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#95031
NO.
STATE OF NEBRASKA
OFFICIAL
APR 19 1995
DEPT. OF JUSTICE

DATE: April 18, 1995

SUBJECT: LB 337 - Constitutionality of Legislation Regulating the Initiative and Referendum Petition Process; Impact of LR 6CA on LB 337

REQUESTED BY: Senator M.L. Dierks
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested the Attorney General's opinion on three questions relating to the constitutionality of LB 337, and the relationship between LB 337 and LR 6CA - both of which pertain to the initiative and referendum petition process.

I. Constitutionality of LB 337

Your first question is "whether the provisions of LB 337, which include requirements for public hearings, publication and distribution of information, submission of proposals to the Revisor of Statutes, minimum residency requirements of petition circulators, and labeling of petition forms violate the current version of the Nebraska Constitution. . . ." To answer this question, we must analyze the provisions of LB 337 in light of Neb. Const. art. III, § 4 and Nebraska case law interpreting that provision. To fully address your question, it is also necessary to examine the provisions of LB 337 under the First Amendment.

A. Provisions of LB 337

LB 337 (as printed in the Enrollment and Review Amendment) (AM 7061) (March 16, 1995) amends portions of Nebraska's Election Act

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and repeals original sections 32-101, 32-202, 32-628, 32-1404, 32-1405, 32-1409, and 32-1413. The substantive provisions, for purposes of this discussion, are as follows:

Section 2 requires the Secretary of State to develop a manual for election commissioners and county clerks describing the initiative and referendum process.

Section 3 amends Neb. Rev. Stat. § 32-628 (Cum. Supp. 1994) to require that each sheet of a petition contain a statement in sixteen-point or larger type in red ink specifying whether the petition is being circulated by a paid circulator or a volunteer circulator.

Section 4 amends § 32-1404 to require that petition circulators shall have been registered to vote in Nebraska for one month prior to circulating an initiative or referendum petition.

Section 5 requires that a statement of the object of the petition and the text of the measure be filed with the Secretary of State prior to obtaining any signatures. This section further provides:

> (2) Upon receipt of the filing, the Secretary of State shall transmit the text of the proposed measure to the Revisor of Statutes. The Revisor of Statutes shall review the proposed measure and suggest changes as to form and draftsmanship. The revisor shall complete the review within ten days after receipt from the Secretary of State. The Secretary of State shall provide the results of the review and suggested changes to the sponsor but shall otherwise keep them confidential for five days after receipt by the sponsor. The Secretary of State shall then maintain the opinion as public information and as a part of the official record of the initiative. The suggested changes may be accepted or rejected by the sponsor.
>
> (3) The Secretary of State shall prepare five camera-ready copies of the petition from the information filed by the sponsor and any changes accepted by the sponsor and shall provide the copies to the sponsor within five days after receipt of the review required in subsection (2) of this section. The sponsor shall print the petitions to be circulated from the forms provided.
>
> (4) The changes made to this section by this legislative bill shall apply to initiative and referendum petitions filed on or after the effective date of this act.

Section 6 amends § 32-1409 and provides that the election commissioner or county clerk must check the petition signer's signature, printed name, street and number or voting precinct, and city, village, or post office address with the voter registration records to determine whether the signer is a registered voter. If any of the above information from the registration records does not match the information from the petition, the signature and address are presumed to be invalid. Under current law, the signature and address are presumed to be valid if the election commissioner or county clerk has found the signer to be a registered voter.

Section 7 provides:

> (1) The Secretary of State shall develop and print one informational pamphlet on all initiative and referendum measures to be placed on the ballot. The pamphlet shall include the measure number, the ballot title and text, and the full text of each initiated or referred measure and arguments both for and against each measure.
>
> (2) The Secretary of State shall write the arguments for and against each measure, and each set of arguments shall consist of no more than two hundred fifty words. Information for the arguments may be provided by the sponsors of the measure, opponents to the measure, and other sources.
>
> (3) The Secretary of State shall distribute the pamphlets to election commissioners and county clerks at least six weeks prior to the election. The election commissioners and county clerks shall immediately make the pamphlets available in their offices and in at least three other public locations that will facilitate distribution to the public.

The Secretary of State is given full control over the contents of the arguments presented for and against each measure in the pamphlets, and no requirement of objectivity is specified.

Section 8 provides:

> After the Secretary of State certifies the initiative and referendum measures for the ballot under subsection (3) of section 32-1411, the Secretary of State shall hold one public hearing in each congressional district for the purpose of allowing public comment on the measures. Notice of each hearing shall be published once in a newspaper of general circulation in the congressional district in which the meeting will be held not less than five days prior to the hearing. The

hearings shall be held not more than eight weeks prior to the election.

B. Constitutional Requirements for Laws Regulating the Initiative and Referendum Process.

1. Initiative and Referendum are Cherished and Fundamental Rights of Nebraska Citizens.

The Nebraska constitutional provisions dealing with petitions for initiative and referendum are cherished and fundamental rights. Article III, Section 1, provides in part:

> The people reserve for themselves, however, the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature.

Article III, Section 2 provides in part:

> The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the proposed measures shall be set forth at length.

Article III, Section 3 provides in part:

> The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act.

Article III, Section 4 provides in part:

> The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation.

(Emphasis added).

In *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984), the Nebraska Supreme Court commented on the above

constitutional provisions. The court described the precious nature of the initiative and referendum process:

> By the foregoing constitutional provisions the people of the State of Nebraska have reserved the power to propose and enact laws independent of the Legislature. Consequently, the Legislature and the electorate are concurrently equal in rank as sources of legislation. Provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. ***See Klosterman v. Marsh***, 180 Neb. 506, 143 N.W.2d 744 (1966); ***State ex rel. Morris v. Marsh***, 183 Neb. 521, 162 N.W.2d 262 (1968); ***Adams v. Bolin***, 74 Ariz. 269, 247 P.2d 617 (1952). Such right reserved in the people of Nebraska is so precious and jealously guarded that the Governor cannot veto measures initiated by the people. ***See*** Neb.Const. art. III, §4.
>
> "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." ***McFadden v. Jordan***, 32 Cal.2d 330, 332, 196 P.2d 787, 788 (1948). . . .
>
> Provisions concerning the initiative, the legislative power reserved to the people, should receive liberal construction to effectuate the policy proposed and adopted by the initiative as a part of the democratic process. ***See State v. Davis***, 418 S.W.2d 163, (Mo. 1967); cf. ***State ex rel. Boyer v. Grady***, 201 Neb. 360, 269 N.W.2d 73 (1978) (powers of the initiative and referendum regarding municipalities are to be liberally construed to permit, rather than restrict, the power and to attain, rather than prevent, its object).

Id. at 636, 350 N.W.2d at 21. ***See also State ex rel Morris v. Marsh***, 183 Neb. 521, 545, 162 N.W.2d 262 (1968) ("The powers reserved to the people by initiative and referendum acts have long been regarded as sacrosanct. . . .").

2. Nebraska's Constitutional Standard of Review

Statutory enactments may not directly or indirectly limit, curtail, or destroy the rights of initiative and referendum, which are expressly declared to be self-executing. The Legislature may only facilitate the initiative process. If the Legislature hinders these rights, the statute is unconstitutional and void.

Under the Nebraska Constitution, the people, by means of the initiative and referendum, are of equal status as a legislative body with the legislature.

> Under Nebraska constitutional provisions vesting the legislative power of the state in the Legislature, but reserving to the people the right of initiative and referendum, the Legislature, on the one hand, and the electorate on the other, are coordinate legislative bodies, and there is no superiority of power between the two. In the absence of specific constitutional restraint, either may amend or repeal the enactments of the other.

Klosterman v. Marsh, 180 Neb. 506, 511, 143 N.W.2d 744, 748 (1966) (emphasis added). ***See also State ex rel. Brant v. Beermann***, 217 Neb. at 636, 350 N.W.2d at 21. Thus, an act by the legislature restricting the initiative and referendum process is similar to an act by one house of a bicameral legislature purporting to restrict the powers of the other house. Such acts must be closely scrutinized. ***See Urevich v. Woodard***, 667 P.2d 760, 762 (Colo. 1983) ("Any law that limits this `fundamental right [to petition] at the very core of our republican form of government' is viewed with the closest scrutiny."). ***See also Citizens for Financially Responsible Government v. City of Spokane***, 99 Wash.2d 339, 351, 662 P.2d 845, 852 (1983) (". . . deliberate efforts by a legislative body to circumvent the initiative or referendum rights of an electorate will not be looked upon favorably by this court.").

a. The Legislature may only make laws which facilitate the initiative process.

The Nebraska Supreme Court has construed the constitutional provisions dealing with initiative and referendum petitions as precious and fundamental rights reserved in the people free from interference by the Legislature, save only the legislative right to pass laws which facilitate the initiative and referendum process. ***Stenberg v. Beermann***, 240 Neb. 754, 485 N.W.2d 151 (1992); ***State ex rel. Morris v. Marsh***, 183 Neb. 520, 524-25, 162 N.W.2d 262, 265, 266 (1968); ***Klosterman v. Marsh***, 180 Neb. 506, 513, 143 N.W.2d 744, 749 (1966); ***State ex rel. Winter v. Swanson***, 138 Neb. 597, 598, 294 N.W. 200, 201 (1940); ***State ex rel. Ayres v. Amsberry***, 104 Neb. 273, 276-77, 177 N.W. 179, 180 (1920), *vacated*, 104 Neb. 273, 178 N.W. 822 (1920) (on unrelated jurisdictional grounds).

The Nebraska Supreme Court has consistently applied the standards set forth in ***Amsberry*** to statutes regulating the initiative and referendum process. The court's resolve to declare unconstitutional any statute which does not facilitate the

initiative and referendum process was set forth in ***Amsberry*** as follows:

> Bearing upon the question of the construction of the statute, we have to consider also the language of the initiative and referendum amendment to the Constitution as follows: "This amendment shall be self-executing, but legislation may be enacted especially to facilitate its operation." Const., art. III, sec. 1D. Under this provision, legislation permissible must be such as frees the operation of the constitutional provisions from obstruction or hindrance. Any legislation which would hamper or render ineffective the power reserved to the people would be unconstitutional.
>
> . . .
>
> Laws to facilitate the operation of the amendment must be reasonable, so as not to unnecessarily obstruct or impede the operation of the law.

Id. at 276, 277, 177 N.W. at 180 (emphasis added).

> The amendment under consideration reserves to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their act. The law should be construed, if possible, so as to prevent absurdity and hardship and so as to favor public convenience.

Id. at 278, 177 N.W. at 180.

Legislation which may be enacted to facilitate the operation of the initiative process must be reasonable so as not to obstruct or impede unnecessarily the operation of the law. ***Id.*** at 277, 177 N.W. at 180. ***See State ex rel. Winter v. Swanson***, 138 Neb. 597, at 599, 294 N.W. 200, at 201 (1940). The ***Amsberry*** test was applied by the Nebraska Supreme Court as recently as 1992 in ***Stenberg v. Beermann***, 240 Neb. 754.

i. The word "facilitate" means to "make easy" or "less difficult".

The word "facilitate" is a common term and is always defined as meaning:

> . . . to make easy or less difficult; to free from difficulty or impediment, as to facilitate the execution of a task; to free more or less completely from hindrance

> or obstruction; to free from difficulty, obstruction or hindrance; to lessen the labor of; to make more easy or less difficult; to assist.

35 C.J.S. Facilitate, pgs. 487, 488 (1960). Both Black's Law Dictionary, p. 531 (5th ed. 1979) and Webster's New Collegiate Dictionary, p. 410 (1974), confirm this common sense definition. Legislative acts which unnecessarily restrict the petition process impede rather than facilitate (make less difficult) the operation of Article III, §§ 2-3.

ii. The effect of legislation regulating the powers of initiative and referendum must be examined from the perspective of individual citizens.

The first and second rights reserved to the people of the State of Nebraska are the powers of initiative and referendum. Although these powers are a right of the "people", they are individual rights as well. They can be exercised by any one citizen. Consequently, legislation regulating the powers of initiative and referendum must be examined from the perspective of individual citizens. ***See, e.g., Colorado Project-Common Cause v. Anderson***, 178 Colo. 1, 6, 495 P.2d 220, 222 (Colo. 1972) ("Any legislation which directly or indirectly limits, curtails or destroys the rights given by [constitutional initiative] provisions is invalid as violative of the rights reserved by the people themselves.").

b. Legislation which prevents fraud or renders intelligible the purpose of the proposed law is generally permissible under article III, § 4.

In ***State ex rel. Winter v. Swanson***, 138 Neb. 597, 599, 294 N.W. 200, 201 (1940), the court stated:

> We think the constitutional provision authorizing the legislature to enact laws to facilitate the operation of the initiative power means that it may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment. ***See State v. Amsberry***, 104 Neb. 273, 177 N.W. 179. Any legislative act which tends to insure a fair, intelligent, and impartial result on the part of the electorate may be said to facilitate the exercise of the initiative power.

Id. Thus, prevention of fraud is a legitimate statutory purpose. However, any provision with this purpose must be reasonable, and not contradict the general rules discussed above. This would exclude "anti-fraud" measures which do nothing to prevent fraud beyond the prevention inherent in restrictions which hamper or render the initiative power ineffective by reducing the number of citizens involved.

It is longstanding law in Nebraska that "Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved." ***Lawrence v. Beermann***, 192 Neb. 507, 508, 222 N.W.2d 809, 810 (1974); ***Ayres v. Amsberry***, 104 Neb. at 278, 177 N.W. at 180; ***Klosterman v. Marsh***, 180 Neb. at 513, 143 N.W.2d 749. In ***State ex rel. Morris v. Marsh***, the court stated, "The decisions almost universally hold that the power of initiative must be liberally construed to promote the democratic process and that the right of initiative constitutionally provided should not be circumscribed by restrictive legislation. . . ." 183 Neb. at 531, 162 N.W.2d at 269.

C. Analysis of LB 337 under Article III, § 4.

At issue, then, is whether the provisions of LB 337 restrict, hamper, obstruct, limit, or impede the right of initiative and referendum, or whether the provisions facilitate the process. Permissible provisions to "facilitate" the process include those which prevent fraud, or render intelligible the purpose of a proposed law or insure a fair, intelligent or impartial result on the part of the electorate. We will examine each section, of LB 337, separately.

Section 2, which requires development of a manual for election officials, clearly facilitates the initiative and referendum process. **Section 5**, which requires submission of proposed measures to the Revisor of Statutes for comment, serves to "render intelligible the purpose of the proposed law or constitutional amendment" and "tends to insure a fair, intelligent, and impartial result on the part of the electorate." Consequently, it is also constitutionally permissible. We note that this conclusion is based, in part, on the fact that the delays associated with Section 5 are minimal, and that the petition sponsor is free to reject any changes suggested by the Revisor of Statutes.

Section 7, which requires development of informational pamphlets, is likely constitutional as well, as it arguably "tends to insure a fair, intelligent, and impartial result on the part of the electorate." We caution, however, that if the "arguments both for and against" prepared by the Secretary of State are not

objective, the provision could have the effect of hampering, or impeding the initiative process in violation of article III, § 4. Consequently, we believe a court would hold that this provision impliedly requires fairness as to the contents of the pamphlets.

Similarly, **Section 8** (public hearings) arguably tends to insure a fair, intelligent, and impartial result on the part of the electorate, and is thus permissible under article III, § 4. Such hearings would, of course, have to be conducted so as to not impede or hinder the process.

Section 3 is only slightly different from current law, and requires each sheet of a petition to contain a statement in sixteen-point or larger type in red ink specifying whether the petition is being circulated by a paid circulator or a volunteer circulator. This section is subject to some doubt, but is arguably constitutional.

In August of 1992, a suit was filed in the United States District Court for the District of Nebraska by former State Senator John DeCamp, on behalf of Nebraskans For Political Reform, challenging the constitutionality of this same provision under Neb. Const. art. III, §§ 2-4 and the First Amendment of the U.S. Constitution. The Attorney General's Office succeeded in getting the suit dismissed in October of 1992. However, the State's Motion to Dismiss was granted "based on grounds of abstention" since the issue was more properly one for state court determination. ***Nebraskans For Political Reform v. Stenberg, et al.***, 4:CV92-3118 (Memorandum and Order on Defendants' Motions to Dismiss, Oct. 13, 1992). If Section 3 of LB 337 is challenged, a court would have to determine whether the large red notice regarding whether the circulator was paid is a legitimate means to prevent fraud and/or insure a fair and impartial result, or whether it unreasonably restricts, hampers, obstructs, limits or impedes the right of initiative. The provision would also have to pass scrutiny as a restriction on free speech under the U.S. Constitution. Although it is a close question, section 3 is arguably constitutional, and this office would defend the section, if challenged, as it did in 1992.

Section 4 requires petition circulators to be registered to vote in Nebraska for one month prior to circulating an initiative or referendum petition. The Attorney General's Office has already successfully defended the general requirement that petition circulators be registered voters. In ***Clean Environment Committee v. Beermann***, Docket 486, Page 94 (Lancaster County District Court 1992), the plaintiffs alleged that the requirement that circulators be registered voters violates Neb. Const. art. III, § 3 and the

First Amendment of the U.S. Constitution. The Lancaster County District Court held, however, that

> The requirement that petition circulators be registered voters facilitates fraud prevention in concrete and substantive ways. Voter registration ensures a readily available and important means for keeping track of petition circulators. It also provides a handwriting sample for use in determining the validity of circulator signatures. When the Secretary of State or a county clerk or election commissioner has a question about some aspect of the validity of a petition or petition signature, he or she can locate the circulator by use of the voter registration records.

(Order at 5). The court also found the registration requirement does not violate the First Amendment. The Court held, "The registered voter requirement is a narrowly tailored requirement which serves the compelling state interest to prevent fraud and ensure the integrity of the initiative process without unduly burdening the right to free speech." (Order at p.6). The district court's decision was consistent with prior federal court decisions including ***Libertarian Party v. Beermann***, 598 F.Supp. 57, 65 (D.Neb. 1984), in which the court stated, "there is a compelling state interest to prevent . . . fraud. It is reasonable that petition circulators . . . be registered voters of the State of Nebraska. . . ." ***See also Merritt v. Graves***, 702 F.Supp. 828 (D.Kan. 1988) (upholding Kansas' requirement that petition circulators be registered voters).

Section 4, however, goes a step beyond these cases and imposes a requirement that circulators not only be registered voters, but that they be registered for one month prior to circulating a petition. This likely creates a constitutional infirmity, since the only requirement to <u>sign</u> a petition under the Nebraska Constitution is that the signer be a registered voter. No waiting period is imposed. ***See*** Neb. Const. art. III, §§ 2, 3. In ***Colorado Project-Common Cause v. Anderson***, 495 P.2d 220 (Colo. 1972), the court held that a Colorado statute requiring petition circulators to be registered voters "unconstitutionally diminishes the class of people permitted by the constitution to . . . circulate initiative petitions." ***Id.*** at 222. The court's decision was based on the discrepancy between the statutory requirement for circulators (registered voters only) and signers (all legal voters and qualified electors). The Court concluded, "The statutory requirement that the signing and circulating of petitions must be by <u>registered electors</u> rather than permitting <u>qualified electors</u> to carry on these functions is therefore a limitation not authorized by the constitution and is impermissible." ***Id.*** LB 337 creates a

similar disparity between the constitutional requirement under art. III, §§ 2, 3, and the statutory requirement for circulators. Thus, Section 4 would likely be held to violate Neb. Const. art. III.

This conclusion is supported by a prior Nebraska case. In 1988, the District Court of Douglas County concluded the then-existing discrepancy under Neb. Rev. Stat. §§ 32-705 and 32-713 between the qualifications to circulate an initiative petition (a "registered and qualified voter") and to sign a petition (a "qualified" voter) rendered the statutory scheme unconstitutional. On appeal, the Nebraska Supreme Court noted,

> The district court concluded the `registered voter' requirement of § 32-705, as an additional qualification to be a circulator of an initiative petition, would discourage circulation of an initiative petition and thereby curtail or discourage a form of political expression protected by the first amendment to the U.S. Constitution.

State v. Monastero, 228 Neb. 818, 823, 424 N.W.2d 837 (1988), *appeal dismissed*, ***Monastero v. Nebraska***, 488 U.S. 936, 109 S.Ct. 358 (1988). The Supreme Court, however, held "the district court's ruling concerning § 32-705 was unnecessary for disposition of the defendants' constitutional challenge to § 32-713 as vague." ***Id.*** at 841. The court vacated the findings of the district court and stated "we express no opinion concerning the constitutionality of any provision of § 32-705" since the issue was not before the court. ***Id.***

Even if Nebraska courts refused to follow the reasoning employed by the Colorado Supreme Court in ***Anderson***, Section 4 likely also violates the "facilitate" requirement of Article III of the Nebraska Constitution. Although voter registration requirements for circulators have been upheld as fraud prevention measures, there would appear to be little or no increased fraud prevention by imposing a one month waiting period. The arguments used to uphold registration requirements are no stronger with a one month delay added. Consequently, a waiting period would likely be held to constitute a punitive measure designed to restrict the number of circulators, and thus unconstitutionally restrict, hamper or impede the initiative process.

Section 6 of LB 337 creates a presumption of invalidity for any signature on an initiative petition if the signer's signature, printed name, street and number or voting precinct, and city, village, or post office address do not match corresponding information in voting registration records (regardless of whether election officials determine the signer is, in fact, a registered

voter). Consequently, under the requirements of Section 6 if a person signs a petition as "Cap", but the voter registration record lists him as "Merton", or if a person lists his or her address on the petition as "Rural Route, Ewing, NE", but the voter registration records show the address as HC 81, Box 42, Ewing, NE, the signature or address would apparently be presumed invalid.

In ***State ex rel. Morris v. Marsh***, 183 Neb. 521, 527, 162 N.W 262 (1968), the court stated, with respect to petition signatures challenged on the basis of incomplete circulator names, "If presumptions are to be indulged in, the presumption ought to be that acts performed in the circulation of petitions are legal rather than fraudulent." ***Id.*** at 529. The court stated that in light of "the specific constitutional provisions preserving the right of initiative, presumptions must be in favor of legality rather than illegality." ***Id.*** at 528. ***See also id.*** at 531 ("The amendment under consideration reserves to the people the right to act in the capacity of legislators. The presumption should be in favor of the validity and legality of their act."). The court also validated signatures involving addresses of signers where ditto marks were used for all or part of the address. ***Id.*** at 532. Whereas the court's determination in ***Morris*** was based on constitutional requirements, we believe a Nebraska court would find Section 6 of LB 337 to be impermissible. We fail to see how this provision constitutes legislation to "facilitate" the operation of the process. On the contrary, it would appear to "impede," or "hamper or render ineffective the power reserved to the people." As such, it violates Neb. Const. art. III, § 4. ***Stenberg v. Beermann***, 240 Neb. at 756; ***Amsberry***, 104 Neb. at 276.

D. Restrictions on the Initiative and Referendum Process Must also be Scrutinized Under The First Amendment of the United States Constitution and Article I, Section 5 of the Nebraska Constitution.

In addition to examination under Article III, Section 4 of the Nebraska Constitution, restrictions on the initiative and referendum process must also be scrutinized under the free speech clauses of the First Amendment of the United States Constitution and Article I, § 5 of the Nebraska Constitution (treated herein as synonymous with the First Amendment).

Section 4 of LB 337 arguably limits the size of the audience a circulator may reach and makes it less likely the circulator will garner the number of signatures necessary to place a matter on the ballot because it requires a one month delay after registering to vote, in the event the circulator is not already registered. It is likely this portion of LB 337 would be challenged as violating the free speech clause of the First Amendment of the U.S. Constitution

and the free speech clause of Article I, Section 5 of the Constitution of the State of Nebraska.

1. Applicable First Amendment Standard of Review - Strict Scrutiny.

The circulation of initiative and referendum petitions constitutes core political speech protected by the First and Fourteenth Amendments. The United States Supreme Court has held that expression of political ideas is the highest form of protected speech and is entitled to strict scrutiny to prevent state infringement. ***See Meyer v. Grant***, 486 U.S. 414, 421, 108 S.Ct. 1886, 1892 (1988); ***State v. Monastero***, 228 Neb. 818, 825, 424 N.W.2d 837, 843 (1988), *appeal dismissed*, ***Monastero v. Nebraska***, 488 U.S. 936, 109 S.Ct. 358 (1988) ("[s]peech protected by the first amendment to the U.S. Constitution includes the free expression or exchange of ideas, the communication of information or opinions, and the dissemination and propagation of views and ideas, as well as the advocacy of causes.").

In ***State v. Radcliffe***, 228 Neb. 868, 424 N.W.2d 608 (1988), the Nebraska Supreme Court concluded a Nebraska statute prohibiting the payment of petition circulators violated the First Amendment and was of no force or effect. ***Id.*** at 872, 424 N.W.2d at 611. The court's First Amendment analysis in ***Radcliffe*** is relevant here.

> U.S. Const. amend. I provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . ." That guarantee is made applicable to the states by the requirement of U.S. Const. amend. XIV that no state "deprive any person of . . . liberty . . . without due process of law. . . ." ***Meyer v. Grant***, [486 U.S. 414, 420, 108 S.Ct. 1886, 1891 (1988)]. (Other citations omitted).
>
> The U.S. Supreme Court, in ***Meyer v. Grant***, ***supra***, recently reaffirmed that the freedom of speech guaranteed by the first amendment embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The ***Meyer*** Court went on to observe that the circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Recognizing that a petition circulator need not necessarily persuade a potential petition signer that a particular proposal should prevail, the Court observed that, nonetheless, a circulator would, in order to obtain a signature, at least have to persuade a potential signer that the matter is one deserving of the public scrutiny

> and debate that would attend its consideration by the whole electorate. The Court reasoned that in almost every case this will involve an explanation of the nature of the proposal and why its advocates support it, and thus concluded that the circulation of an initiative petition "involves the type of interactive communication concerning political change that is appropriately described as `core political speech.'" [***Meyer v. Grant***, at 421, 422, 108 S.Ct. at 1892]. As such, statutes limiting the power of the initiative are to be "`closely scrutinized and narrowly construed.'"

Id. (emphasis added). Thus, Section 4 of LB 337 would likely be subject to strict scrutiny by the courts with respect to its validity under the First Amendment.

2. The One Month Registration Requirement in LB 337 Limits the Size of the Audience a Circulator May Reach; Makes it Less Likely the Circulator will Garner the Requisite Number of Signatures, and is not Narrowly Tailored to Meet the State's Interest in Fraud Prevention.

In ***Radcliffe***, the Nebraska Supreme Court stated:

> The [U.S. Supreme] Court noted [in ***Meyer***] that it is often more difficult to get people to work without compensation than it is to get them to work for pay. Proceeding from that premise, the ***Meyer*** Court concluded that the Colorado statute restricted political expression both by limiting the number of circulators and, thus, the size of the audience reached by those who sought to initiate an amendment to the Colorado Constitution so as to exempt motor carriers from certain regulation, and by reducing the likelihood of garnering the number of signatures required to place the issue on the ballot, thereby limiting the ability of its proponents to make the issue the focus of statewide discussion.

Id. at 871, 424 N.W.2d at 610 (emphasis added). These concerns apply equally to a waiting period for newly registered circulators. Furthermore, the argument that the waiting period ensures petition drives have grass-roots support is insufficient to get the restriction past First Amendment scrutiny even supposing it were true. In ***Radcliffe***, the court stated as follows regarding ***Meyer***:

> Nor was the Court persuaded by the argument that the payment ban was justified by Colorado's interest in assuring that an initiative has sufficient grassroots

> support to be placed on the ballot. The Court observed that such interest was adequately protected by the requirement that no initiative proposal might be placed on the ballot unless the required number of signatures (at least 5 percent of the qualified voters) was obtained.

Radcliffe, 228 Neb. at 871, 424 N.W.2d at 610. As in ***Meyer*** and ***Radcliffe***, the interest in assuring that an initiative has sufficient grass-roots support is adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures is obtained.

As discussed, ***supra***, at 11, fraud prevention may constitute a compelling state interest sufficient to enable a statute to survive even strict scrutiny. ***See Libertarian Party***, 598 F.Supp. at 65. However, fraud prevention statutes must be narrowly tailored. A statute containing a one month waiting period, in addition to the registration requirement, is not narrowly tailored to meet the state's interest in fraud prevention, as it adds nothing to the safeguards discussed in ***Clean Environment Committee v. Beermann***, ***supra*** at 11. Rather it appears to be a punitive measure.

Thus, as with the restrictions in ***Meyer*** and ***Radcliffe***, the one month registration requirement in LB 337 likely violates the First Amendment. Section 4 restricts political expression by limiting the number of circulators and, thus, the size of the audience reached by those who desire to circulate petitions, and by reducing the likelihood of garnering the number of signatures required to place the issue on the ballot, thereby limiting the ability of citizens to make an issue the focus of statewide discussion. It goes beyond permissible registration requirements, and is not narrowly tailored to meet the State's interest in fraud prevention.

II. Constitutionality of LB 337 Under Proposed Constitutional Revision.

Your second question involves the constitutionality of LB 337 under LR 6CA, as amended. A recent amendment to LR 6CA would remove the limitation on legislative regulation of the initiative process as discussed in section I, above. In its place, the Nebraska Constitution would be amended to read, ". . . the Legislature may enact general laws that the Legislature deems

necessary to carry out the provisions with respect to the initiative and referendum."[1]

"General laws" are those which "embrace the whole of a subject, with their subject matter of common interest to the whole state." ***Haman v. Marsh***, 237 Neb. 699, 709, 467 N.W.2d 836 (1991). "By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provide for. . . ." ***Id.***

Thus, the amendment to LR 6CA removes virtually all restraint on legislative regulation of the referendum and initiative petition process from the Nebraska Constitution. No longer would the Legislature be prohibited from enacting legislation which would "hamper," "obstruct," "limit," or "impede" the right of initiative, so long as such legislation did not run afoul of other constitutional provisions. Consequently, the provisions of LB 337 would almost certainly be permissible within the broad parameters of "general laws" under LR 6CA, as amended. We note, however, that the amendment would not remove First Amendment constraints.

III. Ratification and Confirmation of Unconstitutional Legislation By Subsequent Constitutional Amendment.

Your final question asks whether the approval by voters in the November 1996 election of LR 6CA would have any impact on the constitutionality of LB 337, assuming it is approved in the 1995 legislative session. Specifically, you ask whether LB 337 would need to be re-enacted after November 1996.

In Op. Att'y Gen. No. 92064 (April 27, 1992), this office responded to former Senator Scott Moore's question of whether, if LB 1063 was unconstitutional when enacted, the bill would be

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[1]LR 6CA, as introduced, was clearly intended to restore the initiative and referendum process to its status prior to the Nebraska Supreme Court's decision in ***Duggan v. Beermann***, 245 Neb. 907, 515 N.W.2d 788 (1994), in which the court effectively increased the number of petition signatures required to place a proposal before the voters. Since then, a two-tiered signature requirement scheme has been incorporated into LR 6CA. As indicated in Op. Att'y Gen. No. 95005 (Jan. 26, 1995), we believe this portion of LR 6CA is unconstitutional in that it violates the First and Fourteenth Amendments by impermissibly burdening the freedom of speech.

validated by subsequent adoption of LR 219CA. Our analysis from that opinion is applicable here.

> [T]he question remains as to whether, if the property tax provisions of LB 1063 are unconstitutional for the reason articulated in part I, supra, of this opinion, the bill may be successfully defended against a constitutional challenge if LR 219CA is adopted, by virtue of the express ratification clause contained in the constitutional amendment.
>
> It is well-established that an unconstitutional statute is wholly void from the time of its enactment and is not validated by such a statute. ***E.g., Fellows v. Shultz***, 81 N.W. 496, 469 P.2d 141 (1970); ***Matthews v. Quinton***, 367 P.2d 932 (Alaska 1961; ***Banaz v. Smith***, 133 Cal. 102, 65 P. 309 (1901). ***See generally*** Annot., 171 A.L.R. 1070, 1070-1072 (1947); 16 C.J.S. *Constitutional Law* § 44 (1984); 16 Am.Jur.2d *Constitutional Law* § 259 (1979). The Nebraska Supreme Court has followed this general principle, holding that "[a]n act of the Legislature that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution authorizing it to pass such an act." ***Whetstone v. Slonaker***, 110 Neb. 343, 344, 193 N.W. 749, 749 (1923) (syllabus of the court). ***Accord State ex rel. Rogers v. Swanson***, 192 Neb. 125, 219 N.W.2d 726 (1974).
>
> An exception to this general rule is recognized, however, where a constitutional amendment expressly or impliedly ratifies or confirms an unconstitutional statute. Under these circumstances, such ratification renders valid antecedent unconstitutional legislation, without reenactment by the legislature, unless such attempted validation would impair the obligation of contracts or divest vested rights. ***E.g., Bonds v. State Dept. of Revenue***, 254 Ala. 553, 49 So.2d 280 (1950); ***Peck v. City of New Orleans***, 199 La. 76, 5 So.2d 508 (1941); ***Peck v. Tugwell***, 199 La. 125, 5 So.2d 524 (1941). ***See*** generally Annot., 171 A.L.R. 1070, 1072-1074 (1947); 16 C.J.S. *Constitutional Law* § 44 (1984); 16 Am.Jur.2d *Constitutional Law* § 259 (1979).
>
> In a previous opinion (discussed in Part I., ***supra***), we concluded that legislation designed to become operative upon the adoption of a subsequent constitutional amendment would "rest upon infirm constitutional footing, on the ground that a statute

which is contrary to the Constitution when enacted cannot be revitalized by a subsequent constitutional amendment, ..." Report of Attorney General 1965-66, Opinion No. 61, p. 89, 91. Discussing the principle articulated by the Nebraska Supreme Court in ***Whetstone v. Slonaker, supra***, that an act contrary to the Constitution when enacted is void from its enactment and is not validated by a later amendment to the Constitution authorizing its passage, we stated the following:

> True, apparently the constitutional amendment involved in the ***Whetstone*** case contained no express provision purporting to ratify or confirm the statute in question. However, the Nebraska court has been so emphatic in its pronouncements to the effect that a statute which is contrary to the form of the Constitution when enacted is, for all purposes absolutely null and void and is as though the statute had never been passed in the first instance, that we are inclined to believe that the court would adopt the view that a statute which is in its terms contrary to the Constitution at the time of passage can never be validated by any constitutional amendment, even though such amendment might contain a ratification clause.

Report of Attorney General 1965-66, Opinion No. 61, *supra*, at 91.

. . .

While LR 219CA contains an express ratification clause purporting to validate legislation enacted during the 1992 regular legislative session, there is no guarantee that our state supreme court would uphold the effectiveness of such an attempt to revitalize LB 1063, should it be determined that the statute was contrary to the Constitution when enacted.

For these reasons it is our strong recommendation that if LR 219CA is approved by the voters, that the Legislature reconvene for the purpose of re-enacting LB 1063 or its equivalent. Any other course of action would be nothing more than a legal gamble, which if lost, could have very serious consequences for the people of Nebraska.

Op. Att'y Gen. 92064 at 7-9. This opinion was further validated just three months later when the Nebraska Supreme Court held, in ***Jaksha v. State***, 241 Neb. 106, 110, 486 N.W.2d 858 (1992), that although the people of the state voted on May 12, 1992, to amend the uniformity clause of article VIII, § 1, that LB 829 (which was being challenged in the case) had to be reviewed under the Constitution as it existed on June 11, 1991.

We believe the Nebraska Supreme Court would follow the general rule set forth in ***Whetstone*** and ***Rogers v. Swanson***, and hold that an act of the Legislature (LB 337 in this case) that is forbidden by the Constitution at the time of its passage is absolutely null and void, and is not validated by a subsequent amendment to the Constitution. This is especially likely since LR 6CA contains no ratification clause purporting to validate LB 337. Consequently, we conclude LB 337, to the extent it violates Neb. Const. art. III, § 4, would need to be re-enacted after November 1996 under the scenario set forth in your opinion request.

IV. Conclusion and Summary

In response to your first question, we conclude that of the nine sections of LB 337, two sections are unconstitutional. Section 4's one-month waiting period for newly registered petition circulators violates Article III of the Nebraska Constitution as well as the First Amendment of the United States Constitution. Section 6's presumption of invalidity for signatures and addresses not matching voting records violates Article III, § 4 of the Nebraska Constitution.

In response to your second question, LR 6CA, as amended, removes virtually all restraint on legislative regulation of the initiative and referendum process from the Nebraska Constitution. Consequently, Sections 4 and 6 of LB 337 would be permissible within the broad parameters of "general laws" under LR 6CA, as amended. Section 4, however, would still be subject to challenge under the First Amendment.

Finally, in response to your third question, we believe LB 337 would need to be re-enacted after November 1996 in order for

Sections 4 and 6 to be adjudicated under the more lenient standard in LR 6CA, as amended.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:

Attorney General

cc: Clerk of the Legislature

3-2008-3