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September 1, 2021

Bernadette Marie Lyons
12 Highvale Lane
Andover, MA 01810

Re: Initiative Petition No. 21-05: A Law to Preserve the Lives of Children Born Alive

Dear Ms. Lyons:

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 this measure is in "proper form for submission to the people," as required by Article 48, the Initiative, Part 2, Section 3. Our decision, as with all decisions on certification of initiative petitions, is based solely on art. 48's legal standards; it does not reflect any policy views the Attorney General may have on the merits of the proposed law.

The proposed law would amend Massachusetts General Laws ch. 111 to add a new Section 110D that would require, notwithstanding any general or special law to the contrary, that "if a child is born alive, all reasonable steps, in keeping with good medical practice, shall be taken to preserve the life of the child born alive."

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 also 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).

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 "a child born alive" or what is required to "preserve the life of a child born alive," nor does it specify what "reasonable steps" must be taken or who "shall" take them. By contrast, other similar provisions in existing law are more specific. For example, G.L. c. 112, § 12O requires that "the facility where the abortion is performed shall maintain life-supporting equipment." (emphasis added). 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. 111, which provide fines for noncompliance (see G.L. c. 111, §§ 110, 110B ("Whoever violated this section shall be punished by a fine of not more than one hundred dollars")), this proposed new section is silent as to any penalty for noncompliance, and therefore does not put the public – or voters – on notice as to the consequences for violating the section. See Opinion of the Justices to House of Representatives, 378 Mass. 822, 826 (1979) ("[i]t is a central tenet of our constitutional law that, as a matter of due process, a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden should be deemed void for vagueness."); see also Aleo v. SLB Toys USA, Inc., 466 Mass. 398, 413 (2013) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). Although you have told us that you believe that some form of civil liability would arise from violations of the proposed law, nothing on the face of the proposed law so specifies.

Nor does the new section fit within a larger framework for enforcement. You have told us that placement of the proposed law within Section 110 of Chapter 111 of the General Laws would afford the Department of Public Health the ability to promulgate regulations or otherwise clarify the obligations imposed by the proposed law. However, the proposed law does not direct, or even explicitly permit, the Department of Public Health to promulgate such regulations, nor is there such a generally applicable provision elsewhere in Section 110. 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 the foregoing reasons, Petition No. 21-05 cannot be certified under art. 48.

Very truly yours,

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