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NO.
STATE OF NEBRASKA
OFFICIAL
FEB 14 2000
DEPT. OF JUSTICE

DATE: February 14, 2000

SUBJECT: Constitutionality of LB 729; Testing the legal sufficiency of initiative and referendum measures prior to their submission to the voters of Nebraska.

REQUESTED BY: Mike Johanns
Governor of Nebraska

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

LB 729 is a bill which would change the initiative and referendum process in Nebraska in several respects. Among other things, the bill would allow individuals to test the constitutionality and legality of initiative and referendum measures through litigation prior to the time that those measures are submitted to the voters of the state for their approval. LB 729 was passed on February 10, and you now have the Final Reading version of the bill before you for your action.

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In our Op. Att'y Gen. #99020 (May 5, 1999), we discussed the constitutionality of a previous version of LB 729, and we concluded that there were several constitutional problems with the bill. LB 729 has been amended since that opinion, and the Final Reading version of the bill before you differs from the legislation which was the subject of our Opinion No. 99020. Consequently, you have now asked us to advise you as to whether the amendments to LB 729, reflected in the Final Reading version of the bill before you, cure the constitutional defects noted in our earlier opinion.

The amendments to LB 729 deleted several provisions which required the Nebraska Secretary of State to make certain determinations as to the constitutionality and legal validity of initiative and referendum petitions submitted to that office as a part of the initiative and referendum process. Those provisions were of concern to us in Opinion No. 99020. However, the Final Reading version of LB 729 still contains provisions which would require courts to adjudicate the constitutionality and legal validity of initiative and referendum petitions prior to the time that they are submitted to the voters for approval. We had concerns with those latter provisions in Opinion No. 99020, and we still have concerns with those provisions in the following respects:

1. As noted on pages 7 and 8 of Opinion No. 99020, we believe that it is highly likely that courts will not entertain suits regarding the constitutionality or legal validity of particular initiative or referendum measures prior to the time that they are presented to the voters notwithstanding the provisions of LB 729, because such suits would lack both a justiciable issue and an actual case or controversy. Moreover, such suits would involve the courts in rendering an advisory opinion.

2. We do not believe, for the reasons stated on pages 8 thorough 10 of Opinion No. 99020, that the Final Reading version of LB 729 would "facilitate" the initiative and referendum process in Nebraska.[1] We believe that the bill in its final form will likely result in lengthy litigation for most initiative and referendum measures prior to the time that they are submitted to the voters. Such a burden on the initiative and referendum process would, in all probability, be held to be unconstitutional.

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[1] The Nebraska Supreme Court reaffirmed the precious nature of the initiative right in Nebraska and the requirement that legislation facilitate that right as recently as November, 1999. ***State ex rel. Stenberg v. Moore***, 258 Neb. 199, --- N.W.2d --- (November 19, 1999).

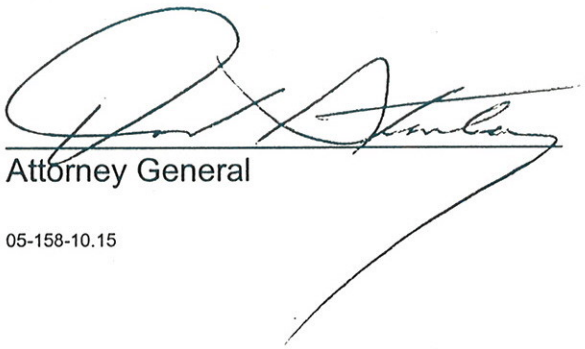
Therefore, we do not believe that the amendments to LB 729 cure the constitutional defects in that legislation. In our view, the Final Reading version of the bill remains unconstitutional.

Sincerely yours,

DON STENBERG
Attorney General

Dale A. Comer
Assistant Attorney General

Approved by:



Attorney General

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