STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

#95039

NO.
STATE OF NEBRASKA
OFFICIAL
MAY 16 1995
DEPT. OF JUSTICE

DATE: May 15, 1995

SUBJECT: Constitutionality of Neb. Rev. Stat. § 49-1474.01 (prohibition on anonymous campaign literature)

REQUESTED BY: Dannie Trautwein, Executive Director
Nebraska Accountability and Disclosure Commission

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

Due to the enforcement responsibilities of the Nebraska Accountability and Disclosure Commission, you have requested an Attorney General's Opinion regarding the constitutionality of Neb. Rev. Stat. § 49-1474.01, Nebraska's prohibition on anonymous campaign literature.

Neb. Rev. Stat. § 49-1474.01 provides:

> (1) <u>The person who pays for the production, distribution, or posting of a billboard, placard, poster, pamphlet, or other printed matter relating to a candidate or ballot question shall cause a disclaimer containing the name and street address of the person to appear on such matter</u>. The person who pays for a radio or television advertisement relating to a candidate or ballot question shall cause a disclaimer containing the name of such person to be included in the advertisement, and the radio or television station shall, for a period of at least six months, keep the street address of such person on file and divulge it to any person upon request.

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> (2) The size and placement of the disclaimer shall be determined by rules and regulations adopted and promulgated by the commission. The rules and regulations shall exempt from the disclaimer required by this section windshield stickers, yard signs, bumper stickers, campaign buttons, and balloons and may also exempt other items relating to a candidate or committee which are printed or reproduced at the request of such candidate or committee.
>
> (3) Any person who knowingly violates the provisions of this section shall be guilty of a Class IV misdemeanor.

(Emphasis added).

On April 19, the United States Supreme Court issued its decision in ***McIntyre v. Ohio Elections Commission***, 63 USLW 4279, 115 S.Ct. 1511 (1995). The Court held that an Ohio statute prohibiting the distribution of anonymous campaign literature abridged the freedom of speech in violation of the First Amendment.

The Ohio statute provided as follows:

> No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor. . . .
>
> The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer.

Ohio Rev. Code Ann. § 3599.09(A) (1988).

In ***McIntyre***, the Supreme Court considered "whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process." 63 USLW at 4282. The Court noted that Ohio's statute "does not control the mechanics of the electoral process. It is a regulation of pure speech . . . it is a direct regulation of the content of speech." ***Id.*** The Court found that "the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment." ***Id.*** In fact, the Court concluded, "No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's [handing out leaflets in the advocacy of a politically controversial viewpoint]." ***Id.*** at 4282. Consequently, the Court applied "exacting scrutiny" to the Ohio statute. Under this test, a restriction on speech may be upheld "only if it is narrowly tailored to serve an overriding state interest." ***Id.***

In holding the Ohio statute unconstitutional, the Court concluded that "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude." ***Id.*** The Court agreed that preventing fraud and libel are important state interests, but found that Ohio had other anti-fraud statutes to address such activity. ***Id.*** at 4283-4284. The Court also stressed the breadth of the statute, in that it applied to documents that were not even arguably false or misleading, to individuals acting independently from candidates, to ballot issues as well as elections of public officers, and to materials distributed well in advance of elections. ***Id.*** at 4284.

McIntyre clearly stands for the proposition that a state may not require "compelled self-identification of all election-related writings." ***Id.*** at 4285. Nebraska's prohibition or anonymous campaign literature, § 49-1474.01, is indistinguishable, in relevant part, from the Ohio statute. In fact, Justice Scalia, in his dissent, lists Neb. Rev. Stat. § 49-1474.01 as one of the 48 state statutes "similar" to the Ohio statute struck down by the majority. ***Id.*** at 4291 (Scalia, J., dissenting).[1] Consequently, § 49-1474.01 is clearly unconstitutional, under ***McIntyre***, in that

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[1]This opinion expresses no view as to the severability of portions of § 49-1474.01.

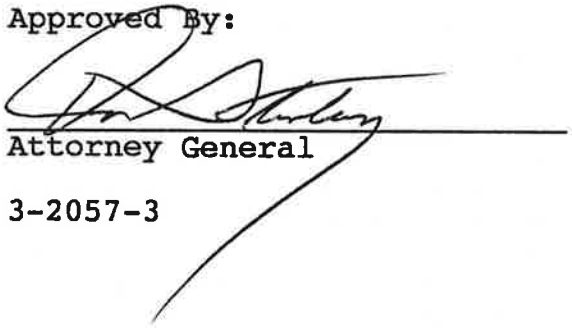
it abridges the freedom of speech in violation of the First Amendment.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:



Attorney General

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