resident of the county court district in which the judge is elected or appointed."

What qualifications and privileges of an elector existed in 1851, both in the constitution and by statute?

Article XV, Section 4, indicates that, in addition to being eligible to vote, one benefit of being a qualified elector is the ability to assume public office.

Some case law supports that a person must possess the qualifications of an elector in order to be elected or appointed to any office, and that this requirement takes precedent over statutory law purporting to broaden who may hold office. For instance, in 1898, the Ohio Supreme Court rejected an attempt to amend statutory language to allow a woman to act as a notary public because, at that time, women could not vote and therefore lacked the "qualifications of an elector."

Nevertheless, in 1917, three years before ratification of the Nineteenth Amendment gave women the right to vote and five years after the 1912 Constitution Convention resulted in the home rule amendment, the Ohio Supreme Court carved out an exception to Article V, Section 1's requirement that only male citizens possessed the qualifications of an elector. In *State ex rel. Taylor v. French*, 96 Ohio St. 172, 117 N.E. 173 (1917), the Court determined that the home rule provisions found in Article XVIII allowed the city of East Cleveland to confer in its municipal charter a right of women to vote for municipal elective officers, and to be appointed or elected to any municipal office provided for in the charter. As the Court explained it:

> The authority given by Article XVIII of the Constitution to adopt a charter, and exercise thereunder all powers of local self-government, is manifestly limited to matters of purely local and municipal concern. No power is thereby granted to legislate upon or interfere in any way with the affairs of the state government. The municipality, as well after as before the adoption of a charter, is an arm -- a part -- of the state. It could not confer upon women the right to vote for, or exercise any of the functions of, an office created by the constitution or by the general assembly. For example, Section 1, Article IV of the Constitution, makes provisions for courts to exercise the judicial power of the state. That is a matter wholly within the state governmental authority, to be provided for and regulated by the state. And to hold that a municipality could establish a court with jurisdiction in state cases, or make any other provision relating to governmental

> matters of the state or any of its subdivisions except the municipality itself, would be to confer on it powers not at all contemplated by the home-rule amendment.

Thus, despite the Court's acknowledgement that home rule might allow "qualifications of an elector" to be defined locally for local elections, the Court nevertheless supported that Article V, Section 1 governs what are the "qualifications of an elector" in all other instances.

What does the U.S. Constitution say about "electors"?

> Article I, Section 2
>
> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> The only other references to "Electors" in the U.S. Constitution occur with regard to the Electoral College. The first reference to the college is contained in Article II, Section 1:
>
> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows
>
> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.
>
> The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of

> all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.
>
> The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

Other references occur in Amendments 12, 14, 17, 23, and 24; however, none of these references specifically define "elector." The one that comes closest is Amendment 17, providing:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

What specific rights and privileges does one lose by losing the ability to be an elector?

There is support for the concept that one may be an elector without being a voter, but that one cannot be a voter without qualifying as an elector. In a decision holding that a previously-registered juror whose name had been removed from the active voting rolls nevertheless qualified to serve as a juror, one court stated:

> There is a difference between an elector and a voter. The voter is an elector who votes. An elector may not have her name on the registration list at all. She may not vote, but she still retains her qualification of an elector. The juror in question passed all the necessary qualifications of an elector as required by Article V, Section 1, of the constitution and the fact that she neglected to re-register in nowise affected her status as an elector.

State v. Roche, 135 N.E.2d 789 (Franklin Cty. Ct. App. 1956).

What happens to elected officials who are temporarily disabled; do they lose the privileges or qualifications of an elector?

It is unclear what, if any, statutory law governs this situation. With regard to judges, R.C. 2701.11 provides:

> Subject to rules implementing this section and section 2701.12 of the Revised Code that shall be promulgated by the supreme court, upon written and sworn complaint setting forth the cause or causes and after reasonable notice thereof and an opportunity to be heard, any judge may be retired for disability, removed for cause, or suspended, without pay, for cause by a commission composed of five judges of this state, all of whom shall be appointed by the supreme court from

> among judges of the courts of record located within the territorial jurisdiction in each of any five of the appellate districts, not including that within which the respondent judge resides.

R.C. 2701.12(B) clarifies that grounds for retirement of a judge for disability exist "when he has a permanent physical or mental disability which prevents the proper discharge of the duties of his office." Further, division (C) of that section indicates there are grounds for suspension without pay for disability exist when the judge "has a physical or mental disability which will prevent the proper discharge of the duties of his office for an indefinite time." These statutes do not mention "qualifications of an elector," or indicate that the judge's status as an "elector" is at all affected by the disability or the removal or suspension from office.

A cursory review of the Revised Code suggests that there is no equivalent statutory law governing other elected officials who become mentally or physically disabled while in office. Nor is there any law suggesting that any elected official loses his or her status as an elector if he or she becomes disabled.

Several sections of the Ohio Constitution address the removal from office of officials who engage in misconduct (see Article II, Sections 5, 23, 24, and 38; Article IV, Section 17; and Article V, Section 4). Article II, Section 24 indicates a judgment of impeachment does not extend further than "removal from office and disqualification to hold any office," while Article V, Section 4 allows the General Assembly to enact laws to prevent persons who have committed felonies from being "eligible to office." Neither of these two sections indicate such a person loses his or her status as an "elector."