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September 1, 2021

Summer Schmaling
32 Indian Path Road
Halifax, MA 02338

Re: Initiative Petition No. 21-19, Initiative Petitions for a Law Relative to Our Nation's History

Dear Ms. Schmaling:

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 for two independent reasons: (1) it is inconsistent with the right to free speech embodied in Article 16 of the Declaration of Rights and (2) it is not in proper form for submission to the people. Our decision, as with all decisions on certification of initiative petitions, is based solely on Article 48's legal standards and does not reflect the Attorney General's policy views on the merits of the proposed law.

The proposed law would amend Chapter 71 of the General Laws to add a new Section 69B, which would forbid all elementary and high school teachers from teaching "our country's history" with the "specific intent" of making their students "feel personally responsible, at fault or liable, either individually or as a member of a racial or ethnic group, for the actions or omissions of others."

The Petition is Inconsistent with the Rights of Free Speech

Article 48, the Initiative, Part 2, Section 2 provides, in pertinent part, that "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," including the freedom of speech. As explained below, the proposed law is inconsistent with these rights because it would impinge on the freedom of speech.

Article 16 of the Massachusetts Declaration of Rights provides, in relevant part, that the

"right of free speech shall not be abridged." The rights protected by Article 16 – and its federal law analog the First Amendment to the United States Constitution – include a "teacher's right to academic freedom." Hosford v. School Committee of Sandwich, 421 Mass. 708, 712 (1996); Opinions of the Justices to the Governor, 372 Mass. 874, 879 (1977) (observing that teachers enjoy free speech rights and explaining that a rule compelling them to recite the Pledge of Allegiance was unconstitutional). The rights to "expression in the academic context fully implicate[] free speech concerns." Id. at 713. Nonetheless, school officials enjoy some "discretion to restrict school speech in order to further educational goals . . . [,]" including "the right to design curricula and select textbooks[.]" Conward v. Cambridge School Committee, 171 F.3d 12, 23 (1st Cir. 1999). Thus, while teachers retain their "right to free speech in school," the government also may, under certain circumstances, "limit classroom speech to promote educational goals." Ward v. Hickey, 996 F.2d 448, 452 (1st Cir. 1993). In accounting for these competing interests, Courts generally find that a school may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern, and (2) the school provided the teacher with notice of what conduct was prohibited. Id.

Assuming, as the Attorney General's Office does on the limited record before it, see Associated Industries of Massachusetts v. Attorney General, 418 Mass. 279, 286-87 (1994); Yankee Atomic Elec. v. Secretary of the Commonwealth, 402 Mass. 750, 759 (1988), that the proposed law is reasonably related to a legitimate pedagogical concern, the proposed law nonetheless fails to provide teachers with a comprehensible and workable way of knowing what conduct is proscribed by this proposed law. School teachers have a right to know what pedagogical conduct is forbidden by a law. See Ward, 996 F.2d at 453. "If teachers must fear retaliation for every utterance, they will fear teaching." Id. This danger – that a law proscribing certain teachings fails to "clearly inform teachers what is being proscribed" – can have a "chilling effect upon the exercise" of free speech rights. Id.; see also Opinions of the Justices, 372 Mass. at 879 (discussing need to avoid chilling teachers' speech).

Here, the proposed law does not clearly inform teachers what speech is barred when teaching "our country's history" in their classrooms. As an initial matter, even the term "our country's history" is undefined, making the subject of this proposed law vague and ambiguous. Teachers are also left to guess what instruction is forbidden by this proposed law by judging not only their own subjective intent in teaching certain material to their students but also their students' subjective feelings in receiving that information. This leaves teachers in a precarious and untenable bind: having to determine curriculum choices about "our country's history" based on their own intentions and their perceptions of their students' feelings. This proposed law provides no workable guardrails for teachers, and thus the proposed law is inconsistent with their free speech rights.

This proposed law also may be inconsistent with other free speech protections afforded by Article 16. Because the standards set forth in this proposed law are unmanageably nebulous, it is also constitutionally overbroad. See Commonwealth v. Ora, 451 Mass. 125, 128 (2008) (explaining that a law may be declared overbroad, and thus unconstitutional, if it prohibits a substantial amount of constitutionally protected speech). A law is overbroad and violates free

speech rights where it "prohibits a substantial amount of protected speech." Schoeller v. Board of Registration of Funeral Directors and Embalmers, 463 Mass. 605, 612 (2012); see also Opinions of the Justices to the Governor, 372 Mass. 874, 879 (1977) (explaining that statutes that infringe upon free speech rights must be precise and narrowly drawn).

Read literally, a teacher could violate this proposed law based on their students' feelings in receiving instruction, and as a result, teachers' speech about "our country's history" is chilled by this proposed law. This chilling effect is particularly acute here because the proposed laws terms are undefined and dependent upon subjective feelings and intentions. This is to say nothing of students, who also enjoy their own free speech rights to receive information in school, and whose rights may also be impacted by the proposed law. See Bd. of Educ., Island Trees Free School Dist. v. Pico, 457 U.S. 853, 866-67, 875 (1982) (plurality opinion) (holding that a school could not remove certain materials from its library to impose a "political orthodoxy" on students); see also Commonwealth v. Bohmer, 374 Mass. 368, 374 (1978) ("First Amendment rights must be zealously guarded in our schools in order to promote the free exchange of ideas that is central to the development of this country's younger citizens.").

The Petition is not in Proper Form for Submission to the People

Article 48 requires that an initiative petition be in "proper form for submission to the people." Art. 48, Init., II, § 3. To satisfy this requirement, "[a]n initiative petition shall set forth the full text of the … law, hereinafter designated as the measure, which is proposed by the petition." Art. 48, Init., II, § 1. As explained below, this petition does not "propose a law" and thus cannot be certified.

The proposed law is not in "proper form for submission to the people" as required by Article 48 because its provisions are so ambiguous that it is impossible to determine, or inform potential voters of, the proposed law's meaning an effect. 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."). The "proper form" requirement was originally designed primarily to avoid "errors of draftsmanship." Nigro v. Attorney General, 402 Mass. 438, 446 (1988). As stated by one of the framers of Article 48, "the object is this: That we shall have a responsible officer … to certify that there are no mistakes." Id. (quoting 2 Debates in the Massachusetts Constitutional Convention, 1917-18, the Initiative and Referendum at 724 (1918) (comments of Mr. Churchill)). The Attorney General's review, however, extends beyond a "narrow and technical" reading of the "proper form" requirement. See Paisner v. Attorney General, 390 Mass. 593, 598 (1983).

Particularly after Article 48 was amended in 1944 to emphasize the "[e]conomy of language and fairness" in the Attorney General's summary of a proposed law, the understanding of what constitutes "proper form" has expanded. Mass. Teachers Ass'n v. Sec'y of Commonwealth, 384 Mass. 209, 227 (1981). The "proper form" requirement, read together with the amended Article 48 requirement that the Attorney General prepare a "fair, concise summary"

of the measure, aims "to inform both potential signers and voters of the contents of the proposed law." Nigro, 402 Mass. at 447. A proposed law must include "a measure with a binding effect, or as importing a general rule of conduct with appropriate means for its enforcement declare by some authority possessing sovereign power over the subject; it implies command and not entreaty. Mazzone v. Attorney General, 432 Mass. 515, 530 (2002) (quoting Opinion of the Justices, 262 Mass. 603, 605 (1928).

A petition that seeks to prohibit a vague concept in a classroom setting – an intent by a teacher to cause a forbidden feeling in the mind of a listener – is so unmanageably nebulous as to defy summary explanation by the Attorney General's Office let alone enforcement as a law. Here, the proposed law contains several highly ambiguous provisions, which make it impossible for us to determine, and inform potential voters of, the meaning and effect of the proposed law. Specifically, the proposed law does not define what it means for a teacher to "present our country's history," let alone to do so "with the specific intent of making any such students feel personally responsible, at fault or liable, either individually or as a member of a racial or ethnic group, for the actions or omissions of others." By contrast, other similar provisions in existing law are more specific. For example, G.L. c. 71, § 2 delineates the requirements for the teaching of American history, civics, and social sciences in Massachusetts public schools, and this law goes into painstaking detail about these curricular requirements, including that schools instruct students on a number of concrete, specific topics. See also G.L. c. 69, § 1D (setting statewide educational goals and academic standards). This proposed law, however, does not contain any such clear guidance, but depends instead on the subjective intentions of teachers and feelings of their pupils; these ambiguities make it impossible for a voter to know what "general rule of conduct" is proscribed by this proposed law.

Moreover, the proposed law does not provide any means for its enforcement. Unlike other provisions of G.L. c. 71, which provide fines or other penalties for noncompliance (see G.L. c. 111, §§ 4A, 26, 38F, 45, 67, 69), this proposed new section is silent as to any penalty for noncompliance. Nor does the new section fit within a larger framework for education and curricular standards. The proposed law is therefore without an "appropriate means for its enforcement" either on its face or in the context of the statute it seeks to amend.

Considering the omissions and unresolvable ambiguities described above, we cannot determine with certainty what the proposed law means or would do. The 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. Moreover, we are unable to certify that the proposed law is in "proper form," as we cannot inform voters, through a "fair, concise summary," what they are being asked to support. The purpose of Article 48's requirement that the Attorney General certify a petition to be in "proper form" is, as stated in the Debates in the Constitutional Convention of 1917-18, "[t]hat we shall have a responsible officer . . . to certify that there are no

mistakes[;] [t]hat such mistakes are possible, . . . even under the most careful, painstaking handling of the drafting of bills, every member of the Legislature knows . . . [including] mistakes which would change even the complete nature of a bill." Nigro, 402 Mass. at 446 (quoting Debates). Here, the multiple ambiguities and omissions in the proposed law appear to reflect drafting mistakes that certainly would "change . . . the complete nature" of important provisions, depending on which particular interpretations of the operative language were adopted.

For these reasons, the Attorney General's Office is unable to certify that Petition No. 21-19 complies with Article 48.

Very truly yours,

Anne Sterman
Deputy Chief, Government Bureau
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cc: William Francis Galvin, Secretary of the Commonwealth