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**DOUGLAS J. PETERSON**
ATTORNEY GENERAL

15-011
NO.
STATE OF NEBRASKA
OFFICIAL
SEP 10 2015
DEPT. OF JUSTICE

SUBJECT: Constitutionality of Legislation Requiring Nonresident Drivers of Motor Vehicles to Carry Proof of Insurance or Financial Responsibility

REQUESTED BY: Senator Al Davis
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Lynn A. Melson, Assistant Attorney General

You have asked, "whether it would be lawful for the State to require that non-resident drivers provide proof of financial responsibility if stopped by a law enforcement officer on a public Nebraska highway, and provide for civil penalties for non-compliance." You state that the current requirement to carry proof of insurance applies only to Nebraska residents and that a police chief in your district has expressed concern for public safety. Your proposal is to amend Neb. Rev. Stat. § 60-3,167(1) by deleting the words "in this state" as follows:

> (1) It shall be unlawful for any owner of a motor vehicle or trailer which is being operated or towed with In Transit stickers pursuant to section 60-376, which is being operated or towed pursuant to section 60-365 or 60-369, or which is required to be registered ~~in this state~~ and which is operated or towed on a public highway of this state to allow the operation or towing of the motor vehicle or trailer on a public highway of this state without having a current and effective automobile liability policy, evidence of insurance, or proof of financial responsibility.

That statutory provision further provides that the owner who operates or allows the operation of the motor vehicle in violation of this section shall be guilty of a Class II misdemeanor. The owner is allowed ten days after the date of the law enforcement officer's request to produce proof to the appropriate prosecutor or county attorney that the owner had automobile insurance or proof of financial responsibility and the citation will then be dismissed.

We first note that § 60-3,167 is found within the Motor Vehicle Registration Act, Neb. Rev. Stat. §§ 60-301 to 60-3,222 (2010 and Cum. Supp. 2014). As a general rule, no motor vehicle may be operated on Nebraska highways unless it is registered in compliance with the Motor Vehicle Registration Act. Neb. Rev. Stat. § 60-362. In order to apply for registration of a motor vehicle, an owner must show proof of financial responsibility or evidence of insurance coverage. Neb. Rev. Stat. § 60-387. And, by paying the required registration fees, the owner certifies that he or she will maintain insurance or proof of financial responsibility and provide evidence of insurance or proof of financial responsibility upon demand. Neb. Rev. Stat. § 60-390. In other words, the provisions concerning proof of insurance currently found within this Act are tied to registration of a motor vehicle in Nebraska.[1]

The Motor Vehicle Registration Act includes certain provisions pertaining specifically to nonresidents. The right of a nonresident owner of a motor vehicle to operate that vehicle in Nebraska under a registration issued in another state is recognized in some circumstances. Neb. Rev. Stat. § 60-366(2) provides generally that a nonresident owner of a vehicle, which is properly registered in the place of which the owner is a resident and which displays the appropriate license plates, may operate the motor vehicle within Nebraska without registering the vehicle in Nebraska or paying any fees in this state. Section 60-366(3) requires that a nonresident owner "shall register such motor vehicle or trailer in the same manner as a Nebraska resident, after thirty days of continuous employment or presence in this state, unless the state of his or her legal residence grants immunity from such requirements to residents of this state operating a motor vehicle or towing a trailer in that state." Further, § 30-367 states that Nebraska statutes "relative to registration and display of registration numbers do not apply to a motor vehicle or trailer owned by a nonresident...if the owner thereof has complied with the provisions of the law of the foreign country, state, territory, or federal district of his or her residence relative to registration of motor vehicles..." There are also separate provisions concerning particular nonresident vehicles such as trucks, truck-tractors, trailers and buses.

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[1] Nebraska also has a Motor Vehicle Safety Responsibility Act, codified at Neb. Rev. Stat. §§ 60-501 to 60-569, that pertains to proof of financial responsibility subsequent to a motor vehicle accident or conviction in Nebraska. That Act contains various provisions applying to residents and nonresidents. However, as you propose to amend a statute that falls within the Motor Vehicle Registration Act, we will limit our discussion to that Act.

You have proposed to amend § 60-3,167(1) by deleting the words "in this state" in the first sentence which refers to motor vehicles required to be registered in this state. We note that the last sentence of subsection (1) states "[T]his subsection shall not apply to motor vehicles or trailers registered in another state." It seems to us that this language would also need to be amended. Depending on the language of your proposed amendment, it may also be appropriate or necessary to amend other provisions of the Act pertaining to nonresidents to eliminate any conflict or inconsistency within the Act. Also, for purposes of this opinion, we will presume that the intent of your proposed amendment is that nonresidents carry proof of insurance that is adequate under the laws of their state of residence and not necessarily adequate under Nebraska laws.

You have requested an opinion whether it would be "lawful" for the State to require nonresident drivers to also provide proof of insurance or financial responsibility as required by § 60-3,167 and to impose civil penalties for non-compliance. You did not set out any specific constitutional concerns regarding your proposal. We have previously indicated that a general question on the constitutionality of proposed legislation will necessarily result in a general response from this office. Op. Att'y Gen. No. 94012 (March 8, 1994). As a result, our response to your opinion request must be in general terms.

It seems to us that one area which might present potential constitutional issues with respect to your proposal involves the Equal Protection provisions of the state and federal constitutions. The Nebraska Supreme Court has stated "The Nebraska Constitution and U.S. Constitution have identical requirements for equal protection challenges." *DeCoste v. City of Wahoo*, 255 Neb. 266, 274, 583 N.W.2d 595, 601 (1998). Those constitutional provisions prohibit improper disparate treatment or improper classifications of people who are otherwise similarly situated. With regard to your proposed amendment of Neb. Rev. Stat. § 60-3,167, the classification at issue would presumably involve nonresident owners of motor vehicles who operate or allow the operation of that vehicle on Nebraska highways as distinguished from motor vehicle owners who are Nebraska residents. Treating nonresident and resident motor vehicle owners alike, and requiring both to provide proof of insurance on demand, would seem to eliminate possible equal protection concerns. For example, in *Bookbinder v. Hults,* 19 Misc. 2d 1062, 192 N.Y.S.2d 331 (1959), a New York court upheld the validity of an act similar to Nebraska's Motor Vehicle Safety Responsibility Act, noting that a section of that Act "makes the safeguards which are applicable to resident operators applicable to the non-resident operators. This is not a discrimination against non-residents, denying them the equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners." *Id.* at 1064, 192 N.Y.S. 2d at 334.

However, your request letter also mentions civil penalties for nonresident motor vehicle owners. If you intend to impose civil penalties for nonresidents that are not also imposed on Nebraska residents, or to otherwise amend the Motor Vehicle Registration

Act to treat nonresidents differently than residents, such a proposal may require analysis under the Equal Protection provisions.

Without specific legislation to review, other than the deletion of "in this state" in § 60-3,167, we are unable to fully address that potential challenge. We do note that, generally, the equal protection clause allows government to make distinctions among groups and to treat different groups differently so long as there is a "rational basis" serving a legitimate governmental purpose for such differing treatment. *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006). However, if a "fundamental right" or "suspect classification" is involved, then the classification and differing treatment in the legislation will be subject to strict judicial scrutiny and will be upheld only if there is a compelling governmental interest.

The right to travel has been identified as a fundamental right. *State v. Michalski*, 221 Neb. 380, 391, 377 N.W.2d 510, 518 (1985), *abrogated on other grounds*, *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). The Nebraska Supreme Court therein held that a statute providing for permanent revocation of an operator's license upon that individual's drunken driving conviction did not impair the defendant's right to travel and was constitutional. "While the revocation of Michalski's driver's license limits his options as to method of transportation, it does not impair his right to travel or his right to reach a given destination." *Id.* at 392, 377 N.W.2d at 518. *Michalsk*i involved action taken against a driver's operator's license after a conviction. It is possible that the Court's analysis might differ when applied to a statutory requirement of carrying proof of insurance or financial responsibility prior to an accident or violation of law.

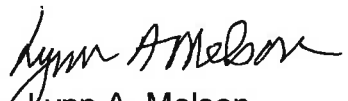
In *City of Beatrice v. Meints,* 20 Neb. App. 776, 830 N.W.2d 524 (Ct. App. 2013), the Nebraska Court of Appeals considered an equal protection challenge to a Beatrice city ordinance that requires operators of motor vehicles registered in Nebraska to carry proof of insurance and noted that the ordinance is virtually identical to Neb. Rev. Stat. § 60-3,167. Meints, when asked for his proof of insurance after a motorcycle accident, challenged the ordinance because it applies only to vehicles registered in Nebraska and, arguably, treats residents less favorably than nonresidents. The Court of Appeals did not refer to the right to travel and instead stated, "[A] classification based on the location of motor vehicle registration is not the type of suspect classification that warrants strict judicial scrutiny." *Id.* at 784, 830 N.W.2d at 532. The Court found that the Beatrice city ordinance at issue and Neb. Rev. Stat. § 60-3,167 serve the same purpose as the Motor Vehicle Safety Responsibility Act, which was upheld by the Nebraska Supreme Court in *Russell v. State*, 247 Neb. 885, 531 N.W.2d 212 (1995) (protecting the public against the operation of motor vehicles by financially irresponsible persons). It also quoted with approval a decision of the Massachusetts Supreme Court regarding a similar law. "Moreover, a classification including only motor vehicles registered under our statutes cannot be pronounced unreasonable. Nonresident owners of motor vehicles or motor vehicles not registered under our laws doubtless might be included within the law." *Opinion of the Justices*, 251 Mass. 569, 602, 147 N.E. 681, 696 (1925). In *Meints*, the Court then applied a rational basis level of scrutiny and found the Beatrice city ordinance to be constitutional.

Finally, while your opinion request refers generally to imposing civil penalties on nonresidents who fail to carry the proof of insurance required in their states of residence, we note that imposing such penalties may raise issues of due process, lack of notice to nonresidents or other concerns. It is our understanding that most states, but perhaps not all, require insurance coverage as a requirement of registering a motor vehicle. Also, it appears that not all states require that the proof of insurance or financial responsibility be carried in the motor vehicle. For these reasons, while we lack specific language to review, we suggest that imposing civil penalties may be problematic.

In summary, to the extent your proposed legislation is limited to deleting the words "in this state" from § 60-3,167, we conclude that the legislation would most likely be upheld as the result would seem to be equal treatment of residents and nonresidents. If other amendments to the Motor Vehicle Registration Act are also proposed, such as civil penalties for nonresidents, those specific amendments would need to be addressed separately.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Lynn A. Melson
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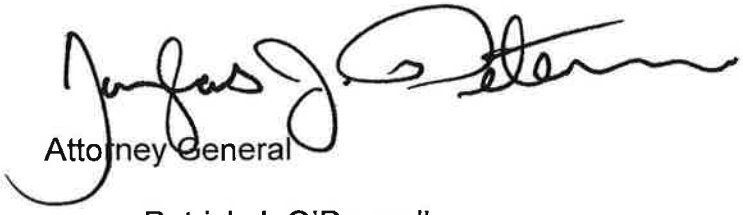

Attorney General

pc. Patrick J. O'Donnell
Clerk of the Nebraska Legislature

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