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STATE OF NEBRASKA
OFFICIAL
MAR 15 1993
DEPT. OF JUSTICE

DATE: March 15, 1993

SUBJECT: LB790 - A proposal to restrict public issue picketing and prohibit "interference" with medical facilities, personnel, and patients.

REQUESTED BY: Senator John Lindsay

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

You have requested an Attorney General's Opinion concerning the constitutionality of LB790, a proposal to restrict public issue picketing and prohibit "interference" with medical facilities, personnel, and patients.

LB790 provides in part, as follows:

> Sec. 3. A person shall not prevent or act in concert with other persons with the intent to prevent an individual from entering or exiting a medical facility or providing or obtaining medical services by taking any of the following actions:
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> (1) Detaining the individual;
>
> (2) Obstructing, impeding, or hindering the individual's passage;
>
> (3) Menacing, threatening, coercing, intimidating, or frightening such person in any manner;
>
> (4) Undertaking any other action which would prevent an individual from entering or exiting a medical facility;

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(5) Following or intercepting a medical professional or medical patient to or from his or her place of work, school, home, or lodging or about the city against the will of the person; or

(6) Picketing or patrolling the place of residence of medical personnel or medical patients or any street, alley, road, highway, or other place where such persons my be, or in the vicinity thereof, against the will of such persons.

A person who violates this section commits a Class I misdemeanor for a first offense and a Class IV felony for second and subsequent offenses.

This proposed legislation is similar to LB818, introduced in 1991. In Op.Atty.Gen. No. 91035 (May 2, 1991), this office examined the provisions of LB818 and found them to violate both the Nebraska and U.S. Constitution. We likewise conclude LB790 violates fundamental provisions of constitutional law.

Section 2 of LB790 expressly limits application of the statute to "physical activity" which "shall not include only speech." Thus, unlike LB818, LB790 attempts to avoid punishing "pure speech," or speech without any accompanying conduct. However, this provision is not sufficient to save the proposal from constitutional difficulty. Section 3(3) prohibits acting with the intent to prevent an individual from entering or exiting a medical facility or providing or obtaining medical services by "menacing, threatening, coercing, intimidating, or frightening such person in any manner." Section 6 prohibits "picketing or patrolling the place of residence of medical personnel or medical patients or any street, alley, road, highway, or other place where such persons may be, or in the vicinity thereof, against the will of such persons." As the Eighth Circuit has stated,

> [P]icketing is not pure speech, because it involves conduct and need not include spoken words. <u>Nevertheless</u>, '[t]here is no doubt that as a general matter <u>peaceful picketing and leafletting are expressive activities involving `speech' protected by the First Amendment</u>.' . . . More specifically, '[t]here can be no doubt that . . . peaceful picketing on the public streets and sidewalks in residential neighborhoods [constitutes] expressive conduct that falls within the First Amendments' preserve.'

Pursley v. City of Fayettville, Ark., 820 F.2d 951, 954 (8th Cir. 1987). Thus, picketing, although it involves conduct, is still protected by the First Amendment.

LB790 makes picketing "any street, alley, road, highway, or other place" where medical personnel or patients may be "or in the vicinity thereof" a criminal offense (Class I misdemeanor for a first offense and a Class IV felony for a second or subsequent offense). This provision is repugnant to the free speech clause of the First Amendment of the Constitution of the United States as well as that of the Constitution of Nebraska. See Op. Atty. Gen. No. 91035. As we have previously stated:

> Article I, §5 of the Constitution of the State of Nebraska provides, "Every person may freely speak . . . on all subjects. . . ." Similarly, the first amendment to the Constitution of the United States, as applied to the states through the fourteenth amendment, provides: "Congress shall make no law . . . abridging the freedom of speech. . . ."
>
> As the United States Supreme Court stated in ***Boos v. Barry***, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988),
>
> [T]he First Amendment reflects a `profound national commitment' to the principle that `debate on public issues should be uninhibited, robust, and wide-open.' (citation omitted), and [we] have consistently commented on the central importance of protecting speech on public issues . . . This has led us to scrutinize carefully any restrictions on public issue picketing.
>
> Id. at 343 (emphasis added). Where such picketing occurs on public streets and sidewalks, "the government's ability to restrict expressive activity `is very limited.'" Id. (quoting ***United States v. Grace***, 461 U.S. at 177).

Id. See also ***Frisby v. Schultz***, 487 U.S. 474, 108 S.Ct. 2495 (1988). In ***Frisby*** the Court made it clear that "a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." Id. at 2501.

LB790 attempts to impose a blanket prohibition on picketing anywhere remotely near medical personnel or patients. Such a restriction is not narrowly tailored to serve a significant government interest and does not leave open ample alternative channels of communication. ***Frisby***, 108 S.Ct. at 2501; ***Pursley***, 820 F.2d at 955. Thus, LB790's attempt to criminalize picketing any street or other place where medical personnel or patients may be is clearly unconstitutional.

The provisions of LB790 prohibiting "menacing, threatening, coercing, intimidating, or frightening . . . in any manner," if upheld at all, would be judicially narrowed to encompass only unprotected "fighting words." See ***Nash v. Chandler***, 848 F.2d 567, 569 (5th Cir. 1988); ***Howard Gault Co. v. Texas Rural Legal Aid, Inc.***, 848 F.2d 544, 561 (5th Cir. 1988).

> As the Supreme Court has stated, "in public debate our citizens must tolerate insulting and even outrageous speech in order to provide "adequate `breathing space' for the freedoms protected by the First Amendment."" ***Boos v. Barry***, 99 L.Ed.2d at 345.
>
> The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. . . ."
>
> ***Edwards v. South Carolina***, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697, 703 (1963) (quoting ***Terminiello v. Chicago***, 337 U.S. 1, 4 (1949)).

Op.Atty.Gen. No. 91035 at 7. As a federal court recently stated,

> Attempts to persuade another to action are clearly within the scope of the First Amendment. ***Thomas v. Collins***, 323 U.S. 516, 537, 65 S.Ct. 315, 326, 89 L.Ed. 430 (1945). The fact that the defendants' speech was intended to persuade patients to forego their abortions or employees to leave their employment at an abortion-providing clinic does not, in itself, corrupt the speech or diminish its protection under the Constitution. See ***Thornhill v. Alabama***, 310 U.S. 88, 99, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940). That this expression was designed to have an "offensive" or "coercive" effect is of little significance provided that the manner of expression retained its peaceful nature. ***NAACP v. Claiborne Hardware Co.***, 458 U.S. 886, 911, 102 S.Ct. 3409, 3424, 73 L.Ed.2d 1215 (1982).

Northeast Women's Center, Inc. v. McMonagle, 670 F.Supp. 1300, 1308 (Ed.Pa. 1987)(emphasis added).

Even if application of section 3(3) of LB790 was limited to "fighting words," the existence of such broad language in state statutes would have a chilling effect on protected speech. "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." ***Thornhill v. State of Alabama***, 310 U.S. 88, 97-98 (1939) (invalidating Alabama picketing statute). See also ***Gooding v. Wilson***, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 405, 413 (1972) ("[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."). As one federal court stated with regard to a Texas statute, "As presently drawn, the statute manifestly could have a chilling effect on those who are unclear regarding what is unlawful, and these individuals, on that account, well might restrict their conduct to that which is unquestionably safe. ***Nash v. State of Texas***, 632 F.Supp. 951, 980 (E.D. Tex. 1986), aff'd in part and rev'd in part, 848 F.2d 567 (1988)(quoting ***Baggett v. Bullitt***, 377 U.S. 360, 372 (1964)).

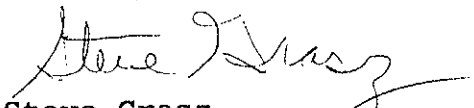
LB790 is not narrowly drawn to punish only unprotected speech and is susceptible of application to protected expression. Thus, Sections 3(3) and 3(6) of the bill are unconstitutional. See ***Members of City Council of City of Los Angeles v. Taxpayers For Vincent***, 466 U.S. 789, 801 (1984). It must be remembered that "Speech does not lose its protected character, simply because it may embarrass others or coerce them into action. . . ." Id. at 974 (quoting ***NAACP v. Claiborne Hardware***, 458 U.S. 886, 102 S.Ct. 3409, 3424 (1982).

In addition, Sections 3(4) and 3(5) are likely unconstitutionally vague and overbroad since they purport to criminalize "undertaking any other action" which would prevent entry or exit of a medical facility, and also "intercepting" medical professionals or patients "about the city." See Op.Atty.Gen. No. 91035 at 2-5. These provisions forbid acts in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. See ***State ex. rel. Douglas v. Herrington***, 206 Neb. 516, 294 N.W.2d 330 (1980). These provisions are not precise and narrowly drawn permissible restrictions on protected first amendment activity, but rather are overly broad prohibitions.

In conclusion, LB790 would criminalize activity protected by the First Amendment and the Nebraska Constitution, and is thus unconstitutional.

Sincerely yours,

DON STENBERG
Attorney General



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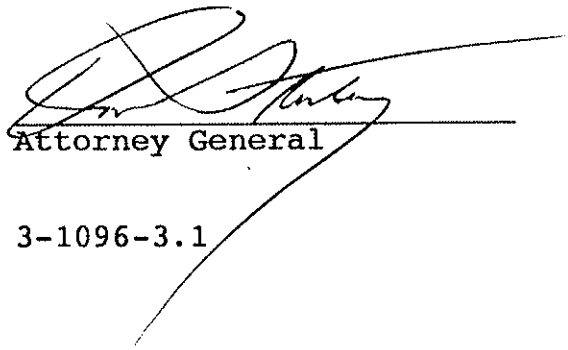

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