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STATE OF NEBRASKA
OFFICIAL
FEB 7 1991
DEPT. OF JUSTICE

DATE: February 6, 1991

SUBJECT: LB 17, Payment of Petition Circulators

REQUESTED BY: Senator Loran Schmit

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have inquired of this office whether LB 17 is constitutional. LB 17 makes it illegal to pay petition circulators based upon the number of signatures obtained or contingent upon the outcome of the petition effort. It also sets a minimum rate for circulator wages and makes any person who pays circulators an employer for purposes of the Nebraska Workers' Compensation Act and Employment Security Law.

It is our determination that the constitutionality of the proposed legislation is highly suspect based on the United States Supreme Court decision in Meyer v. Grant, 486 U.S. 414 (1988), and the Nebraska Supreme Court's adoption of Meyer in State v. Radcliffe, 228 Neb. 868, 424 N.W.2d 608 (1988). In Radcliffe, the Nebraska Supreme Court upheld a district court decision that the statute then in force prohibiting the payment of petition circulators was an unconstitutional infringement of free speech.

Neb. Const. art. III, § 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.

Further, Neb. Const. art. III, § 2, provides in part: "The first power reserved by the people is the initiative

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> whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature."
>
> 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. (Citations omitted.) 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." (Citations omitted.)

State ex rel. Brant v. Beerman, 217 Neb. 632, 635-636, 350 N.W.2d 18, 20-21 (1984).

In Meyer, supra, the United States Supreme Court was faced with the question of whether a Colorado law prohibiting payment of petition circulators was constitutional under the First Amendment of the United States Constitution. The United States Supreme Court determined that the Colorado statute was unconstitutional.

The First Amendment of the Constitution of the United States provides that Congress "shall make no law . . . abridging freedom of speech, or of the press; or of the right of people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment makes this prohibition applicable to the states. In Meyer, the Supreme Court determined that once the state decided to confer the right of initiative and referendum on the people, it is obligated to do so in a manner consistent with the United States Constitution, specifically the First Amendment, since it involves core political speech. 486 U.S. at 420. The Court determined that:

> The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to

make the matter the focus of statewide discussion. . .

486 U.S. 423.

In Meyer, the appellants argued that even if the statute imposed some limitation on First Amendment expression, the burden was permissible because other avenues of expression remained open to appellees and because the state had the authority to impose limitations on the scope of the state-created right to legislate by initiative. In response, the Unites States Supreme Court stated:

> That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication, does not relieve its burden on First Amendment expression. . . . The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.

486 U.S. at 424.

Finally, the Supreme Court held that:

> The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns. The Attorney General has argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. . . .
>
> Other provisions of the Colorado statute deal expressly with the potential danger that circulators might be tempted to pad their petitions with false signatures. It is a crime to forge a signature on a petition, . . . to make false or misleading statements relating to a petition, . . . or to pay someone to sign a petition, . . . Further, the top of each page of the petition must bear a statement printed in red ink warning

> potential signatories that it is a felony to forge a signature on a petition or to sign the petition when not qualified to vote and admonishing signatories not to sign the petition unless they have read and understand the proposed initiative. These provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting. . . .

486 U.S. 426-427.

Neb.Rev.Stat. §§ 32-705 and 32-705.01 currently protect the integrity of the initiative and referendum process much as the Colorado laws cited in Meyer. Neb.Rev.Stat. § 32-705 (1990 Cum.Supp.) provides for the following affidavit to be signed by each circulator and notarized:

> _____ being first duly sworn,
> Name of Circulator
> deposes and says that he or she is the circulator of the foregoing petition containing _____ signatures; that he or she is a registered voter of the State of Nebraska; that each person whose name appears on the petition sheet personally signed the petition in the presence of affiant; that the date to the left of each signature is the correct date on which the signature was affixed to the petition and that the date was personally affixed by the person signing such petition; that affiant believes that each signer has stated his or her name, street, and street number or voting precinct and his or her city, village, or post office address correctly; that affiant believes that each petition was a registered voter of the state and county at the time of signing the petition or will be a registered voter of the state and county on or before the date on which the petition is required to be filed with the Secretary of State for signature verification and qualified to sign the petition; and that affiant stated to each petitioner before he or she affixed his or her signature the purpose of such petition.

Additionally, the following warning is to appear on each petition:

> WARNING: Any person willfully and knowingly signing any name other than his or her own to any petition, any person willfully and knowingly signing his or her name more than once for the same measure at one election, any person who willfully and knowingly circulates a petition

> if he or she is not, at the time of circulating the same, a registered voter and qualified to circulate the same, any person who willfully and knowingly signs a petition if he or she is not a registered voter at the time of signing the petition or will not be a registered voter on or before the date on which the petition is required to be filed with the Secretary of State for signature verification and qualified to sign the petition, any person who willfully and knowingly falsely swears to any signature upon any such petition, any person who willfully and knowingly accepts money or other things of value for signing the petition, or any circulator who willfully and knowingly offers money or other things of value in exchange for a signature upon any such petition shall be guilty of a felony. . . .

Neb.Rev.Stat. § 32-705 also provides that:

> Any person willfully and knowingly circulating a petition outside of the county in which he or she is registered to vote without registering with the Secretary of State shall be guilty of a Class I misdemeanor. All signatures secured in a manner contrary to sections 32-702 to 32-713 shall not be counted. . . .

Neb.Rev.Stat. § 32-705.01 (Reissue 1988) also provides that any person who has been induced to sign any statewide initiative or referendum petition as a result of fraud, deceit, misrepresentation, or an inadequate or incomplete explanation of the proposal by the circulator may remove his name from such petition.

Based on the Supreme Court's analysis in Meyer, Neb.Rev.Stat. §§ 32-705 and 32-705.01 would appear to adequately protect the validity of the initiative and referendum process without infringing upon the right of individuals or groups to engage in political speech. The limitation on payment of petition circulators does not appear to provide any additional safeguards for the validity of the initiative and referendum process and arguably infringes on the ability of individuals to select the means they feel most effective to get their message to the voters. Therefore, it is our determination that the section of LB 17 which restricts payment of petition circulators based on number of signatures or the petition outcome is constitutionally suspect.

That portion of LB 17 which requires that circulators be paid a minimum rate and that any person paying a circulator be deemed an employer for purposes of the Nebraska Workers' Compensation Act and the Employment Security Law addresses a legitimate state interest in protecting employees. It does not appear to unduly

restrict the ability of individuals who have the ability to pay circulators to do so and does not require that those using unpaid circulators meet any specific requirements. It is possible that a requirement to pay minimum wage only to paid circulators and allowing volunteer circulators for the same sponsor could also prove burdensome for some small or nonprofit groups wishing to hire circulators. In such a case, the interest of the state in protecting employees would necessarily have to be weighed against the limitations placed on those wishing to circulate petitions in an initiative or referendum issue. In such an instance, the state's interests in protecting employees would probably outweigh the limited requirements which this section places on petition circulators with regard to minimum wage and worker compensation. However, as this bill is currently written, if a petition sponsor pays even one circulator, it must pay all of its circulators and must pay them a minimum wage. The chances of this requirement being unduly burdensome, as currently written, are considerably greater.

Sincerely,

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28-01-14.91

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:

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