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STATE OF NEVADA

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OFFICE OF THE
SECRETARY OF STATE

September 19, 2008

To Whom It May Concern:

As you are aware, the Secretary of State temporarily suspended the enforcement of NRS 294A.281-284 pending the review of these provisions by the Attorney General. Attached please find an Opinion from the Office of the Attorney General regarding the scope and application of NRS 294A.281. Please review the decision and contact the Secretary of State's office should you have any questions.

Consistent with the Attorney General's opinion, and in order to comply with the reporting requirements for ballot advocacy groups, please be advised that the third report is due October 15, 2008. You are required to disclose the information required pursuant to NRS 294A.283-284 beginning the date the ballot advocacy commenced advocacy for or against a ballot measure, and ending on September 30, 2008. On January 15, 2009, you will be required to file the final report, which will cover the period beginning October 1, 2008 through December 31, 2008. Further, each person or group of persons organized formally or informally which advocates the passage or defeat of a constitutional amendment or statewide measure proposed by initiative or referendum must file a statement of organization with the Secretary of State's office on or before September 24, 2008. Because of the temporary suspension of the rules, you will not be penalized for failing to register prior to the commencement of any such advocacy.

Respectfully,

ROSS MILLER
Secretary of State of Nevada

By: 
Matthew M. Griffin
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September 8, 2008

Ross Miller, Secretary of State
State of Nevada
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Dear Mr. Miller:

You have asked the Office of the Attorney General for an opinion regarding the scope and application of NRS 294A.281, which requires registration of certain persons and groups who advocate passage or defeat of a constitutional amendment or statewide initiative or referendum measure.

QUESTION

Does NRS 294A.281 raise any potential constitutional issues involving free speech or vagueness that will affect the manner in which the Secretary of State interprets and enforces this provision?

ANALYSIS

Chapter 294A of the NRS is entitled "Campaign Practices." A subchapter entitled "Persons and Groups Who Advocate for Passage or Defeat of Constitutional Amendments or Statewide Measures," NRS 294A.281-284, regulates certain persons and groups involved with political advocacy.

You ask whether the registration provision contained in this subchapter is subject to First Amendment challenge. For measuring a state's regulation of ballot measure advocacy, the relevant standard is identified in *Lemons v. Bradbury*, --- F.3d ---, 2008 WL 3522418 (9th Cir. 2008). Under the *Lemons* standard, "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are

generally sufficient to justify the restrictions." *Id.* at * 4 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).¹

1. BURDEN ON SPEECH

NRS 294A.281 requires that certain persons and groups register with the Secretary of State.

1. Each person or group of persons organized formally or informally, including a business entity, who advocates the passage or defeat of a constitutional amendment or statewide measure proposed by an initiative or referendum, before engaging in any such advocacy in this State, shall file a statement of organization with the Secretary of State as provided in subsection 2.

2. Each statement of organization must include:

(a) The name of the person, group of persons or business entity;

(b) The purpose for which the person, group of persons or business entity is organized;

(c) The names and addresses of any officers of the person, group of persons or business entity;

(d) If the person, group of persons or business entity is affiliated with or is retained by any other person, group or business entity for the purpose of advocating the passage or defeat of a constitutional amendment or statewide measure proposed by initiative or referendum, the name and address of each such other person, group or business entity; and

(e) The name, address and telephone number of the registered agent of the person, group of persons or business entity.

3. A person, group of persons or business entity which has filed a statement of organization pursuant to this section shall file an amended statement with the Secretary of State within 30 days of any changes to the information required pursuant to subsection 2.

¹ But see *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 (9th Cir. 2003), setting forth strict scrutiny test. The Ninth Circuit acknowledged that "the Supreme Court has been less than clear as to the proper level of judicial scrutiny we must apply in deciding the constitutionality of disclosure regulations" 328 F.3d at 1101 n.16. To find that strict scrutiny is necessary, the Ninth Circuit relied on *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, effectively overruling the decision in *C & C Plywood v. Hanson*, 583 F.2d 421, 425 (9th Cir. 1978). *Id.*

Several tenets guide construction of statutory language. The first consideration is the plain meaning of the language itself. "When determining how to give effect to a statute, a court should look first to its plain language." *Smith v. Crown Fin. Servs. of America*, 111 Nev. 277, 284, 890 P.2d 769, 773 (1995).

Language in subsection (1) of NRS 294A.281 defines who must register. Registration is required for "[e]ach person or group of persons *organized formally or informally . . . who advocates*." NRS 294A.281(1) (emphasis added). Thus the requirement pertains only if a person or group is organized to advocate.²

"The term 'organized' means 'having a formal organization to coordinate and carry out activities.'" *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600, 609 (6th Cir. 2005) (quoting from WEBSTER'S COLLEGIATE DICTIONARY (9TH ED. 1990)). Thus those who must register would *not* include an individual who purchases a newspaper ad, or hosts a dinner party to discuss political issues, or carries a sign advocating passage of an initiative. Instead, the requirement pertains to more extensively and deliberately involved persons and groups.

This reading is not only clear on the face of the statute, but is also consistent with the legislative history of A.B. 604 (2007), which became NRS 294A.281. The law was intended to supply transparency in the initiative process. "We are trying to have disclosure for the public so that they will understand who is actually behind initiatives. It is about transparency in the process of initiatives and referenda." Assemblyman Conklin, Assembly Committee on Elections, Procedures, Ethics, and Constitutional Amendments, April 5, 2007, at 13. Assemblyman Settlemeyer concurred: "I do want transparency in government and addressing where the big money that may be behind some of these ballot initiatives may be coming from." *Id.* Kristina Wilfore, Executive Director, Ballot Initiative Strategy Center and Foundation, Washington, D.C., testified that "[c]ertain signature firms and their sponsors have been 'gaming' the system for years." *Id.* at 21.

In the past, it was thought that ballot measures moved forward with a significant amount of volunteers from a particular state who cared about the policy in their state. That is just not the case; these are not volunteers who understand or want to comply with the rules. These are paid signature gatherers, working for major, multi-million dollar, for-profit organizations whose very business model is dependent upon frauding the system and skirting the rules.

² This understanding is furthermore consistent with the form of required registration, denominated by the legislature as a "statement of organization." NRS 294A.281(1).

Id. at 22. Another individual, Danny Thompson, representing the Nevada State AFL-CIO, testified that his organization investigated and found "massive fraud" committed by circulators in the 1998 election. *Id.* at 23. However, "[t]he problem with state law right now is that you cannot get find [sic] the people who were circulating the petitions; they disappear." Testimony of Mike Griffin, Retired Carson City District Court Judge, *id.* at 26.

The purpose of the registration requirement is thus disclosure of the identity of a measure's principal proponents so that voters may make informed choices. This purpose is condoned by the U.S. Supreme Court. See *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 202 (1999), noting approvingly the Tenth Circuit's recognition of the "importance of disclosure as a control or check on domination of the initiative process by affluent special interest groups." The state requirements approved in *Buckley* required that voters be told *who* has proposed a measure, and *who* has provided funds for its circulation. *Id.* at 203.

By limiting the registration requirement of NRS 294A.281 to only those whose involvement in advocacy is organized, the legislature narrowly tailored its regulation of political speech.³ It did not create "undue hindrances to political conversations and the exchange of ideas." *Buckley*, 525 U.S. at 192, citing *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

Now measuring this construction of NRS 294A.281 under the standard set forth in *Lemons v. Bradbury*, we conclude the measure is constitutional. It does not prohibit speech, nor does it limit contributions or expenditures. It only requires registration by certain narrowly defined ballot measure advocates.⁴ The U.S. Supreme Court has acknowledged that this purpose is a compelling one that justifies regulation if the regulation is narrowly tailored. See discussion in *California Pro-Life Council*, 328 F.3d at 1102–1103. See also *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007).

Therefore Nevada's statute satisfies the *Lemons* standard, and could even survive strict scrutiny because it is narrowly tailored to serve a compelling state purpose.

³ We suggest that the Secretary may properly use his rulemaking authority, NRS 294A.380(1), to identify relevant indicia of organization.

⁴ The significant influence of such speech has been objectively demonstrated. See *California Pro-Life Council, Inc.*, 507 F.3d at 1179, n. 8 (discussing several reports confirming that voters are significantly influenced by the source of a measure).

2. VAGUENESS

You have also asked whether the provisions governing ballot advocacy groups suffer from vagueness because the term "advocate" is not defined.

[A law] is unconstitutionally vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or if it authorizes or even encourages arbitrary and discriminatory enforcement. There must be a greater degree of specificity and clarity when First Amendment freedoms are at stake. However, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. [S]ee *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language"). As a result, uncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications.'

Gospel Missions of America v. City of Los Angeles, 419 F.3d 1042, 1047 (9th Cir. 2005) (internal quotations and citations omitted). See also *City of Las Vegas v. Dist. Ct.*, 118 Nev. 859, 59 P.3d 477 (2002).

We conclude that the term "advocate" is sufficiently well understood to create reasonable notice of the statutory requirements. "Speech is 'advocacy' if it 'presents a clear plea for specific action, and ... it must be clear what action is advocated.'" *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). If further clarification of the term is desired, the Secretary, through his authority at NRS 294A.380, may promulgate regulations to do so.

CONCLUSION

A person or groups of persons should only be required to file a statement of registration pursuant to NRS 294A.281 if they are formally or informally organized to advocate for or against a constitutional amendment or statewide measure proposed by an initiative or referendum. This requirement establishes a narrowly tailored burden on

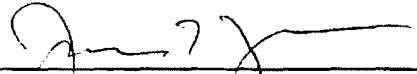
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political speech that advances a compelling state interest. The statute is also sufficiently clear, when read in this manner, to give adequate notice of its requirements.

Sincerely,

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