



THE COMMONWEALTH OF MASSACHUSETTS  
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September 2, 2015

Stephen Babbitt  
17 Court Street  
Boston, MA 02108

Re: Initiative Petition No. 15-21: A Law Relative to Preventing the Commonwealth of Massachusetts, Counties, Municipal Entities, and Public Institutions from Working with Holocaust Denial Organizations

Dear Mr. Babbitt:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was submitted to the Attorney General on or before the first Wednesday of August of this year.

I regret that we are unable to certify that the proposed law complies with the requirements of Article 48, the Initiative, Part 2, Sections 2 and 3. Section 2 states in pertinent part: "No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: . . . freedom of speech[.]" As explained below, the law proposed by this petition would discriminate against certain speech based on its content and therefore is inconsistent with this right as guaranteed in Article 16 of the Declaration of Rights, Mass. Const. Pt. I, as amended by Mass. Const. amend. art. 77 ("The right of free speech shall not be abridged.").<sup>1</sup> Our decision, as with all decisions on certification of initiative petitions, is based solely on art. 48's legal standards and it does not reflect any policy views the Attorney General may have on the merits of the proposed law.

The proposed law would exclude any "holocaust denial organization" from distributing information or facilitating activities on the premises of public institutions or to their employees, clients, and students. This prohibition would apply to any organization that denies the Jewish, Armenian, or Ukrainian holocausts; lobbies publicly or privately against their recognition; or is a

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<sup>1</sup> We need not now resolve whether the proposed law would be inconsistent with other enumerated rights set forth in Article 48, such as the right to peaceably assemble.

“front” for another organization that engages in such activities. The prohibition would apply on property owned by the state, counties, cities and towns, law enforcement organizations, and educational institutions receiving state funds. It would apply whether or not the information being distributed includes holocaust denial or arguments against official recognition of the Jewish, Armenian, or Ukrainian holocausts.

In interpreting the free speech protections of art. 16, the Supreme Judicial Court and the Justices have frequently looked for guidance to federal decisions interpreting the First Amendment of the federal constitution. E.g., Opinion of the Justices, 430 Mass. 1205, 1208-09 & n.3 (2000). Under such decisions, “a content-based speech restriction . . . can stand only if it satisfies strict scrutiny. . . . If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. . . . If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) (citations omitted).

Governmental efforts to restrict speech because of content are presumptively invalid. Commonwealth v. Lucas, 2015 WL 4643550 (statute criminalizing false statements about political candidates was an unconstitutional restriction on free speech.) Content-based restrictions have historically been permitted for only a few specific categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so called “fighting words,” child pornography, fraud, true threats, and speech presenting a grave and imminent threat. United States v. Alvarez, 132 S. Ct. 2537, 2544, 183 L.Ed.2d 574 (2012); United States v. Stevens, 559 U.S. 460, 468-470 (2010).

No exception allows content-based restrictions on false statements based on their falsity alone. Alvarez, 132 S. Ct. at 2544-2545. In Alvarez, the Supreme Court held that the remedy for speech that is false is speech that is true. 132 S. Ct. at 2550. Similarly, in Lucas, the SJC concluded that the First Amendment presupposes that right conclusions are more likely to be found from a multitude of voices rather than from an authoritarian selection of voices. 2015 WL 4643550. The Supreme Court has recognized that one of the costs of the First Amendment is protection of speech we detest as well as speech we embrace. Alvarez, 132 S. Ct. at 2551. Courts have generally applied “the most exacting scrutiny” to statutes restricting speech on the basis of content, Alvarez, 132 S. Ct. at 2548 (cf. concurring opinion in which Justices Breyer and Kagan apply intermediate scrutiny.)

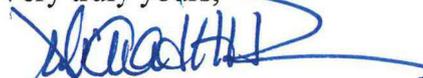
Initiative Petition 15-21 would bar holocaust denial organizations from diffusing information, which act necessarily incorporates speech, on public property, which includes such traditional public forums as sidewalks and parks. The restriction would be content-based, as the prohibition would be triggered only based on the viewpoint held by these organizations. Restricting the speech of holocaust denial organizations does not seem to fall within any of the exceptions that allow for such restrictions, such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. Even if the assertions of the holocaust denial organizations are false, that alone is not a basis for a content-based restriction.

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As a content-based restriction on speech, it is difficult to see how such a law would survive strict scrutiny or even intermediate scrutiny. The interests that the proponents claim the proposed law seeks to advance are to prevent lobbying by holocaust denial organizations and to prevent such organizations from approaching schools in order to disseminate information denying the enumerated holocausts. It is unlikely that preventing organizations from engaging in lobbying to further their viewpoints would be considered a sufficient government interest to survive intermediate or strict scrutiny. Even if the government had a legitimate interest in restricting this information in public educational settings, there would be narrower means of advancing such an interest than the broad prohibitions proposed by this initiative petition.

For the foregoing reasons, we are unable to certify Petition 15-21 as meeting the requirements of art. 48.

Very truly yours,



Juliana deHaan Rice  
Deputy Chief, Government Bureau  
617-963-2583

cc: William Francis Galvin, Secretary of the Commonwealth