



DEPARTMENT OF JUSTICE
CRIMINAL JUSTICE DIVISION

August 29, 2018

Stephen N. Trout
Secretary of State's Office – Elections Division
255 Capitol Street NE, Suite 501
Salem, Oregon 97310-0722

RE: Nikki Condon and Shilo Gest-Vigil Complaint
Elections Division Case 18-005
Criminal Justice Division Matter CJD0111-18

Dear Mr. Trout,

In late February, 2018, we received your referral requesting that the Criminal Justice Division investigate a complaint that two individuals were circulating a petition (IP 22) for signatures in downtown Portland and, in doing so, made false statements about the intent and purpose of the proposed measure. The request was based on information you received from Robin Fisher, which included her written complaint and a link to a video she posted on YouTube. The video depicts a recorded conversation between Ms. Fisher and Nikki Condon, who was one of the individuals circulating IP 22 and the subject of Ms. Fisher's complaint.

In response to your request, we conducted an investigation to determine whether sufficient evidence exists to prove beyond a reasonable doubt—the criminal law standard of proof—that either of the named individuals circulating IP 22 committed a criminal election law violation. In our investigation, we interviewed Ms. Fisher and Mr. Condon, as well as other individuals, and we reviewed the petition sheets and other documents provided by your office. It must be noted that because Ms. Fisher did not specifically inform Mr. Condon that she was recording the conversation, the video recording could not be considered as evidence in our criminal investigation. (See ORS 165.540 and ORS 41.910.)

In sum, our investigation did not reveal sufficient evidence that either circulator violated ORS 260.555, which prohibits, among other things, making a false statement regarding the contents, meaning, or effect of a petition. To prove a violation of that statute, the state would have to be able to prove beyond a reasonable doubt (1) that a circulator made a specific statement, (2) that the statement was in fact false, and (3) that the circulator knew the statement was false at the time the circulator made the statement.

As a threshold matter, we would not be able to prove the verbatim words spoken by either circulator when circulating the petition.¹ That is because the witnesses we interviewed told

¹ Ms. Fisher did not specifically hear any statements made by Shilo Gest-Vigil and we have been unable to locate him. For purposes of our analysis, we have assumed Mr. Gest-Vigil's statements to signers and potential signers were similar to those Ms. Fisher has attributed to Mr. Condon.

us differing versions of the circulators' statements and we cannot determine with sufficient certainty what was actually said.

Moreover, we would not be able to demonstrate that the statements were false within the meaning of the statute. First, some versions of the statements ascribed to the circulators related to the proponent's motive for circulating the petition, not to the specific contents, meaning, or effect of the petition itself. In that sense, those versions resemble wording the proponents have used to promote the petition: "If you sign our petition, you will be allowing voters to decide if Oregon should be a Sanctuary State." (<https://www.stoporegonsanctuaries.org/>). Second, we do not feel we can meet our burden to prove that the statements were actually false, as opposed to potentially misleading. In interpreting a related statute, the Supreme Court has said that, "[s]tatements are not 'false' [if] any reasonable inference can be drawn from the evidence that the statement is factually correct."² The court further clarified that the "mere possibility of an inference of falsity" is not sufficient, if "the evidence may also give rise to a reasonable inference of correct fact[.]" *Id.* Applying that standard to the facts we developed in our investigation, we could not prove that the circulators' statements were false beyond a reasonable doubt.

In conclusion, there is insufficient evidence to support a criminal prosecution for violations of ORS 260.255. Accordingly, we are referring the complaint back to your agency.

We will close our file at this time. Please do not hesitate to contact me if you have any questions or wish to discuss this further.

Sincerely,



Michael J. Slauson
Chief Counsel
Criminal Justice Division

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² *Comm. of 1000 v. Eivers*, 296 Or 195, 202 (1983) (interpreting ORS 260.532).