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DATE: October 19, 1994

SUBJECT: Whether Write-in Candidates For Governor Must Have a Lieutenant Governor Running Mate

REQUESTED BY: Allen J. Beermann, Secretary of State

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

You have requested the opinion of this office regarding the necessity of a write-in candidate for the office of Governor of the State of Nebraska having a designated Lieutenant Governor candidate as a running mate in order to have ballots cast for him or her counted on election day.

Applicable Nebraska Law

The law which governs your question is found in both the Nebraska Constitution and state election statutes. The Nebraska Constitution provides, "In the general election one vote shall be cast jointly for the candidates for Governor and Lieutenant Governor nominated by the same party." Neb. Const. art. IV, § 1. Although this provision arguably applies only to candidates nominated by a political party, Nebraska statutory law further provides:

> Beneath the names of the candidates for Governor and Lieutenant Governor nominated at a primary election by party and beneath the names of all candidates for Governor and Lieutenant Governor placed on the general election ballot by petition there shall be two write-in lines provided enclosed with brackets with one square to the left in which the voter may write the names of the candidates of his or her choice. The name appearing on

> the top line will be considered to be the candidate for Governor and the name appearing on the second line shall be considered to be the candidate for Lieutenant Governor. If an elector chooses to use the write-in provision for casting a joint ballot for the Governor and Lieutenant Governor of his or her choice, he or she shall write-in the name of his or her choice for Governor and the name of his or her choice for Lieutenant Governor and in the case of the omission of a name for Governor or for Lieutenant Governor under this provision, the counting board shall reject that portion of the ballot pertaining to the offices of Governor and Lieutenant Governor. . . .

Neb. Rev. Stat. § 32-504(2)(a) (1993) (emphasis added).

Other relevant statues govern the counting of write-in ballots. Neb. Rev. Stat. § 32-428.06 (1993) provides:

> If (1) at any stage of the counting a ballot is found having a given or generally recognized name and surname of a person written or printed on a line provided for that purpose and the square or oval to the left of the name of the candidate has been marked with a cross or other clear, intelligible mark or, if the ballot is a punch card ballot, the office and name of the write-in candidate has been written on the ballot envelope or jacket and the square properly marked or (2) the provisions of subsection (2) of section 32-428.10 are applicable, the ballot shall be counted.

(emphasis added). Neb. Rev. Stat. § 32-428.10(2) (1993) provides:

> Any candidate engaged in or pursuing a write-in campaign shall file a notarized affidavit of his or her intent with the county clerk or election commissioner no later than the day prior to the election. Candidates filing a notarized affidavit shall be entitled to all write-in votes when only the surname of the candidates has been written if such surname is reasonably close to the proper spelling.

(emphasis added).[1]

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[1] Whereas LB76 (Neb. Laws 1994) does not become effective until Jan. 1, 1995, this opinion does not consider amendments to applicable statutes pursuant to LB76.

Analysis

A question similar to the one presented was addressed by this office in Attorney General Opinion No. 274 (August 7, 1978). The following is our analysis from that opinion, which also addressed §32-504(2)(a):

> You first ask whether or not a person is restricted from filing for just the office of Lieutenant Governor under this statute. Since one individual can only file for one office we assume you are asking whether or not an individual can file in this manner for the office of Lieutenant Governor without designating a person who will seek election on their "team" as Governor. We believe the statute clearly requires all candidates for Lieutenant Governor and Governor to designate prior to circulating petitions in an effort to be placed on the ballot by petition, the name of a person the individual wishes to be their team member. Stated differently we believe this section prohibits a person from running for the office of Lieutenant Governor if he is not attached by preference to an individual seeking the office for Governor.
>
> You also ask whether or not the individual's opportunity for the office of Lieutenant Governor would be contingent upon the completion of the petition of an individual running for Governor. If you mean by this would it be necessary for a candidate for the office of Lieutenant Governor to file a petition containing the requisite number of signatures on which appeared the name of a gubernatorial candidate we agree. We do hasten to point out however that only one petition needs to be circulated on behalf of both the person seeking the office of Lieutenant Governor and Governor.

Atty. Gen. Op. No. 274 (August 7, 1978) (emphasis added).

Although the 1978 opinion dealt with petition candidates, it supports our conclusion that Neb. Rev. Stat. § 32-504(2)(a) also requires write-in candidates for Governor to designate an eligible Lieutenant Governor running mate in order to qualify for the benefits of § 32-428.10(2) (liberalized counting of partial names on ballots). This does not mean, however, that ballots cast for write-in candidates will not be counted if no running mate has been officially designated. When all applicable statutes are read together, it is our conclusion that all write-in ballots cast are to be counted, if qualified, pursuant to § 32-428.06 and § 32-504(2)(a). In the case of a write-in candidate for Governor, the

statutes require that a Lieutenant Governor candidate be written in on the ballot as well. As stated above, a write-in candidate who does not file an affidavit pursuant to § 32-428.10 is not entitled to the benefits of § 32-428.10(2), but this does not mean that write-in ballots which meet the more strict general statutory requirements will not be counted. In short, whether a particular ballot is counted ultimately depends on how the voter marks the ballot rather than on any declaration by the write-in candidate.

The remaining legal question is whether the requirement that voters write in names of both a candidate for Governor and Lieutenant Governor on write-in ballots unconstitutionally hinders write-in candidates for either office. This question was also raised in the 1978 opinion.

> You finally ask whether or not if, in fact, both persons must run as a team as in fact they must whether or not this unduly hinders the process of petition candidates from seeking the offices of Lieutenant Governor or Governor. We assume you are asking whether or not the fact that a candidate for Governor or Lieutenant Governor must run as a team hinders or unduly restricts the right of an individual to seek one of these elective offices.

Atty. Gen. Op. No. 274 (August 7, 1978). The 1978 opinion, however, avoided answering the above question regarding the constitutionality of § 32-504(2)(a).

Whereas Nebraska law is clear that ballots cast for write-in candidates for Governor are not to be counted unless a Lieutenant Governor candidate is also written in, the Secretary of State is not in a position to direct otherwise unless § 32-504(2)(a) is unconstitutional on its face. ***See generally State ex rel. Brant v. Beermann***, 217 Neb. 632, 637, 350 N.W.2d 18 (1984). Several constitutional principals are relevant to this inquiry, and a series of court decisions in recent years have clarified this area of law. In ***Burdick v. Takushi***, ___ U.S. ___, 112 S.Ct. 2059 (1992), the court upheld Hawaii's complete prohibition of write-in voting under the specific facts of that case.

One relevant fundamental principal is that, "The First Amendment grants to voters the right to associate to express their views through the candidates and their votes." ***Miyazawa v. City of Cincinnati***, 825 F.Supp. 816, 820 (S.D. Ohio 1993), (***quoting Anderson v. Celebrezze***, 460 U.S. 780, 786 (1982)). The ***Miyazawa*** court further stated, "'[T]he impact of candidate eligibility requirements on voters implicates basic constitutional rights.'" ***Miyazawa***, 825 F.Supp. at 820. In short, "`[L]aws that affect

candidates always have at least some theoretical, correlative effect on voters.'" ***Miyazawa***, 826 F.Supp. at 820 (***quoting Bullock v. Carter***, 405 U.S. 134, 143 (1972)). Thus, important constitutional rights are affected by § 32-504(2)(a).

States are not prohibited, however, from imposing some restrictions to regulate their elections. "Although the rights of voters are fundamental, not all restrictions imposed by the States on candidates `eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates.'" ***Miyazawa***, 825 F.Supp. at 820 (***quoting Anderson***, 460 U.S. at 788). "[T]he State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." ***Id. See Burdick***, 112 S.Ct. at 2063-2064. "The right to run for election is not an unlimited one." ***Miyazawa***, 825 F.Supp. at 821. "The [state] . . . has a compelling interest in preserving the integrity of its election process." ***Miyazawa***, 825 F.Supp. at 822.

There is no hard and fast rule for determining which regulations are permissible. "Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any `litmus-paper test' that will separate valid from invalid restrictions. (Citation omitted). Instead, a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." ***Burdick***, 112 S.Ct. at 2063 (***quoting Anderson***, 460 U.S. at 789).

Although ***Anderson v. Celebrezze*** was a ballot access case, it provides the standard by which restrictions on write-in voting are evaluated. ***Burdick v. Takushi***, 112 S.Ct. at 2066. As the California Supreme Court stated, "Thus, ***Anderson v. Celebrezze***, 460 U.S. 780 . . . requires us to consider three separate elements in ascertaining the constitutionality of state laws restricting access to the ballot: (1) the nature of the injury to the rights affected, (2) the interests asserted by the state as justifications for that injury, and (3) the necessity for imposing the particular burden affecting the plaintiff's rights, rather than some less drastic alternatives." ***Legislature of State of Cal. v. Eu***, 816 P.2d 1309, 1324 (Cal. 1991), ***cert. denied***, 112 S.Ct. 1292 (1992).

Regulations may not discriminate against candidates outside the major political parties.

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its

> very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and - of particular importance - against those voters whose political preferences lie outside the existing political parties. (Citation omitted). By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas.

Anderson, 460 U.S. at 794.

In a case involving Nebraska's statutes governing Presidential elections, the court held that a statutory scheme which provides no method by which an independent candidate for office may appear on a ballot other than through certification by a political party is unconstitutional. ***McCarthy v. Exon***, 424 F.Supp. 1143, 1144 (D.Neb. 1976) (***citing Storer v. Brown***, 415 U.S. 724 (1974)). It should be noted, though, that a "State has a less important interest in regulating Presidential elections than statewide or local elections. . . ." ***Anderson***, 460 U.S. at 795.

What restrictions on write-in candidates, then, are permissible? In another federal case involving Nebraska election statutes, the court held,

> Nebraska has a constitutional right, subject to restrictions, . . . to prescribe how and in what circumstances the names of party candidates or independent candidates may be placed on the general election ballot. . . On the other hand, it must be recognized that the power of a state to restrict the right of qualified electors to vote for candidates of their choice and the right of candidates, including independent candidates, to run for office is severely circumscribed by the Constitution.

MacBride v. Exon, 558 F.2d 443, 448 (8th Cir. 1977). In ***Storer v. Brown***, 415 U.S. at 735, the Court "approved the State's goals of discouraging `independent candidacies prompted by short-range political goals, pique, or personal quarrel.'" ***Anderson***, 460 U.S. at 803. The most definitive answer, however, comes from ***Burdick v. Takushi***. In ***Burdick***, the court concluded, "in light of the adequate ballot access afforded under Hawaii's election code, the State's ban on write-in voting imposes only a limited burden on voter's rights to make free choices and to associate politically through the vote." ***Burdick***, 112 S.Ct. at 2066.

> [W]hen a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights - as do Hawaii's election laws - a prohibition on write-in voting will be presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme.

Id. at 2067 (emphasis added).

Nebraska is not alone in requiring write-in candidates to run as a team for Governor and Lieutenant Governor. ***See, e.g.***, Ohio Revised Code § 3513.25.7 (***cited in Anderson v. Celebrezze***, 460 U.S. at 783 n.1). We conclude that, if challenged, the State of Nebraska could show sufficient State interests in regulating the election of a Governor and Lieutenant Governor as a team, and in preventing vacancies in either position following a general election. We further conclude § 32-504(2)(a) treats write-in candidates no differently in this regard than candidates of the major political parties.

In light of the foregoing considerations, section 32-504(2)(a) is clearly not facially unconstitutional. In fact, in light of the Supreme Court's analysis in ***Burdick*** upholding Hawaii's complete ban or write-in voting, we believe § 32-504(2)(a) is presumptively valid. Nebraska provides ample opportunity for candidates to get on the ballot by other means, and Nebraska places only reasonable restrictions on write-in voting, in contrast to Hawaii's complete ban. Consequently, the language of § 32-428.10(2) and § 32-504(2)(a) must be followed. Any write-in candidate for Governor must designate a Lieutenant Governor running mate in order to qualify for the benefit of § 32-428.10(2) (liberalized counting of incomplete names on ballots). All write-in ballots are to be counted pursuant to §§ 32-428.06 and 32-504(2)(a). However, these statutes require the names of both a candidate for Governor and Lieutenant Governor to be written in on a write-in ballot, and do not provide for counting of incomplete names on ballots for write-

in candidates who have not filed an affidavit pursuant to § 32-428.10(2).

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:

Attorney General

3-1764-3

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DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#94083

DATE: November 2, 1994

SUBJECT: Nebraska Constitution Article I, § 13 - Attendance of Victims at Trial

REQUESTED BY: Senator Carol McBride Pirsch

WRITTEN BY: Don Stenberg, Attorney General
Sam Grimminger, Deputy Attorney General

In relevant part, your proposed constitutional amendment would read, "A victim of a crime, as shall be defined by law, or his or her guardian or representative shall have the right to be present at trial unless the trial court finds sequestration necessary for a fair trial for the defendant." You ask whether legislation implementing the foregoing "would necessarily conflict with or limit any `attendance rights' of a victim under the open court provisions of Art. I, Sec. 13 of the constitution of the state of Nebraska." Neb. Const. art. I, § 13, provides, "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." It is presumed that your concern arises because under your proposed amendment, a victim-witness would be barred from being physically present in the courtroom during the period of time in which he or she would be sequestered.

If the proposed constitutional amendment is adopted, your proposed legislation would not run afoul of art. I, § 13, assuming, of course, that the legislation would conform to the proposed amendment. This is so because the proposed amendment would become part of the Nebraska Constitution and would, therefore, have the same footing as art I., § 13. The question then becomes whether there is a conflict between art. I, § 13, and the proposed constitutional amendment and, if so, the result.

As the court explained in ***Jaksha v. State***, 241 Neb. 106, 110-11, 486 N.W.2d 858, 863 (1992) (citation omitted):

> A constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument. If inconsistent, a constitutional amendment prevails over a provision in the original instrument . . . .

The open courts provision was included within the original Nebraska Constitution. ***See First Trust Co. v. Smith***, 134 Neb. 84, 106, 277 N.W. 762, 774 (1938). Whether one attempts to harmonize art. I, § 13, and the proposed constitutional amendment or views the proposed amendment as a specific exception to art. I, § 13, the result would be the same. A ~~victim~~-witness could be sequestered under the specific language of your proposed amendment.

Sincerely,

DON STENBERG
Attorney General

Sam Grimminger
Deputy Attorney General

APPROVED BY:

Attorney General

14-038-10