STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 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

DATE: May 16, 1995

SUBJECT: Amendments to Correct Constitutional Defects in Neb. Rev. Stat. § 49-1474.01 (Nebraska's prohibition on anonymous campaign literature).

REQUESTED BY: Senator Kermit Brashear, District 4

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

You have requested an Attorney General's Opinion concerning a series of possible amendments designed to cure constitutional infirmities in Neb. Rev. Stat. § 49-1474.01 (Nebraska's prohibition on anonymous campaign literature).[1]

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[1]It is the longstanding policy of the Office of the Attorney General not to provide opinions to State Senators on the constitutionality of existing statutes. ***See*** Op.Att'y Gen. No. 157 (Dec. 20, 1985). The Attorney General does, however, provide such opinions to state agencies due to their administrative responsibilities. ***See, infra***, at 2. Under Nebraska law, "When the Attorney General issues a written opinion that an act of the Legislature is unconstitutional and any state officer charged with the duty of implementing the act, in reliance on such opinion, refuses to implement the act, the Attorney General shall . . . file an action . . . to determine the validity of the act." Neb. Rev. Stat. § 84-215 (1994). Consequently, corrective action in this legislative session would preclude the necessity (and expense) of a lawsuit testing the constitutionality of § 49-1474.01.

On April 19, the United States Supreme Court, in ***McIntyre v. The Ohio Elections Commission***, 63 USLW 4279, 115 S.Ct. 1511 (1995), declared a similar Ohio statute unconstitutional in that it abridged the freedom of speech in violation of the First Amendment. In Op. Att'y Gen. No. 95038 (May 15, 1995) (to the Nebraska Accountability and Disclosure Commission), we found Neb. Rev. Stat. § 49-1474.01 to be indistinguishable, in relevant part, from the Ohio statute, and concluded § 49-1474.01 is unconstitutional. A copy of that opinion is enclosed for your reference. This opinion will begin with some general comments concerning permissible regulation of election-related speech in light of ***McIntyre***, and then address each of the five potential amendments to Neb. Rev. Stat. § 49-1474.01.

The Supreme Court's decision in ***McIntyre v. Ohio Elections Commission***, 63 U.S.L.W. 4279, 115 S.Ct. 1511 should be narrowly construed until and unless further guidance is provided by the courts. First of all, the Supreme Court clearly limited its decision to written communications, and did not address the constitutionality of disclaimer requirements for television and radio advertisements. ***Id.***, 63 USLW at 4280, n.3 ("Section 3599.09(B) [of the Ohio statute] contains a comparable prohibition against unidentified communications uttered over the broadcast facilities of any radio or television station. No question concerning that provision is raised in this case. Our opinion, therefore, discusses only written communications and, particularly, leaflets of the kind Mrs. McIntyre distributed."). ***See also id.*** at 4286 ("Appropriately leaving open matters not presented by McIntyre's handbills. . . ."") (Ginsburg, J., concurring).

In holding the Ohio statute unconstitutional, the Court concluded that "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude." ***Id.*** The Court agreed that preventing fraud and libel are important state interests, but found that Ohio had other anti-fraud statutes to address such activity. ***Id.*** at 4283-4284. The Court also stressed the breadth of the statute, in that it applied to documents that were not even arguably false or misleading; to individuals acting independently from candidates; to ballot issues as well as elections of public officers; and to materials distributed well in advance of elections. ***Id.*** at 4284. Although the Court invalidated the Ohio statute, the Court specifically recognized "that a State's enforcement interest might justify a more limited identification requirement. . . ." ***Id.*** at 4284. ***See also id.*** at 4286 (Ginsburg, J., concurring). With the foregoing in mind, each of the potential amendments to Nebraska's statute will be analyzed.

A. Amending § 49-1474.01 to Limit its Applicability to Candidate Elections.

The first potential amendment presented would amend Neb. Rev. Stat. § 49-1471.01 so as to limit its applicability to candidate elections, thereby exempting ballot issues.

The Court, in ***McIntyre***, noted that the Federal Election Act of 1971 regulates only candidate elections, and not referenda or other issue-based ballot measures. ***Id.*** at 4285. The Court also noted that the "risk of corruption perceived in cases involving candidate elections (citation omitted) simply is not present in a popular vote on a public issue." ***Id.*** at 4284 n. 15 (*quoting* ***First Nat. Bank of Boston v. Bellolti***, 435 U.S. 765, 790 (1978)). However, the Court's comments seem to refer more to the permissibility of expenditure disclosure requirements in candidate elections. ***See id.*** at 4285. The basic considerations regarding free speech would seem to be the same for all "election-related" writings, at least with regard to the writings of individuals (as discussed further below). "Advocacy of the election or defeat of candidates . . . is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." ***Buckley v. Valeo***, 424 U.S. 1, 48. Consequently, we cannot conclude that limiting the applicability of § 49-1474.01 to candidate elections would cure the constitutional defect.

B. Amending § 49-1474.01 to Limit its Applicability to "Persons" as Defined in § 49-1438, except an "Individual".

The next potential amendment to § 49-1474.01 would limit its applicability by making it apply only to "persons" as defined by § 49-1438, with the exception of "individuals."

Section § 49-1438 defines "person" for purposes of the Nebraska Political Accountability and Disclosure Act. Under § 49-1438, "person" includes "a business, individual, proprietorship, firm, partnership, limited liability company, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or other organization or group of persons acting jointly." Under § 49-1474.01, the name and address of the "person" who pays for election-related literature must appear on such matter. Any "person" who knowingly violates this provision is guilty of a Class IV misdemeanor.

The Court in ***McIntyre*** specifically pointed out that the Ohio statute "applies not only to the activities of candidates and their organized supporters, but also to <u>individuals acting independently</u>

and using only their own modest resources." *Id.* at 4284-4285 (emphasis added). *See also Buckley v. Valeo*, 424 U.S. 1, 37 (1976). In light of the entire analysis set forth in *McIntyre*, it is our view that limiting the applicability of § 49-1474.01 so as to exempt individuals acting independently would likely cure the constitutional defect in the statute. Our only caution comes with regard to the inclusion, under the definition of "person" in § 49-1438, of a "group of persons acting jointly." If this is construed, for example, to compel a husband and wife, acting jointly with their next door neighbor, to print their names on pamphlets they make on their personal computer for distribution prior to a local school bond election, then it would be difficult to distinguish the free speech rights of such a "group of persons" from an individual. We note that even Mrs. McIntyre had "help provided by her son and a friend" in placing leaflets on car windshields. *Id.* at 4280. Yet, the Court characterized her activity as independent.

C. Amending § 49-1474.01 to Provide a Dollar Threshold Which Would Trigger the Applicability of the Statute.

The next potential amendment would provide a dollar threshold which would trigger the applicability of § 49-1474.01. Although the *McIntyre* decision involved an individual "using only their own modest resources," we see no permissible basis to require identification simply on the basis of the amount expended on election-related writings.

In *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886 (1988), the Court stated, "The First Amendment protects [a citizen's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* at 1893 (striking down prohibition on paying petition circulators). The Court further stated, "Colorado also seems to suggest that it is permissible to mute the voices of those who can afford to pay petition circulators . . . `But the concept that government may restrict the speech of some . . . in order to enhance the relative voice of others is wholly foreign to the First Amendment.'" *Id.* at 1894, n.7 (*quoting Buckley*, 424 U.S. 1, 48-49).

In short, financial ability is not a legitimate basis for restricting First Amendment free speech rights. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley v. Valeo*, 424 U.S. 1, 49. *See also id.* at 19. ("The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs.") (noting that a restriction on the amount of money a person can spend on political communication reduces the

quantity of expression). This does not mean the State may not require reporting of expenditures at a threshold level.

D. Amending § 49-1474.01 by Repealing the Criminal Penalty Thereby Limiting it to Civil Enforcement.

Another potential amendment would simply repeal the criminal penalty in § 49-1474.01(3). As noted above, violation of § 49-1474.01 is currently a Class IV misdemeanor. It is our view that repealing the criminal penalty would simply transform an unconstitutional criminal statute into an unconstitutional civil statute. The Ohio statute invalidated in ***McIntyre*** carried a criminal penalty for violations. Ohio Rev. Code Ann. § 3599.09.1(C) (first degree misdemeanor). However, the criminal penalty could be imposed only if the Ohio Elections Commission decided not to issue a fine. ***Id.*** § 3599.09(C). In ***McIntyre***, the citizen who successfully challenged the statute had simply been fined $100.00 by the Ohio Elections Commission.

The First Amendment ensures that protected speech is unhindered, not just that such speech will not be criminally prosecuted. Civil penalties can impede free speech as effectively as criminal penalties. Consequently, an amendment repealing only the criminal penalty would not cure the constitutional defect.

E. Amending § 49-1474.01 to Provide a Specific Time Period Surrounding an Election for the Applicability of the Statute.

The final potential amendment would provide a specific time period surrounding an election during which § 49-1474.01 would operate. The Court, in ***McIntyre***, noted that the Ohio statute "applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance." ***Id.*** at 4284. However, under the very facts before the Court, the leaflets were distributed on April 27, 1988, just prior to "an imminent referendum." ***Id.*** at 4280 (emphasis added). Consequently, we do not believe that limiting the applicability of § 49-1474.01 to a specific period of time surrounding an election would cure the violation of the First Amendment. It is unclear why the Court focused on the time issue, given that Mrs. McIntyre clearly engaged in her leafleting just prior to the election, and given that the Court's opinion already appears limited in its application to individuals such as Mrs. McIntyre.

Finally, in addition to the foregoing analysis, we would point out that the Court in ***McIntyre*** stated, "a State's enforcement interest [against fraud] might justify a more limited

identification requirement. . . ." *Id.* at 4284. Consequently, it may be permissible for a state to require some identification (other than name and address) on election-related materials. It is not clear, however, what the Court meant by its reference to a "more limited" identification requirement, especially given the stringent test applied by the Court to such restrictions on political speech.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:

Attorney General

Enclosure

cc: Clerk of the Legislature

3-2058-3