THE COMMONWEALTH OF MASSACHUSETTS
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September 1, 2021

Jon Fetherston
98 Heritage Ave.
Ashland, MA 01721

Re: Initiative Petition No. 21-01, "To make it a felony to target another's ability to make a living due to postings on social media and or other media platforms"

Dear Mr. Fetherston:

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 this year. I regret that we are unable to certify that the proposed law complies with Article 48. Our decision, as with all decisions on certification of initiative petitions, is based solely on art. 48's legal standards and does not reflect the Attorney General's policy views on the merits of the proposed law.

Below, we describe the proposed law and then explain why we cannot certify it due to the operation of Article 48, The Init., Pt. 2, § 2, ¶ 3, which excludes initiative petitions that are "inconsistent with … freedom of speech." We also explain why are unable to certify the petition for the additional reason that it does not "propose a law" in proper form for submission to the people, as required by Article 48, The Init., Pt. 2, § 3. Finally, although not dispositive on the question of certification, we offer some thoughts on the requirements for original signatures and voter registration certificates that might be helpful should you choose to file another petition in the future.

Description of Petition

The entire petition reads, "To make it a felony to target another's ability to make a living due to postings on social media and or other media platforms." This proposed law would criminalize social media postings undermining the professional standing of another person or organization. We understand from a communication with another of the original signers that, in fact, the petition is aimed at any effort to use someone's social media postings to try to get the author of the postings fired. The certification issues identified herein are the same under either

interpretation of the text.

The Proposed Law is Inconsistent with the Freedom of Speech and, Therefore, is Excluded from the Initiative Petition Process.

Initiative petitions are invalid under Amend. Art. 48 of the Massachusetts Constitution if they are, among other things, "inconsistent with … freedom of speech." Article 48, The Init., Pt. 2, § 2, ¶ 3. Freedom of speech in Massachusetts is protected by Article 16 of the Commonwealth's Declaration of Rights, which may provide broader protection than the First Amendment. See Massachusetts Coalition for the Homeless v. City of Fall River, 486 Mass. 437, 440 (2020). The law proposed by this petition would criminalize any online speech having to do with the professional efforts of another person or organization. Because a court would need to evaluate the content of particular speech to determine whether the law applied to it, the law would be viewed as a content-based restriction. See Commonwealth v. Lucas, 472 Mass. 387, 395 (2015). Content-based restrictions on speech are subject to strict judicial scrutiny and will be invalidated unless the government can prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. See Massachusetts Coalition for the Homeless, 486 Mass. at 442-443. Even false statements are protected under the First Amendment and Art. 16. See Lucas, 472 Mass. at 399.

This petition would criminalize a wide array of social media posts concerning the business or career of any other person. It would apply to constitutionally protected expressions of opinion, descriptions of personal experience, and many other statements made on-line. Professional or amateur reviews of restaurants, literature, theatrical or musical performances, artwork, and other publicly offered creative endeavors could fall within the ambit of the proposed law. Because the contours of the prohibited conduct are not clearly specified and because the law would criminalize much constitutionally protected speech, a court would be likely to conclude that it is unconstitutionally vague, overbroad, or both. See Schoeller v. Board of Registration of Funeral Directors and Embalmers, 463 Mass. 605, 611-612 (2012) (law is constitutionally infirm if it fails to advise persons of common intelligence what it prohibits or if it subsumes within its reach a substantial amount of protected speech).

This petition does not fare any better under the alternative reading you offered: that the prohibition would not apply to an author's social media posts themselves but rather to the reliance by a third person on the author's social media posts to interfere with the author's employment status. Under this reading, the proposed law would prohibit communications with someone's employer, customers, or clients concerning that person's social media posts. Read this way, the law would still be a content-based restriction subject to strict scrutiny. It could criminalize a parent's expression of concern to a day-care operator about an employee's social media post advocating the benefits of frequent corporal punishment or complaints by a medical-practice patient about a doctor's on-line statements in favor of treating female hysteria with leeches, both of which would be constitutionally protected forms of speech.

Even if the government could establish a compelling interest in criminalizing statements

made on or about social media (which could be true, false, or not demonstrably either), the proposed law is not narrowly tailored to advance that interest. Content-based restrictions on speech 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, 130 S. Ct. 1577 (2010). Although this proposed law could apply to fraudulent or defamatory speech, its reach is far broader. Under the examples above, it would include a large swath of constitutionally protected speech. Moreover, it would not put persons of common intelligence on notice of what statements they could or could not make with impunity. We are therefore constrained to conclude that the proposed law is inconsistent with the freedom of speech and excluded from the initiative petition process of Amend. Art. 48 on that basis.

The Proposed Law is Not in Proper Form for Submission to the Voters

The Attorney General's duty of certification under Amend. Art. 48 requires her to determine whether "the measure and the title thereof are in proper form for submission to the people." *See* Amend. Art. 48, The Init., Pt. II, § 3. An initiative petition that does not propose a law (or a constitutional amendment) is not in proper form for certification by the Attorney General. *See* Amend. Art. 48, The Init., Part II, § 1 ("An initiative petition shall set forth the full text of the … law . . . which is proposed by the petition."); Paisner v. Attorney General, 390 Mass. 593, 598-599 (1983) (to be in proper form for submission to the voters, initiatives under Article 48 must propose either a constitutional amendment or a law). For purposes of Article 48, the Supreme Judicial Court has described a law "as including a measure with binding effect, or as importing 'a general rule of conduct with appropriate means for its enforcement by some authority possessing sovereign power over the subject; it implies command and not entreaty.'" Mazzone v. Attorney General, 432 Mass. 515, 530-31 (2000) (citing Opinion of the Justices to the House of Representatives, 262 Mass. 604, 605 (1928)).

This petition does not propose a law that voters could enact without further legislative implementation. It is not clear from the petition text what acts are prohibited or what the punishment for violation of the law would be. Thus, the measure does not meet the definition of a "law" set forth in Mazzone. As such, this petition is a "nonbinding expression of opinion" and not a "law" that may be proposed via art. 48. See Paisner, 390 Mass. at 601.

A Note About Original Signatures and Voter Registration Certificates

In order to be filed with the Attorney General for certification, initiative petitions must be signed by "ten qualified voters of the commonwealth." Amend. Art. 48, The Init., Pt. II, § 3. With respect to these signatures, Art. 48 goes on to specify that, "[p]rovision shall be made by law for the proper identification and certification of signatures to" initiative petitions. Amend. Art. 48, General Provisions, Pt. I. The Legislature has enacted G.L. c. 53, § 22A, which provides in pertinent part that, "[c]ertificates showing that each of the ten original signers is a registered

voter at the stated address, signed by a majority of the registrars of voters, shall accompany an original initiative or referendum petition." Even if this section does not mandate the filing of voter registration certificates (VRCs) with the Attorney General, we have historically relied on VRCs to establish compliance with Art. 48's original signature requirement.

Submission of VRCs for the ten original signers of an initiative petition filed with the Attorney General on or before the first Wednesday in August conclusively demonstrates satisfaction of Art. 48's initial signature requirements. See Compton v. State Ballot Law Comm'n, 311 Mass. 643, 651-652 (1942). The burden on petitioners of securing adequate VRCs and submitting them to the Attorney General is minimal: VRCs are statutorily required for filing certified petitions with the Secretary of State in September, see G.L. c. 53, § 22A, and the Attorney General returns original VRCs to petitioners to re-use for that purpose.

This petition was filed on or about April 15 with ten signatures but only nine voter registration certificates. A computer print-out was supplied for the tenth signer, stamped with a facsimile of the Town Clerk's signature. This print-out does not satisfy the statutory requirement that a VRC must be signed by a majority of the registrars of voters. See G.L. c. 53, § 22A. I brought this deficiency to your attention by an email dated May 4 and a letter dated May 21 and invited you to rectify the problem by filing an appropriate VRC for the tenth signer on or before the constitutional filing deadline of August 4, but you did not do so.

Because of the other obstacles to certification discussed above, we do not reach the issue of whether the deficiency in your VRCs would preclude us from certifying that your petition met the initial signature requirements of Art. 48 when filed. Even if we determined that the documentation you supplied was sufficient to demonstrate compliance with the signature requirement, a reviewing court might disagree in the event the validity of your petition were to be challenged. We bring this concern to your attention in the event you file another petition in the future so that you can be sure to file adequate VRCs to establish beyond doubt that the initial signature requirements of Art. 48 have been met.

For the reasons discussed above, the Attorney General's Office is unable to certify that Petition No. 21-01 meets the constitutional requirements for certification set by Amendment Article 48.

Very truly yours,

Anne Sterman
Deputy Chief, Government Bureau
617-963-2524

cc: William Francis Galvin, Secretary of the Commonwealth