STATE OF NEBRASKA

Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 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

98021

NO.
STATE OF NEBRASKA
OFFICIAL
MAR 30 1998
DEPT. OF JUSTICE

SUBJECT: Constitutionality of Amendment Prohibiting Use of Public Trust Funds to Award Grants to Entities Providing Abortion-Related Services

REQUESTED BY: Senator Don Wesely
Senator Jim Jensen

DATE: March 30, 1998

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

This opinion addresses separate but essentially identical requests submitted by Senator Wesely and Senator Jensen concerning the constitutionality of a proposed amendment prohibiting the distribution of certain trust funds to persons or entities which provide abortion-related services. It also addresses a third opinion request from Senator Jensen as to the broader issue of what restrictions a state can constitutionally place on funding to entities that perform or facilitate the performance of abortions.

The proposed amendment would amend AM 3434 to LB 1070 so as to provide that "no funds shall be used under this section to award grants to any person or entity which provides, facilitates, or counsels or refers for abortions."

As indicated in Senator Wesely's request, the issue of the validity of similar provisions has arisen previously in other jurisdictions. Although the issue is complicated and fraught with controversy, a considerable amount of guidance is available from these decisions.

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Senator Wesely's opinion request quotes from a federal court's opinion in the case of ***Kivlahan v. Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc.***, Case No. 96-4186-CV-C-2 (W.D. Mo. 1996). Our research reveals that ***Kivlahan*** is an unpublished opinion, and is not even available through normal legal research sources. The decision was not reviewed by an appellate court. Pursuant to the rules of the United States Court of Appeals for the Eighth Circuit, such opinions "are not precedent and parties generally should not cite them." Eighth Cir. R. 28A(k). Consequently, ***Kivlahan*** is of no precedential value in Nebraska.

Notwithstanding the status of the ***Kivlahan*** decision, we have reviewed the opinion to examine its logic and application of precedent. ***Kivlahan*** is lacking in both areas. The court in ***Kivlahan*** acknowledged that Missouri's restrictions on the use of family planning funds need only be rationally related to a legitimate governmental purpose to survive an equal protection challenge. ***Id.*** at 5. The court further acknowledged that Missouri has a stated public policy of not promoting or encouraging abortions, ***id.***, and that "the State of Missouri has no positive obligation to fund or subsidize certain activities, including abortions." ***Id.*** at 6. However, the court then proceeded to engage in emotional rhetoric supported only by a logical non sequitur.

The opinion relies on factually unsupported leaps of logic to reach the conclusion that Missouri's funding restrictions were nothing more than a means to punish a disfavored group. The court then (correctly) stated that, "the government may not punish an entity by refusing to contract with it because that entity's agenda may be politically unpopular." ***Id.*** The court further concluded that it could find "no rational basis for the distinction between Planned Parenthood and the other eligible recipients for the state appropriated family-planning funds." ***Id.*** The court's inability to identify a rational basis for the distinction contrasts starkly with the United States Supreme Court's clear holding that "the State has an interest in protecting the life of the unborn," and that the States may actively promote natural childbirth over abortion. ***Planned Parenthood of Southeastern Pennsylvania v. Casey***, 505 U.S. 833, 1125 S.Ct. 2791, 2818 (1992).

Most striking of all, however, was the absence from the ***Kivlahan*** decision of any citation, reference or discussion of the leading case in this area of law, ***Rust v. Sullivan***, 500 U.S. 173,

111 S.Ct. 1759 (1991).[1] In ***Rust***, the U.S. Supreme Court upheld federal funding restrictions which prohibited Title X fund recipients from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. The funding restrictions in ***Rust*** provided that "'[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."' ***Rust***, 111 S.Ct. at 1764 (quoting Section 1008 of the Public Health Service Act).

Federal regulations promulgated to implement the law prohibited Title X fund recipients "from engaging in activities that 'encourage, promote or advocate abortion as a method of family planning.'" ***Id***. at 1765 (quoting § 59.10(a)). Under the regulations, "forbidden activities include lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion..., using legal action to make abortion available...and paying dues to any group that advocates abortion as a method of family planning..." ***Id***.

Most significantly, the regulations also required that Title X projects "be organized so that they are <u>physically and financially separate from prohibited abortion activities</u>.'" ***Id***. at 1766 (quoting § 59.9) (emphasis added). Title X funding recipients were required to "have an <u>objective integrity and independence from prohibited activities</u>." ***Id***. "<u>Mere bookkeeping separation of Title X funds from other monies is not sufficient</u>." ***Id***. Among factors in determining objective integrity and independence were <u>separate personnel</u> and <u>degree of physical separation of the project from facilities for prohibited activities</u>." ***Id***. (emphasis added).

In contrast to the federal judge's opinion in ***Kivlahan***, the Supreme Court in ***Rust*** concluded, "There is no question but that the statutory prohibition . . . is constitutional. In ***Maher v. Roe***, . . . [w]e held that <u>the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds</u>.'" ***Rust v. Sullivan***,

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[1]Interestingly, ten Missouri state legislators attempted to intervene in the case to defend the funding restrictions, but were denied standing. ***Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlman***, ___ F.3d ___, 1998 WL 75547 (8th Cir. 1998). The legislators contended "the Missouri Attorney General colluded with Planned Parenthood <u>by not arguing the constitutionality of [the law] under *Rust v. Sullivan*</u>. . . ." ***Id***. n.4 (emphasis added).

111 S.Ct. at 1772 (quoting ***Maher v. Roe***, 97 S.Ct. at 2382)) (emphasis added). The Supreme Court also discussed the ability of States to make funding decisions consistent with legislative policy and stated, "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." ***Id.*** at 1772 (quoting ***Maher***, 97 S.Ct. at 2383)).

We note that the plaintiff in ***Kivlahan***, Planned Parenthood, also claimed that the state's funding restrictions violated its First Amendment speech rights. ***Kivlahan*** at 2. Although the ***Kivlahan*** court ruled only on the Fourteenth Amendment equal protection challenge, it did so using language sounding in First Amendment terms: "[T]he State of Missouri may not deny a benefit to an entity on a basis of its politically unpopular beliefs." ***Id.*** at 6. While true in a general sense, in this context the court's statement represents a mischaracterization of funding judgments by state legislatures. In ***Rust v. Sullivan***, the petitioners also contended that the federal regulations violated the First Amendment by impermissibly discriminating based on viewpoint. ***Rust***, 111 S.Ct. at 1771-1772. However, the Supreme Court flatly rejected this argument, stating, "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time, funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint, it has merely chosen to fund one activity to the exclusion of the other." ***Id.*** at 1772.

Although the unpublished ***Kivlahan*** decision is fraught with error, and although the U.S. Supreme Court's decision in ***Rust v. Sullivan*** upheld the ability of the government to require separation between eligible program activities and abortion-related services, it must be made clear that the States are not free to ban grant applications from persons or entities based on their viewpoint or their exercise of constitutionally protected activity. Funding bans must be based on the legitimate interests of the state in separating state funding of legislatively approved programs from the direct or indirect funding of other activities such as abortion.

As to the particular amendment in question here, we note that some pre-***Rust v. Sullivan*** cases would seem to call the particular wording of the proposed amendment into question. ***See Planned Parenthood Central and Northern Arizona v. State of Arizona***, 789 F.2d 1348 (9th Cir. 1986), ***aff'd without opinion sub nom. Babbitt v. Planned Parenthood***, 479 U.S. 925, 107 S.Ct. 391 (1986). ***See also*** Op. Att'y Gen. No. 90025 (March 28, 1990). However, the

proposed amendment would appear to be in a much stronger position in light of the ***Rust*** decision. For example, in contrast to the ***Arizona*** decision, the Court in ***Rust*** did not seem to utilize a least restrictive means test in analyzing the funding restrictions, and even the ***Kivlahan*** court applied only a rational basis analysis.

Although the proposed amendment differs in form from the federal restriction considered in ***Rust***, it seems to have the same purpose and effect. As in ***Rust***, "we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." ***Id.*** at 1773. As in *Rust*, the proposed amendment seeks to prevent indirect funding of programs that are outside of, and contrary to, official state policy.

The refusal of the government to provide funding to groups that are engaging in activities contrary to government policy was discussed at some length in ***Rust***:

> The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; <u>it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds</u>.

Id. at 1774. Under the proposed amendment, the funding restrictions would still permit an abortion proponent to create an affiliate which would be eligible to receive funds. ***See Rust***, 111 S.Ct. at 1775 ("a charitable organization could create . . . an affiliate to conduct its nonlobbying activities using tax deductible contributions, and at the same time establish . . . a separate affiliate to pursue its lobbying efforts without such contributions."). As the Supreme Court stated in ***Rust***,

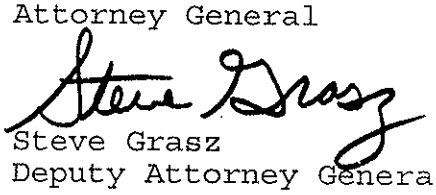
> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and <u>the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program</u>.

Id.

In sum, in our opinion, the proposed amendment prohibiting grants "to any person or entity which provides, facilitates, or counsels or refers for abortions" is constitutional. A State may enact funding restrictions which ensure that public funds are not directly or indirectly subsidizing abortion. A state may require strict separation of the activities of an ineligible entity from those of an eligible affiliate. For example, in ***Rust*** the federal government required separation of finances and facilities so as to ensure no federal funds indirectly subsidized abortion. The State can require that eligible recipients have facilities and finances that are completely and objectively separate and independent from abortion-related services so as to avoid indirect subsidization, and also to avoid the appearance of government support for abortion related activity which would be counterproductive to the State's judicially recognized legitimate interest in promoting childbirth over abortion. The State need not allow trust fund recipients to use public funds to channel new clients into facilities where abortions, abortion counseling, abortion referrals or abortion promotion take place. As the Supreme Court stated in ***Webster v. Reproductive Health Services***, "the State need not commit any resources to facilitating abortions." 492 U.S. 490, 509 (1989).

Sincerely,

DON STENBERG
Attorney General



Steve Grasz
Deputy Attorney General

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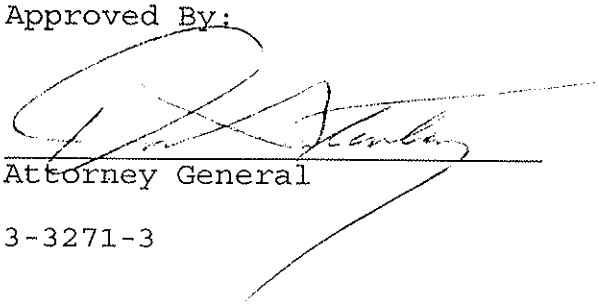

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