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MAY 8 1991

Dept. of Justice
MAY 6 1991
State of Nebraska

DATE: May 2, 1991

SUBJECT: LB 818 - Amendments to Neb.Rev.Stat. §§28-1317 and 1318 relating to offenses of unlawful and mass picketing.

REQUESTED BY: Senator Bernice Labedz

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

You have requested an opinion on the constitutionality of LB 818, a proposal to change provisions relating to the offenses of unlawful and mass picketing. You have specifically expressed concern that LB 818 may violate the right of free speech and may be unconstitutionally vague.

Section one of LB 818 ("the bill"), as amended by AMO 302, amends Neb.Rev.Stat. §§28-1317 and 1318 by expanding the coverage of the unlawful and mass picketing laws from labor and employment situations to also prohibit picketing which interferes with a person's entry and exit of premises for any lawful purpose. Section two of the bill eliminates distance and spacing requirements previously held to violate the United States Constitution. See United Food and Commercial Workers, International Union v. IBP, Inc., 857 F.2d 422 (8th Cir. 1988); Committee Statement on LB 818.

Whereas this office may be called upon to defend the constitutionality of existing legislation, as was the case with this same statute in IBP, this opinion is necessarily limited to those provisions of the bill which expand the scope of activity

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constituting the offenses of unlawful and mass picketing. This opinion does not apply to labor and employment situations under the existing statutory language. Since the existing statute regulates "private issue" (i.e. labor related) picketing, while the bill provides for regulation of "public issue" picketing as well, the constitutional analysis necessarily differs somewhat as between the existing and proposed language in any event. See Medrano v. Allee, 347 F.Supp. 605, 623 (S.D. Tex. 1972) ("[P]eaceful 'public issue' picketing is protected under the first amendment as 'symbolic speech' so long as it is in a location generally open to the public.") (Decision vacated in light of repeal of three statutes in question and remanded for determination whether prosecutions were actually pending under the remaining two statutes, 416 U.S. 802 (1974)). LB 818 regulates "public issue" picketing since it expands the coverage of §§28-1317 and 1318 to restrict political and religious expression on matters of public interest, in addition to the existing restrictions on organized picketing related to labor disputes.

LB 818 Is Unconstitutionally Vague and Overbroad

Section one of the bill prohibits "unlawful picketing." Section two of the bill creates the offense of Mass picketing and defines "Mass picketing" as "any form of picketing which constitutes an obstacle to the free ingress and egress to and from the premises being picketed, any other premises, or the public roads, streets, or highways, either by obstructing by their persons or by placing of vehicles or other physical obstructions." The bill, however, does not define "picketing" or "unlawful picketing". As we have noted previously, "the word picket is a word of 'vague contours' (citation omitted), and . . . the term may include a wide range of action." Opinion of the Attorney General, February 14, 1950.

Vagueness

A fundamental requirement of a statute is that it not be vague and uncertain. See Neeman v. Nebraska Natural Resources Commission, 191 Neb. 672, 217 N.W.2d 166 (1974). The void for vagueness doctrine is based on the due process requirements contained in the Fifth and Fourteenth Amendments to the federal constitution, and contained in Article I, section 3 of our Nebraska Constitution. U.S. v. Articles of Drug, 825 F.2d 1238 (8th Cir. 1987); In Interest of D.L.H., 198 Neb. 444, 253 N.W.2d 283 (1977). In order to pass constitutional muster, a statute must be sufficiently specific so that persons of ordinary intelligence must not have to guess at its meaning, and the statute must contain ascertainable standards by which it may be applied. Id.

The constitutional requirement of reasonable certainty in statutory language is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding. Fulmer v. Jensen, 221 Neb. 582, 379 N.W.2d 736 (1986). Statutes are sufficiently definite when they use language which is commonly grasped. In Re Interest of Metteer, 203 Neb. 515, 279 N.W.2d 374 (1979). In State ex rel. Douglas v. Herrington, 206 Neb. 516, 294 N.W.2d 330 (1980), the court said that the established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. See also State v. Hamilton, 215 Neb. 694, 340 N.W.2d 397 (1983).

The dividing line between what is lawful and unlawful cannot be left to conjecture, and a citizen cannot be held to answer to charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A penal statute must express the crime and the elements constituting it so clearly that an ordinary person can intelligently choose in advance what course is lawful for him to pursue. Id. See also State, Dept. of Roads v. Mayhew Products Corp., 211 Neb. 300, 304-05, 318 N.W.2d 280 (1982).

The constitutional prohibition against undue vagueness does not invalidate every statute which a reviewing court might believe could have been drafted which greater precision; all that due process requires is that a statute give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. Robinson, 202 Neb. 210, 274 N.W.2d 553 (1979), cert. denied, 444 U.S. 865.

In applying the due process test to LB 818, we must determine whether "picketing" is a term of common understanding such that persons of ordinary intelligence would not have to guess at its meaning in terms of complying with the prohibitions in the bill. Bridgeford v. U-Haul Co., 195 Neb. 308, 238 N.W.2d 443 (1976).[1]

Webster's New Collegiate Dictionary (1974) defines "picket" as "a person posted by a labor organization at a place of work affected by a strike; also; a person posted for a demonstration or

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[1] We again note that our review of LB 818 applies only to the proposed amendments to §§28-1317 and 1318. "Picketing" under the current statute may be quite clear in terms of organized labor disputes (private issue picketing), but may be subject to different constitutional analysis in the context of public issue picketing.

protest." The latter portion of the above definition is relevant to non-labor "public issue" picketing.

Considering "picketing" in the context of LB 818 it appears that persons of ordinary intelligence could differ concerning the meaning of the word. Further, without a more precise definition, we fail to find an ascertainable standard for the application of the act. This indefiniteness is constitutionally impermissible. Under the bill, it is unclear whether "unlawful picketing" (a criminal offense) encompasses only individuals parading in front of a "premises" with signs and shouting "threats", or whether the bill also covers a wide range of other activity. Are individuals who pray near a civil rights demonstration site "picketing"? Are Nebraska citizens guilty of unlawful "picketing" if they "conspire with others" at their house of worship to "induce or influence" persons not to enter certain premises by means of "intercepting" such persons on their way "from or to his or her home" or by "picketing or patrolling . . . any street, alley, road, highway, or other place where such person may be. . . ."? These are not far fetched hypothetical situations, but are real situations to which the bill could apply and, perhaps, is intended to apply.

Under section two of the bill any person who shall legally "picket" is required to "visibly display on his or her person a sign showing the name of the protesting organization he or she represents." This sign "shall be uppercase lettering of not less than two and one-half inches in height."

This provision may be permissible as to labor-related picketing under the current statute. However, its application under the bill to public issue picketing is abhorrent to the Constitutions of the United States and Nebraska. This provision is unconstitutionally vague for the reasons set forth above. Also, under the common definition of "picketing" the bill would apparently require, for example, a person peacefully praying near a civil rights demonstration site to wear a sign showing the name of his protesting organization; perhaps the name of his or her church. Article I, §4 of the Constitution of Nebraska guarantees religious liberty to all Nebraskans and prohibits "any interference with the rights of conscience." Requiring civil rights demonstrators or other public issue picketers to wear identification signs wherever they "legally picket" brings visions of oppression. A court would likely find such a requirement violates Article I, §4, as well as the First Amendment.

Overbreadth

To the extent section two prohibits "mass picketing" which constitutes any character of obstruction to free ingress and egress, rather than only unreasonable obstructions, it is constitutionally suspect as being overbroad. As the court stated in Medrano v. Allee, "This is not the precise and narrowly drawn statute contemplated by the Supreme Court. It commands the [removal of] . . . any mode of free expression which presents any character of obstruction and this is impermissible." Medrano v. Allee, 347 F.Supp. at 625. See also Nash v. Chandler, 848 F.2d 567, 569 (5th Cir. 1988) (Section of Texas picketing law prohibiting "any character of obstacle to the free ingress to and egress from any entrance to any premises being picketed . . . " is "unconstitutionally broad and cannot stand.")

LB 818 Violates the Constitutional Guarantee of Free Speech

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).

Analysis of the bill must take into account that some "picketing is not pure speech, because it involves conduct and need not include spoken words." Pursley v. City of Fayettville, Ark., 820 F.2d 951, 954 (8th Cir. 1987). "Nevertheless, there is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First

Amendment." Id. Further, some provisions of the bill attempt to punish "pure speech", or speech without any accompanying conduct.

The Threatening Language Clause

Section one of the bill creates a Class III misdemeanor for anyone who commits the offense of unlawful picketing by "interfering" with any person in the exercise of his or her lawful right to enter and exit a premises for any lawful purpose by using "threatening language" in such person's presence of hearing for the purpose of influencing such person not to enter or exit the premises. Section one similarly creates this offense for anyone who engages in "menacing, threatening, coercing, intimidating, or frightening in any manner" such person for the above purpose. This section also prohibits picketing the place of residence of such person or any street, alley, road, highway, or other place such person may be for such purpose.

Whereas section one creates a criminal offense for speech protected by the First Amendment, it must be narrowly tailored to serve a significant governmental interest. United Food & Commercial Workers International v. IBP, Inc., 857 F.2d at 433; Pursley, 820 F.2d at 955. We conclude that LB 818, section one, fails this test. "Because the First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." Id. at 956 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). See also Northeast Women's Center, Inc. v. McMonagle, 670 F.Supp. 1300, 1308 (E.D.Pa. 1987) ("The fact that the defendants' speech was intended to persuade patients to forgo their abortions or employees to leave their employment at an abortion-providing clinic does not, in itself, corrupt the speech nor diminish its protection under the Constitution.").

Assuming that protecting lawful ingress and egress to a premises is a significant government interest, a court would likely find there are less restrictive means available of addressing this interest than by outlawing otherwise protected speech aimed at persuading or influencing a person not to enter such premises.

The bill does not define "threatening language" nor "menacing, threatening, coercing, intimidating, or frightening." Only if such terms were defined or judicially construed as including only unprotected speech, such as obscene language and fighting words, could this portion of the bill pass constitutional challenge. United Food & Commercial International v. IBP, Inc., 857 F.2d at 435; Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544, 561 (5th Cir. 1988) (limiting Texas picketing statute containing similar language to apply only to fighting words). However, as the

bill is now written, using the usual or ordinary definitions of the above terms, these provisions of the bill are clearly unconstitutional.

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)).

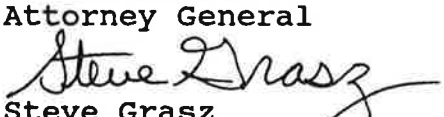
The prohibition of "threatening language" and "menacing, threatening, coercing, intimidating and frightening" is unconstitutionally overbroad. "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups 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.").

The bill is not narrowly drawn to punish only unprotected speech and is susceptible of application to protected expression. Id. at 414. Thus, these provisions 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).[2]

Sincerely yours,

DON STENBERG
Attorney General



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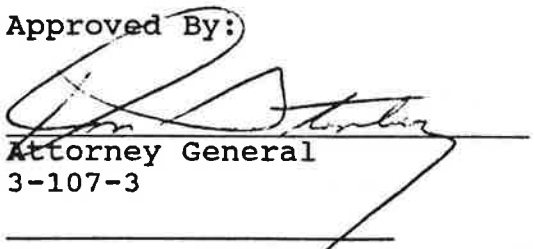

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[2] The language in LB 818 is similar to that addressed by the court in Nash v. State of Texas, 632 F.Supp. 951, 973 (E.D. Tex. 1986) (holding the "intimidating language provision" of the Texas mass picketing statute to be overbroad and unconstitutionally vague.) The court in Nash noted that a violation of the picketing statute occurred "even when a person seeks only by language to interfere with, hinder, obstruct, or intimidate another in any of the activities to which the statute refers." Id. at 973. The court also noted, "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)). Here, as in Nash, "a statute is deemed unconstitutionally overbroad, if it abstracts protected as well as unprotected speech." Id. at 975. The court specifically addressed the terms "threatening," "intimidate" and "interferes with" and held that a statute punishing such language is overbroad. Likewise, the terms "threaten," "interfere with," "hinder," "obstruct," and "intimidate" were held to be unconstitutionally vague as proscribed under the picketing statute in the context of speech. "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." Id. at 980 (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

On appeal the court found the statute was "subject to a narrowing construction" by the Texas state courts such that it could withstand an overbreadth challenge. Nash v. Chandler, 848 F.2d 567, 569 (5th Cir. 1988) (limiting application of the statute to fighting words only).