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DATE: June 21, 1996

SUBJECT: Constitutionality of Neb. Rev. Stat. §§ 32-612(3), (4) (Supp. 1994) (Anti-Fusion Provisions)

REQUESTED BY: Nebraska State Canvassing Board

WRITTEN BY: Don Stenberg, Attorney General
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Due to questions arising from the primary election of May 14, 1996, concerning the counting of votes for certain write-in candidates as well as the certification of nomination of candidates in a party other than the party of the candidate's registration, the State Board of Canvassers has requested the opinion of the Attorney General as to "whether a candidate may receive a write-in vote on a party ballot other than the party which the candidate is registered, and whether a candidate may receive and accept a certificate of nomination for a party other than the party which the candidate is registered."

I. Statutory Provisions

Current Nebraska statutory law expressly prohibits the name of a candidate from appearing printed on more than one political party ballot and prohibits a candidate who is a registered voter of one political party from accepting the nomination of another political party. Another provision directs that write-in votes only be counted on a political party ballot in the primary election if they are cast for a candidate who is a registered voter of that political party. These provisions combine to create a total ban on "fusion". "Fusion, also called multiple party nomination or cross-

filing, entails the nomination of the same candidate to the same office in the same election by more than one political party." *Fusion and The Associational Rights of Minor Political Parties*, William R. Kirschner, 95 Columbia L.Rev. 683. ***See also*** Peter H. Argersinger, *A Place on the Ballot*, Fusion Politics and Antifusion Laws, 85 Am.Hist.Rev. 287, 288 (1980)

Nebraska's anti-fusion statute (effective in 1995) provides, in part, as follows:

> . . . (3) The name of a candidate shall not appear printed on more than one political party ballot. A candidate who is a registered voter of one political party shall not accept the nomination of another political party.
>
> (4) In order to count write-in votes on a political party ballot in the primary election, the candidate who receives the votes must be a registered voter of that political party.

Neb. Rev. Stat. §§ 32-612(3), (4) (Cum. Supp. 1994). This provision clearly provides that write-in votes not be counted in a party's primary unless cast for a member of that party, and prohibits a candidate from accepting a nomination from more than one political party. The issue presented, then, is whether the provisions of Neb. Rev. Stat. §§ 32-612(3), (4) are valid and enforceable.

II. State Constitutional Law

Although the validity of §§ 32-612(3), (4) must be examined under applicable federal constitutional law, see section III, *infra*, state constitutional law provides an independent basis for analysis of a statute and must not be ignored. Consequently, this opinion will first examine the provisions in question under the Nebraska Constitution.

The ability to freely exercise the right to vote is afforded maximum protection under the Nebraska Constitution. The Nebraska Supreme Court has held that "The right of suffrage is absolute; qualified electors cannot be deprived of the right to vote. This right is guaranteed by the twenty-second section of the first article of the constitution. ***State ex rel. Williams v. Moorhead***, 95 Neb. 80, 81, 144 N.W. 1055 (1914), rev'd on other grounds, 96 Neb. 559 (1914).

Article I, Section 22 of the Nebraska Constitution provides that "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Neb. Const. art. I, § 22 (emphasis added).

See Pick v. Nelson, 247 Neb. 487, 493, 528 N.W.2d 309 (1995). The Nebraska Supreme Court has stated that statutes and parts of statutes which conflict with article I, § 22 "are nugatory." ***Bingham v. Broadwell***, 73 Neb. 605, 607, 103 N.W. 323 (1905). Likewise, the court has stated that article I, § 22 cannot be "ignored or evaded" when reviewing the validity of election statutes. ***Id.***

The Nebraska Supreme Court has held that pursuant to article I, § 22, "The right of the voter to vote at the general election for whom he pleases cannot be limited." ***State v. Wells***, 92 Neb. 337, 339, 138 N.W. 165 (1912) (emphasis added). Likewise, the Court stated in ***State ex rel. Baldwin v. Strain***, 152 Neb. 763, 767, 42 N.W.2d 796 (1950) that "The right to vote in a primary election and to participate in party activities is amply protected by constitutional provision." (Emphasis added).[1] Thus, the vote-

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[1]In ***State, ex rel. Nelson v. Marsh***, 123 Neb. 423, 243 N.W. 277 (1932), the court noted that Neb. Const. art. I, § 22 "applies to elections and not to the method of nomination." ***Id.*** at 424-425 (citing ***Baker v. Moorhead***, 103 Neb. 811, 174 N.W. 430 (1919)). However, the court also stated "the legislature may regulate the nomination of candidates provided the regulations are reasonable and do not unnecessarily hamper or impede the right of electors to vote for whomsoever they please." ***Id.*** at 425 (citing ***Morrissey v. Wait***, 92 Neb. 271, 138 N.W. 186 (1912)). Thus, while seemingly rejecting the applicability of art. I, § 22 to primaries, the Court nevertheless applied its principles.

Furthermore, the Court's dicta in ***Nelson v. Marsh*** directly contradicted existing precedent. In ***State v. Drexel***, 74 Neb. 776, 105 N.W. 174 (1905), the Court specifically addressed the question of whether Article I, § 22 applied to primary elections.

> The primary election contemplated in the act may not in and of itself be an election within the meaning of the constitutional provisions which guarantee that "all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Const., art. I, sec. 22. It is, however, a means to an end. It is a part of the election machinery by which is determined who shall be permitted to have their names appear on the official election ballot as candidates for public office. To say that the voters are free to exercise the elective franchise at a general election for nominees, in the choice of which unwarranted restrictions and hindrances are interposed, would be a hollow mockery. The right to freely choose candidates for public offices is as

counting restriction of § 32-612(3) and the prohibition on cross-party nominations of § 32-612(4) must be examined under this constitutional provision.

The judicial test applied under Article I, § 22 is whether the statutory provision under consideration "unreasonably and unnecessarily hampers and restricts the constitutional right of electors to exercise the elective franchise." ***State ex rel. Driscoll v. Swanson***, 127 Neb. 715, 256 N.W. 872, 874 (Neb. 1934). The Nebraska Supreme Court has applied this test on a number of occasions.

A. Validity of Anti-Fusion Provisions under the Nebraska Constitution

Anti-fusion provisions, such as § 32-612(3), restrict the associational rights of voters and political parties. As such, it could be argued that they "hinder and impede the rights of qualified voters to exercise their elective franchise" in violation of the plain terms of article I, § 22. In fact, the Nebraska Supreme Court has stated,

> The exercise of the elective franchise is a right which the law protects and enforces as jealously as property rights. It is afforded constitutional protection against
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> valuable as the right to vote for them after they are chosen. Both these rights are safeguarded by the constitutional guaranty of freedom in the exercise of the elective franchise.

Id. at 790-791 (emphasis added). The court then applied a test to the election provisions under consideration that distinguished regulations which ensured the effectual exercise of voting rights from those which operate as a substantial impairment of the right of the electorate to freely choose its candidates for public office "and therefore infringe on the constitutional guarantee [in Article I, § 22]." *Id.* at 791-792.

Thus, the technical difference between a general election and a primary has been treated by the Nebraska Supreme Court as a distinction with no practical difference for purposes of constitutional analysis. This may be due to the existence of inherent voter rights arising from our republican form of government. For example, in ***Bingham v. Broadwell***, 73 Neb. 605, 607, 103 N.W. 323 (1905), the court relied on Article I, § 22 and also the proposition that "the free and uncorrupted will of the voter shall be given effect" which the court said was "inherent in the idea of representative government." *Id.* at 607.

> legislative impairment. Inherently, it is the right of persons to combine according to their political beliefs and to possess and freely use all the machinery for increasing the power of numbers by acting as a unit to effect a desired political end.

State ex rel. Baldwin v. Strain, 152 Neb. 763, 767, 42 N.W.2d 796 (1950) (emphasis added). In an earlier case, however, the Court upheld an anti-fusion law under the circumstances involved.

At the Nebraska primary election held in April of 1912, Carl Johnson ran as a Republican candidate for County Commissioner of Lancaster County. No Democratic candidate appeared on the ballot in the Democratic primary. Mr. Johnson's name (the Republican candidate) was written in on 62 Democratic ballots as the candidate of that party. The Democratic Party, arguing that a vacancy existed on the ballot, selected George Curyea as the candidate of the Democratic Party for the general election. However, the Lancaster County Clerk refused to place Curyea's name on the ballot, and litigation ensued. The district court ruled in favor of the county clerk and an appeal was had to the Nebraska Supreme Court. ***State v. Wells***, 92 Neb. 337, 138 N.W. 165 (1912).

The Supreme Court framed the question before it as "can [a candidate] be the candidate of more than one political party, and, if so, how and under what conditions?" *Id.* at 338-339. The Court stated, "The important question here is as to the power of the legislature to protect the various political parties in their right to present candidates at the general election who affiliate with the party that presents them." *Id.* at 339.

The court concluded that:

> It is not necessary in order to preserve the rights of the voter at the general election, that the name of a candidate should appear on the ballot more than once, nor is it necessary that he should be described on the ballot at the general election as a member of more than one political party; and the legislature, to carry out the idea of a closed primary, may well provide that the average voter shall not be deceived by a statement on the ballot at the general election that a candidate belongs to or affiliates with two antagonistic political parties.

Id.

On the face of this holding, it would appear that Neb. Rev. Stat. § 32-612(3) would clearly survive judicial scrutiny under Article I, § 22 of the Nebraska Constitution. This is not

necessarily the case, however. The court in ***Wells*** both prefaced and qualified its holding by referencing the ability of candidates (under the then existing statutory scheme) to be the nominee of more than one party by following proper procedures. ***Id.*** at 339 ("The statute provides when and how one may be a candidate of two or more parties"; the legislature may prohibit multiple nominations "when those parties have not affiliated, and the candidate has . . . refused and neglected to state that he affiliates with the other [party]."). ***See also id.*** at 340 ("If two or more political parties are affiliated for any general election, he may, of course, affiliate with both of them and become their candidate accordingly.").

The ***Wells*** decision actually turned on the court's view of the rights of political parties where the top vote-getter was not officially "affiliated" with the party in whose primary he received the most votes. "Affiliation" was a statutorily required process whereby a candidate of one party officially teamed up with another party. The majority opinion in ***Wells*** said "no political party can be compelled to put forward as its candidate one who does not affiliate with it." ***Id.*** at 340.

It is significant that the dissent in ***Wells*** did not disagree with this principle, but disagreed as to its application. While the majority saw the nomination of an "unaffiliated" Republican in the Democratic primary to be a usurpation of the Democratic Party's right to select its own candidate, the dissent pointed out that Mr. Johnson received "a majority of those [votes] cast by democrats for the nomination of a candidate for county commissioner." ***Id.*** at 343 (Rose, J., dissenting) (emphasis added). The dissent further stated, on this same point, that:

> Exercising the right to participate at the primary in nominating a candidate to be voted for at the November election, 62 members of the democratic party voted for him. No other person received so many votes. There is no statute prohibiting those who affiliate with one party from nominating the candidate of another party. By voting for their choice in doing so, they are not disfranchised at a primary election.

Id. at 344-345. The dissent concluded that the effect of the majority's action "is to defeat part of the action of the democratic primary which was held by democrats alone without interference from republicans, to create an artificial vacancy . . . and to permit a political committee to set aside the regular action of the voters themselves." ***Id.*** Thus, the real dispute among the judges was who spoke for the Democratic Party - the democratic primary voters or the party central committee.

The fact that an "affiliation" process was available in 1912 and is not available today, clearly distinguishes ***Wells*** from the present situation under § 32-612(4). The court's holding in ***Wells*** when examined under the statutory scheme in place at the time, stands for the proposition that parties cannot be forced to accept involuntary fusion. Where the statutory "affiliation" process is followed, however, a different result is reached. Thus, a fusion law containing a consent provision is very different than one without. Nonetheless, despite our serious reservations, it cannot be said that Neb. Rev. Stat. §§ 32-612(3) is clearly unconstitutional under Neb. Const. art. I, § 22. ***See State ex rel. Discoll v. Swanson***, 127 Neb. 715, 719, 256 N.W. 872 (1934) (holding that a statute prohibiting defeated primary candidates from running for another office by petition in the general election did not violate article I, § 22).

B. Validity of Restriction on Counting Write-In Votes under the Nebraska Constitution

Neb. Rev. Stat. § 32-612(4) prohibits counting write-in votes in a party's primary for a candidate not registered in that party. Although this provision may save election officials time, we do not see that it serves any constitutionally permissible purpose. A voter whose vote is not counted has arguably been unnecessarily hampered and restricted in his constitutional right to exercise his or her elective franchise. See ***Swanson***, 256 N.W. at 874. Granted, it is clear that if the candidate for whom the vote is cast is precluded from accepting the nomination under § 32-612(3) (assuming, arguendo, that provision is constitutional), counting his or her votes is a largely futile exercise. Nonetheless, it could be argued that voting is a form of political expression protected by the Nebraska Constitution, and thus a citizen's validly cast vote should at least be counted.

Notwithstanding the different statutory scheme in existence at the time, it is instructive to review the Nebraska Supreme Court's past comments on counting all ballots cast regardless of party affiliation. In ***State ex rel. Christy v. Stein***, 35 Neb. 848, 53 N.W. 999 (1892), the Nebraska Supreme Court refused to grant an application for a mandamus seeking to compel the Clay County Clerk to issue a certificate of election to the Republican candidate for State Senate. The Republican candidate received more votes than the candidate of any other single party. However, the combined votes of the Democrat and People's Independent candidates (who was the same person) exceeded the number received by the Republican. The court held that the candidate with the most votes won, regardless of under what party label they were cast.

> If a court, upon some pretext which may nearly always be found, may throw out votes lawfully cast and

> thus defeat the will of the electors, government by the people to that extent is defeated, and an example of disregard of law set before them by the guardians and exponents of the law. It is the duty of all courts to carry out the lawfully expressed will of the electors as declared through the ballot box; and that duty this court not only recognizes, but will duly enforce. It is very clear that the relator has not the highest number of votes cast for senator of the twenty-fifth district, and that defendant Johnson has the highest number of such votes. The writ is therefore denied and the action dismissed.

Id. at 865. ***See also State ex rel. Driscoll v. Swanson***, 127 Neb. 715, 717, 256 N.W. 872 (1934).

The Nebraska Constitution expressly requires that there be no unreasonable hindrance to exercising the right to vote. Having one's duly cast ballet counted and recorded, even if for an ineligible candidate, would seem to be necessary in order to fully recognize the constitutional right to exercise the elective franchise at a free election as required by article I, § 22. ***See also*** Neb.Const. art I, §5 (freedom of speech). We conclude that Neb. Rev. Stat. § 32-612(4) unnecessarily hinders and impedes the right of qualified voters to exercise the elective franchise.

III. Federal Constitutional Law

Pursuant to Article VI of the Constitution of the United States, federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby; any thing in the Constitution or Laws of any State to the contrary notwithstanding." Consequently, the validity of Neb. Rev. Stat. §§ 32-612(3), (4) is controlled by federal law to the extent federal constitutional provisions conflict with state law (state statutes and court decisions notwithstanding).

Because political participation and voting rights are protected by the First Amendment to the United States Constitution (applied to the States through the Fourteenth Amendment), Neb. Rev. Stat. §§ 32-612(3),(4) must be examined under applicable First Amendment law.

A. Standard of Review for State Statutes Which Burden the Right to Political Association

The applicable standard of review for state statutes which burden the right to political association was set forth recently by the United States Court of Appeals for the Eighth Circuit:

> The legal standards that control our review are well-settled. A state's broad power to regulate the time, place, and manner of elections does not eliminate the state's duty to observe its citizens' First Amendment rights to political association. ***Eu v. San Francisco County Democratic Cent. Comm.***, 489 U.S. 214, 222, 109 S.Ct. 1013, 1019-20, 103 L.Ed.2d 271 (1989). To decide a state election law's constitutionality, we first consider whether it burdens First Amendment rights. ***Id.*** If so, the state must justify the law with a corresponding interest. ***See id.*** When the burden on First Amendment rights is severe, the state's interest must be compelling and the law must be narrowly tailored to serve the state's interest. ***See id.; Norman v. Reed***, 502 U.S. 279, 288-289, 112 S.Ct. 698, 704-06, 116 L.Ed.2d 711 (1992).

Twin Cities Area New Party v. McKenna, 73 F.3d 196, 198 (8th Cir. 1996), cert. granted, 1996 WL 183400 (May 28, 1996), stay denied, 1996 WL 332051 (June 18, 1996). ***See also Libertarian Party of Nebraska v. Beermann***, 598 F.Supp. 57, 64 (D. Neb. 1984) ("States do have a compelling interest in controlling fragmentation. . . . However, the burdens placed upon [fundamental voting rights] must be only those burdens necessary to achieve the goal and no more. Those burdens must be the result of the least restrictive means.").

Neb. Rev. Stat. §§ 32-612(3),(4) clearly place a burden on the First Amendment rights to political association of Nebraska voters, in that the statute restricts who can be chosen as the nominee of a political party and even whose votes are counted. If, as here, the burden is severe, the State interest served by the statute must be compelling and the statute must be narrowly tailored to serve that interest. ***See McKenna***, 73 F.3d at 198-199.

B. Analysis of Section 32-612 Under First Amendment Law

1. Constitutionality of Restriction on Counting Write-In Votes

In section IIB, *supra*, we concluded that the restriction on counting write-in votes found in Neb. Rev. Stat. §32-612(4) is invalid under the state constitution. This section will examine the validity of this same restriction on counting write-in votes under the Federal Constitution.

Although the protection of political expression by the First Amendment (via the Fourteenth Amendment) is usually afforded through the use of strict scrutiny, and offending statutes are invalidated if not narrowly tailored to serve a compelling state interest, a different result is possible with respect to

restrictions or write-in voting under certain circumstances as the result of a U.S. Supreme Court decision upholding a Hawaiian statute which completely banned write-in voting.

In ***Burdick v. Takushi***, 70 Haw. 498, 776 P.2d 824 (1989), the Hawaii Supreme Court (without citation to any authority or constitutional law) held that the Hawaii Constitution does not require election officials to permit the casting of write-in votes or to count or publish write-in votes. After further proceedings in federal court, the U.S. Supreme Court held that a state may ban write-in voting entirely under some circumstances. ***Burdick v. Takushi***, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (Hawaii's interest in avoiding the possibility of unrestrained factionalism at the general election provides adequate justification for its ban on write-in voting).

Thus, a total ban on write-in votes is constitutionally permissible if it is necessary to control political fragmentation in a state where "election laws provide for easy access to the ballot by new, or minority parties, and by non-partisan candidates." ***Burdick v. Takushi***, 776 P.2d at 824-825. ***See Burdick***, 504 U.S. 428, 112 S.Ct 2059, 119 L.Ed.2d 245. ***See also*** Op. Att'y Gen. No. 94082 (October 20, 1994).

The analysis of §32-612(4), however, does not stop with the ***Burdick*** decision. Section 32-612(4) must also be examined in the context of its role as a component of an anti-fusion law. The analysis of § 32-612(4) in this context is inseparable from the analysis of § 32-612(3), which is discussed below.

2. Constitutionality of Anti-Fusion Provisions

In ***Twin Cities Area New Party v. McKenna***, 73 F.3d 196 (8th Cir. 1996), the court examined "whether Minnesota can constitutionally prevent a minor political party from nominating its chosen candidate on the ground the candidate is another party's nominee, even though the candidate consents to the minor party's nomination and the other party does not object." ***Id.*** at 197. One of the Minnesota statutes at issue simply required candidates to file an affidavit stating they had "no other affidavit on file as a candidate . . . at the . . . next ensuing general election." ***Id.*** The other statute prohibited an individual from seeking nomination for any partisan office both at the primary and also by nominating petition. ***Id.*** The constitutionality of Minnesota's other more specific anti-fusion statute was technically not at issue. ***Id.*** at 200 ("No individual shall be named on any ballot as the candidate of more than one major political party.").

The Court concluded that "Minnesota's ban on multiple party nomination is broader than necessary to serve the State's asserted

interests. . . ." *Id.* at 199. The Court said the statutes "are unconstitutional because the statutes severely burden the New Party's associational rights and the statutes could be more narrowly tailored (with a consent requirement) to advance Minnesota's interests." *Id.* at 200. The Court stated that Minnesota could, however, prohibit fusion where the candidate and both parties did not consent. "By merely rewriting the laws to require formal consent, Minnesota can address its concerns without suppressing the influence of small parties." *Id.* at 199.

In reaching its decision, the Court examined each of Minnesota's stated interests in the statute: 1) Preventing disruption of the two-party political system by internal discord in the parties, and major party splintering; 2) Preventing voter confusion; 3) Fostering an informed and educated expression of the popular will in a general election; 4) Preventing overcrowded ballots; and 5) "Knowing how the winner will be determined." The Court addressed these interests as follows:

> Minnesota's ban on multiple party nomination is broader than necessary to serve the State's asserted interests, regardless of their importance. Minnesota asserts the statutes are necessary because without them, minor party candidates would just ride the coattails of major party candidates, disrupting the two-party political system as we know it. Minnesota is concerned about internal discord within the two major parties and major party splintering. The New Party responds that to avoid these problems, Minnesota need only require the consent of the candidate and the candidate's party before the minor party can nominate the candidate. We agree. By merely rewriting the laws to require formal consent, Minnesota can address its concerns without suppressing the influence of small parties. ***Norman***, 502 U.S. at 290, 112 S.Ct. at 706. Minnesota has no authority to protect a major party from internal discord and splintering resulting from its own decision to allow a minor party to nominate the major party's candidate. ***Tashjian***, 479 U.S. at 224, 107 S.Ct. at 553-54. The "State . . . may not constitutionally substitute its own judgment for that of the [major] [p]arty." *Id.* Minnesota's interest in maintaining a stable political system simply does not give the State license to frustrate consensual political alliances. We realize "splintered parties and unrestrained factionalism may do significant damage to the fabric of government," ***Storer v. Brown***, 415 U.S. 724, 736, 94 S.Ct. 1274, 1282, 39 L.Ed.2d 714 (1974), but Minnesota's concerns that all multiple party nominations would cause such ruin are misplaced. Indeed, rather than jeopardizing the integrity of the election system,

consensual multiple party nomination may invigorate it by fostering more competition, participation, and representation in American politics. As James Madison observed, when the variety and number of political parties increases, the chance for oppression, factionalism, and nonskeptical acceptance of ideas decreases. Kirschner, 95 Colum.L.Rev. at 712 n. 213.

The State's concerns about voter confusion can also be dealt with in less restrictive ways. The State worries that voters would be confused at the polls by seeing a candidate's name on more than one party line. This confusion could be alleviated by simple explanations in the ballot directions to cast the ballot for the candidate on one party line or the other. The State also believes it would be difficult for the voters to understand where a candidate stands on issues when the candidate's name appears twice on a ballot, and voters will be misled by party labels. The State undoubtedly has a legitimate interest in "'fostering informed and educated expressions of the popular will in a general election.'" ***Tashjian***, 479 U.S. at 220, 107 S.Ct. at 551 (quoting ***Anderson v. Celebrezze***, 460 U.S. 780, 796, 103 S.Ct. 1564, 1573-74, 75 L.Ed.2d 547 (1983)). A consensual multiple party nomination informs voters rather than misleads them, however. If a major party and a minor party believe the same person is the best candidate and would best deliver on their platforms, multiple party nomination brings their political alliance into the open and helps the voters understand what the candidate stands for. . . .

. . . Essentially, Minnesota suggests multiple party nomination would confuse voters by giving them more information. The Supreme Court teaches, however, that courts must skeptically view a state's claim that it is enhancing voters' ability to make wise decisions by restricting the flow of information to them. ***Id.*** at 221, 107 S.Ct. at 552. Indeed, neither the record nor history reveal any evidence that multiple party nominations have ever caused any type of confusion among voters, in Minnesota or anywhere else. ***See*** Kirschner, 95 Colum.L.Rev. at 707-08 n. 176.

The State's remaining concerns about multiple party nomination are simply unjustified in this case. The potential problem of overcrowded ballots is already avoided by requiring a candidate to display a minimum level of support before being placed on the ballot. ***See*** Minn.Stat. § 204B.08. The State's concern with "knowing

> how the winner will be determined" is not furthered by statutes preventing multiple party nomination in general elections. The winner is determined in the same way in general elections whether or not a fusion candidate is involved: the individual who receives the most votes wins.

Id. at 199-200 (emphasis added).

In contrast to the *McKenna* decision, another federal circuit court upheld Wisconsin's anti-fusion law. In *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991), cert. denied, 505 U.S. 1204 (1992), the Court reviewed Wisconsin's statute banning multiple party nominations. Two of the three circuit judges held that Wisconsin's ban on multiple-party nominations did not burden the associational rights of political parties and even if it did, it was justified by the State's compelling interest avoiding voter confusion, preserving the integrity of the election process, and maintaining a stable political system.

The third judge believed the State's compelling interest in maintaining the distinct identities of the political parties was the only basis that justified Wisconsin's law. *Id.* at 387 (Fairchild, Sr. Judge, concurring).

Four years after the *Swamp* decision, the Eighth Circuit Court of Appeals addressed each of the alleged state interests asserted in the *Swamp* case, and, in our view, convincingly refuted each. *McKenna*, 73 F.3d 196. Most importantly perhaps, the Eighth Circuit noted that the *Swamp* decision failed to address the issue of whether the statute could be more narrowly tailored with a consent requirement (which would satisfy several of the state interests discussed by the 7th Circuit). We believe the Eighth Circuit's decision is consistent with existing U.S. Supreme Court precedent and will be affirmed. We base this conclusion, in part on the following quote from a 1986 U.S. Supreme Court decision:

> Were the State to . . . provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals.

Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 107 S.Ct., 544, 549, 93 L.Ed.2d 514 (1986) (invalidating Connecticut statute which prohibited Republican Party from allowing independents to vote in its Primary).

Furthermore, Nebraska would likely fail in an attempt to defend its anti-fusion statute on the one and only ground found to be legitimate by the Senior Circuit Judge in the ***Swamp*** decision -- the maintenance of distinct identities of the political parties. Since Nebraska has a unique nonpartisan unicameral legislature, "closed" primary elections for U.S. Senator and U.S. Representatives were ended in 1988 following the U.S. Supreme Court's decision in ***Tashjian***, 479 U.S. 216. ***See*** Op. Att'y Gen. No. 87070 (May 12, 1987) (opining that Nebraska could no longer exclude independent voters from congressional primaries since the Supreme Court held that all those allowed to vote for the more numerous branch of the state legislature must also be allowed to vote in congressional elections). As a result, the judicially recognized interest in maintaining the distinct identities of the political parties, ***Swamp v. Kennedy***, 950 F.2d at 386-388 (Fairchild, J., concurring), has already been compromised in Nebraska.

Voters who are affiliated with no political party, and who may adhere to any number of political views or philosophies, may now vote in the Republican, Democrat or Libertarian primary simply by requesting a ballot on election day. Consequently, Nebraska would not likely be able to successfully argue that a compelling state interest in maintaining the distinct identities of the political parties justifies § 32-612(3). ***See Swamp***, 950 F.2d at 389 (Ripply, dissenting from denial of rehearing en banc) ("it is not at all clear that Wisconsin, which permits cross-over votes, has an important interest in preventing the sort of 'raiding' that the panel foresees.").

Equally important, Nebraska allowed fusion for more than 100 years, until the 1996 primary election (***see*** Appendix-History of Fusion Law in Nebraska). It is inconceivable that Nebraska has a compelling interest in preventing fusion since it sanctioned it by statute for 97 years. Finally, Nebraska had a fusion law with a consent requirement from 1907 to 1925 (***see*** Appendix). Clearly, the current statute could be more narrowly tailored since Nebraska had a consent provision previously. For a discussion of Nebraska's consent requirement in effect between 1907 and 1925, see 1921-22 Rep. Att'y Gen. 186 (June 1, 1922); 1917-18 Rep. Att'y Gen. 218 (Aug. 27, 1918); and 1907-08 Rep. Att'y Gen. 108 (Aug. 14, 1907). Thus, we conclude Neb. Rev. Stat. § 32-612 is clearly unconstitutional under ***McKenna***, and would be declared invalid by the United States District Court for the District of Nebraska.

C. Current Status and Precedential Authority of *McKenna*

Subsequent to the Eight Circuit's decision in ***McKenna*** in January of 1996, the State of Minnesota requested review by the U.S. Supreme Court. The Supreme Court granted Minnesota's Petition for Writ of Certiorari to review the ***McKenna*** case on May 28, 1996,

apparently to resolve the split between the Eighth and Seventh Circuits. The Court will likely hear arguments this fall or winter, and a decision is expected sometime in 1997. Briefs are due on July 12, 1996.

Since Nebraska is located in the Eighth Circuit, the decision of the Court of Appeals in ***McKenna*** is binding on the United States District Court for the District of Nebraska, absent an intervening United States Supreme Court decision or a stay of proceedings. 2A Federal Procedure, Lawyer's Edition, *Appeal, Certiorari, and Review*, §3.131(1995). On June 18, 1996, the Supreme Court denied Minnesota's request for a stay. The Canvassing Board, then, must decide whether to implement § 32-612(3),(4) or follow the Eighth Circuit's decision in ***McKenna***.

It is a basic rule of statutory construction that legislative acts such as the Nebraska statute in question are presumed to be constitutional. ***Pick v. Nelson***, 247 Neb. 487, 491, 528 N.W.2d 309 (1995); ***Tulloch v. State***, 237 Neb. 138, 465 N.W.2d. 448 (1991). However, this presumption is rebuttable, and does not require state officials to follow unconstitutional statutes. In fact, executive officers in Nebraska must take an oath before entering upon their official duties to "support the Constitution of the United States, and the Constitution of the State of Nebraska. . . ." Neb. Const. art IV, §1. Obviously, this may sometimes place state officials in difficult situations where there are real or perceived conflicts between state statutes and state or federal constitutional provisions. Nebraska law does, however, address this situation.

Under Nebraska law, a procedure has been established whereby a state agency or official may refuse to implement the terms of a state statute which the Attorney General has opined to be unconstitutional:

> 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, within ten working days of the issuance of the opinion, file an action in the appropriate court to determine the validity of the act.

Neb. Rev. Stat. §84-215 (1994). Thus, the Board of Canvassers has legal authority to refuse to implement Neb. Rev. Stat. § 32-612(3),(4) on the basis of the Eighth Circuit's decision in ***McKenna*** and this opinion. The legal theory behind refusal to implement a constitutionally suspect statute is that an unconstitutional statute is considered by the law to be wholly void from the time of

its enactment. It is treated as if it never existed. *See State ex rel. Rogers v. Swanson*, 192 Neb. 125, 219 N.W.2d 726 (1974).

Conclusion

Nebraska's prohibition on counting write-in votes in a party's primary for a candidate not registered in that party (Neb. Rev. Stat. § 32-612(4)) unnecessarily hinders and impedes the right of qualified voters to exercise the elective franchise, and is thus unconstitutional under Article I, §22 of the Nebraska Constitution.

Although a total ban on write-in votes is constitutionally permissible under the Federal Constitution if necessary to control political fragmentation in a state where election laws otherwise provide for easy access to the ballot by new or minority parties, and by non-partisan candidates, § 32-612(4), as a component of an anti-fusion law, nonetheless violates the U.S. Constitution as an overly broad and severe burden on the associational rights of political parties under *McKenna v. Twin Cities Area New Party*, 73 F.3d 196 (8th Cir. 1996).

Section 32 612(3) is suspect, but not clearly unconstitutional under Article I, § 22 of the Nebraska Constitution. Based on controlling precedent from the Eighth Circuit Court of Appeals and the United State Supreme Court, however, we conclude that § 32-612(3) could be more narrowly tailored (with a consent requirement) to advance the State's interests, and thus clearly violates the First Amendment to the U.S. Constitution.

The Board of Canvassers has legal authority to refuse to implement Neb. Rev. Stat. §§ 32-612(3),(4) on the basis of the Eighth Circuit's decision in *McKenna* and this opinion, in accordance with Neb. Rev. Stat. § 84-215.

Sincerely yours,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved By:

Attorney General
3-2475-3

APPENDIX

I. A Brief History of Fusion Law in Nebraska

Multiple party nomination of political candidates, or fusion, has a long and colorful history in Nebraska. Nebraska voters have elected two fusion governors (Silas Holcomb, 1895-1899, and William A. Poynter, 1899-1901). Each of the two were nominated by both the Democrat and People's Independent (Populist) parties.

According to the Nebraska Blue Book, William Jennings Bryan won Nebraska's presidential election in 1896, receiving votes as a Democrat, People's Independent and Middle of the Road Populist. In 1900, Bryan finished second as a fusion candidate (Democrat and People's Independent). Bryan rebounded in 1908 winning Nebraska's electoral votes as both a Democrat and People's Independent candidate. In the 1912 presidential election, Woodrow Wilson defeated William Howard Taft (Republican) and Teddy Roosevelt (Progressive) running as nominee of the Democrat and People's Independent parties.

Prior to 1897, the nomination of candidates was largely unregulated and political parties apparently printed their own ballots in Nebraska. *See* "A Place on the Ballot" Fusion Politics and Antifusion Laws, 85 Am.Hist.Rev. 287, 290 (1980). The party-ballot system was a standard practice prior to adoption of Australian ballot laws in the late 1800s, whereby ballots were printed only by authorized election officials and distributed at public expense. The party-ballot system permitted unrestrained fusion in Nebraska prior to 1897.

A. Legislative Regulation of Party Nominations In Nebraska

Nebraska adopted the Australian ballot system in 1897. Neb. Laws 1897, Ch. 31, p.213. However, under the new system, Nebraska law specifically provided that "Any candidate who shall be the regular nominee of one or more party conventions, shall have his name printed on the ticket of each party so nominating him." Section 3040 at 580, Ch. 26, Comp. St. 1897 (emphasis added). Thus, fusion was officially recognized and actively practiced even after the party-ballot system ended.

In 1899, the Nebraska Legislature adopted a major election reform bill regulating nomination of candidates by parties and the nomination of candidates by petition. The general election ballot was required to conform to a statutorily designated form. Neb. Laws 1899, Ch. 26, p. 121-133. This law, however, also expressly authorized fusion, and provided that "Any candidate who shall be the regular nominee of one or more party conventions shall have the party title of each party so nominating him, printed after his name." *Id.* at 125 (emphasis added). That same year, the Nebraska Legislature adopted another major bill regulating primary elections

and conventions of political parties. The bill also established a registration system to be used to keep non-members from participating in party nominating proceedings. Neb. Laws 1899, Ch. 27, p. 134-142.

In 1907, the Nebraska Legislature adopted yet another major election reform bill which provided that no candidate could have his name printed on the primary ballot unless he, or 25 qualified electors, filed a written application requesting his name appear on the ballot and certifying that he is affiliated with a designated party. Neb. Laws 1907, H.R. 405. The law permitted electors other than the candidate to file such nomination papers, but the candidate had to file what amounted to an acceptance within five days of the filing. Section 3326 at 803, Ch. 26, Comp. St. 1907. Thus, Nebraska adopted a consent requirement which prevented involuntary fusion.

Because of the new restrictions, uncertainty arose over whether fusion was still permitted. This led to litigation which resulted in a major pro-fusion decision by the Nebraska Supreme Court. In ***State v. Junkin***, 80 Neb. 1 (1907), the court held that "Unless the effect of [the provisions of the 1907 legislation at issue] . . . is to allow more than one political party to have the same candidate for an office, it can have no purpose or meaning." ***Id.*** at 3 (referring to a provision regulating nominations by new parties and their placement on the ballot). Thus, the court concluded that where an application has been duly filed by a qualified candidate of a political party, and the members of another party file a petition complying with the statute asking that the same person be placed on the ballot of their party, the name should be placed on both political party's ballots. ***Id.*** This decision confirmed an Attorney General's Opinion which reached the same conclusion just three months earlier. 1907-08 Rep. Att'y Gen. 108 (Aug. 14, 1907).

Subsequent to, and consistent with, the Supreme Court's decision in ***Junkin***, the Legislature amended Nebraska law to expressly provide that "The name of any candidate may appear on one or more of the party tickets if the proper filings have been made." Neb. Laws 1909, S. 109, Ch. 50 at 245-247 (emphasis added). This provision was recodified in 1911 in its same form. ***See*** Neb. Rev. Stat. § 2158 (1913). However, in 1909, the Legislature also adopted a severe restriction on fusion by prohibiting voters from writing in the name "of any party appearing as a candidate in any of the other party columns on such ballot." Neb. Laws 1909, Ch. 50 at 248. This amendment was codified at Cobbey's Ann. Stat. of NE § 5869 (1909) and became effective March 11, 1909.

This restriction on fusion by write-in vote was short-lived, however. In 1911, State Representative Gustafson introduced H.R. 176 which repealed and replaced the 1909 version of § 5869 (Primary

election ballots). *See* Cobbey's Ann. Stat. of NE § 5869 (1911) (effective July 6, 1911).

Section 2158 (which expressly permitted fusion) was amended in 1917 to also provide that "where a candidate seeks nomination on two or more tickets, if he loses the nomination of the majority party, he shall not be permitted to accept the nomination of the minority party. . . ." Neb. Laws 1917 p. 110. The statute, as amended, was retained and recodified in 1922. Section 2115, Comp. St. 1922. This statute remained in use until 1925. Thus, fusion was a significant part of the Nebraska electoral process continually from statehood until 1925 (58 years).

In 1925, State Senator Vance of Adams introduced S. 37, which was Nebraska's first real anti-fusion law. This bill amended the statutory requirements for the candidate nomination application form to require that the candidate verify that he affiliates with a particular political party "and that party only. . . ." Neb. Laws 1925, S. 37, Ch. 108 at 298. The bill also amended § 2115 to provide "The name of the same candidate shall not appear printed on more than one party ticket. . . ." *Id.* at 299 (emphasis added). However, even under this anti-fusion bill the law provided that, "the electors of any party may vote for a candidate of another party by writing his name in . . . , but if he should lose the nomination of the party of which he is an avowed candidate, he shall not be permitted to accept the nomination thus tendered to him by the electors of the other party." *Id.* (emphasis added). Thus, even under the "anti-fusion" law of 1925, a candidate could be nominated by more than one party.

The 1925 law was retained and recodified in 1929 at § 32-1125, Comp. St. 1929, and was again retained and recodified in 1943 at Neb. Rev. Stat. § 32-1124 (1943). The statute was once again recodified in the 1950's at Neb. Rev. Stat. 32-516 and was retained in its basic 1925 form until 1994. *See* Neb. Rev. Stat. § 32-516 (1993). Thus, fusion was statutorily authorized in at least some form in Nebraska continually from the time the state first adopted the Australian ballot in 1897, and was legally possible in Nebraska from statehood until 1994.

In 1994, the Nebraska Legislature adopted LB 76, a massive overhaul of Nebraska's election statutes. Section 180 of LB 76 provided that "A candidate who is a registered voter of one political party shall not accept the nomination of another political party." Neb. Rev. Stat. § 32-612(3) (Cum. Supp. 1994) (emphasis added). LB 76 also eliminated the write-in fusion provision, which had existed since 1925, by providing that "In order to count write-in votes on a political party ballot in the primary election, the candidate who receives the votes must be a registered voter of that political party." Neb. Rev. Stat. § 32-612(4) (emphasis added). LB 76 became operative January 1, 1995. Thus, the 1996 primary election was the first statewide election in

Nebraska history conducted under a total ban on fusion. Between 1925 and 1996, a major party nominee who also received the most votes in another party's primary as a write-in candidate could have been certified as the nominee of both parties under Nebraska law.

B. Opinions of the Nebraska Attorney General on Fusion

Legal questions surrounding fusion have been addressed numerous times by the Nebraska Attorney General, beginning in 1897 (the first year Nebraska used the Australian ballot).

In 1897-98 Rep. Att'y Gen. 92 (Aug. 12, 1897), the Attorney General addressed questions arising under the new election law and concluded, "If more than one party nominates the same person for an office such candidate would be entitled to have his name printed on the ballot under each party name and the judges and clerks of election would give him credit for the aggregate number of votes he received." *Id.* at 93.

In 1900, the Attorney General determined that the Democratic, populist and Free-Silver Republican parties (which ran one set of fusion candidates) were three distinct parties for purposes of ballot ordering, and their nominee was entitled to have each party name printed after his name. 1899-1900 Rep. Att'y Gen. 74, 75 (Sept. 4, 1900).

In 1903, the Attorney General advised the Secretary of State as to the proper form of the general election ballot where two or more candidates are nominated for the same office by the same political party. 1903-04 Rep. Att'y Gen. 143 (Oct. 20, 1903). That same year, the Attorney General advised the County Attorney of Keya Paha County that a ballot marked only in the fusion circle at the top, the vote would count only for candidates nominated by both fusion parties. 1903-04 Rep. Att'y Gen. 147 (Oct. 28, 1903).

In 1905, the Attorney General advised Valley County officials as to which set of candidates was entitled to be placed on the Democratic ballot following a feud among Valley County Democrats over whether they should fuse with the local Populist candidates. 1905-06 Rep. Att'y Gen. 230 (Oct. 14, 1905).

The Attorney General advised the Greeley County Attorney in 1907 that a fusion candidate was required to pay only one filing fee no matter how many parties nominated him. 1907-08 Rep. Att'y Gen. 103 (Aug. 8, 1907).

Also in 1907, the Attorney General issued an opinion concluding that when a candidate has filed a written opinion stating that he affiliates with one party, and another party or twenty-five qualified electors of that party file a written application asking that he be made the candidate also of that party, his name should be placed upon the ballots of each party.

1907-08 Rep. Att'y Gen. 108 (Aug. 14, 1907). This opinion was upheld and confirmed just three months later by the Nebraska Supreme Court in ***State v. Junkin***, 80 Neb. 1 (1907). The Attorney General's Opinion also concluded that a person whose name appears upon more than one party ticket must receive the highest number of votes of any candidate of that party for that particular office before he becomes the candidate of such party. 1907-08 Rep. Att'y Gen. at 109. ***See also*** 1907-08 Rep. Att'y Gen. 110 (this opinion was also confirmed by the Nebraska Supreme Court just three months later in ***State ex rel. Dickinson v. Sheldon***, 80 Neb. 4 (1907), which held that Republican candidates for district judge who were also nominated by the Democratic party did not win the Republican nomination, although they had more total votes, since the winner of the Republican primary was the candidate receiving the most votes in that primary.).

In 1909, the Attorney General concluded in an official opinion that a Democratic nominee for county judge (whose name appeared on the Democratic primary ballot) could not also be the Republican nominee even though he received the most votes (as a write-in candidate) in the Republican primary because of a statutory provision expressly prohibiting write-in votes for any person already appearing on the ballot as a candidate of another party. 1909-1910 Rep. Att'y Gen. 147 (Aug. 25, 1909) (citing Section 117i, Ch. 26, Comp. St. 1909). ***Accord*** 1909-1910 Rep. Att'y Gen. 266 (Aug. 24, 1910). ***See also*** 1909-1910 Rep. Att'y Gen. 152 (holding that a person whose name is written in on the primary ballot who is not a candidate elsewhere on the ballot, and who receives the most votes would be the Republican nominee.). The statute on which these opinions were based became effective March 11, 1909 and was codified at Section 5969, Comp. St. 1909.

This provision was repealed two years later. Accordingly, in 1911, the Attorney General issued an opinion that "an elector is authorized to write upon his party ballot the name of any person for any office which he may select, whether such person may happen to be one who has already filed for the same office on another party ticket or not. . . ." 1911-1912 Rep. Att'y Gen. 130 (July 21, 1911). That same year, the Attorney General confirmed that fusion candidates need pay only one filing fee. 1911-12 Rep. Att'y Gen. 105 (June 8, 1911).

In 1915, the Attorney General concluded that pursuant to Neb. Rev. Stat. § 2158 and ***State v. Junkin***, 80 Neb. 1, a candidate who makes proper application for nomination by one party cannot himself make application as the candidate of another party, but rather must be nominated by petitions signed by 25 voters of the other party in order to be the candidate of both parties. 1915-16 Rep. Att'y Gen. 86 (Feb. 3, 1916).

Three years later, in an opinion based on ***State v. Wells***, 138 N.W. 165 (1912), the Attorney General concluded that a Democratic

nominee for a county office could not also be the Republican nominee even though he received the most votes, as a write-in the Republican primary. 1917-18 Rep. Att'y Gen. 219 (Aug. 27, 1918). The opinion was based on the fact that the candidate had not filed the proper application so as to be affiliated with both parties pursuant to Neb. Rev. Stat. § 2158. This opinion followed the holding in ***Wells*** that "no political party can be compelled to present as its candidate at a general election one who does not affiliate with the party so presenting him as a candidate." ***Id.*** at 220 (quoting ***Wells***, 138 N.W. at 166).

In 1921, the Attorney General concluded that a candidate cannot himself file for office as the candidate of two parties, but must have proper filings by both himself and electors of the other party.

The Attorney General issued an opinion in 1924 that the Box Butte County Democratic Central Committee had no authority to name a candidate for Clerk of the District Court where the Republican candidate had also received the highest number of votes in the Democratic primary, had filed the necessary acceptance and had received a certificate of nomination. 1923-24 Rep. Att'y Gen. 349 (Oct. 1, 1924) (distinguishing ***State v. Wells***, 92 Neb. 337).

Following adoption of the 1925 anti-fusion law, the Attorney General concluded that a candidate could still be listed as both a Republican and a Democrat on the ballot where he was elected at the primary election of one party and won the other primary as a write-in candidate. 1927-28 Rep. Att'y Gen. 152 (Oct. 2, 1928). Likewise, in 1930 the Attorney General issued an opinion concluding that a Democratic nominee in Stanton County could also be listed on the ballot as the Republican nominee where he received the most votes as a write-in candidate in the Republican primary and had accepted the Republican nomination. 1929-30 Rep. Att'y Gen. 336 (Oct. 1, 1930). Similarly, in 1936 the Attorney General concluded that a Republican candidate for county supervisor could also be the Democratic nominee by write-in vote. 1935-36 Rep. Att'y Gen. 100 (April 3, 1936) (citing § 32-1125 and ***State v. Sheldon***, 80 Neb. 4).

In a 1944 opinion, the Attorney General stated, "Section 32-1125 . . . authorizes a candidate of one political party to accept the nomination to such office tendered him by write-in votes of another party, provided he also receives the nomination of the party of which he is an avowed candidate." 1943-44 Rep. Att'y Gen. 153 (Sept. 29, 1994).

The Attorney General concluded in 1950 that no candidate was entitled to be certified as the Democratic nominee for a Madison County office where the winner of the Republican primary was the second-highest write-in candidate in the Democratic primary, and the second place finisher in the Republican primary was the highest

vote-getter in the Democratic primary. 1949-50 Rep. Att'y Gen. 908 (citing Neb. Rev. Stat. § 32-1124).

In 1966, the Attorney General concluded that a person who did not file in the primary election for nomination by any party for Cedar County Commissioner was nonetheless entitled to be certified as both the Republican and Democratic nominee by virtue of his first-place write-in finish in both primaries. 1965-66 Rep. Att'y Gen. 305 (May 23, 1966) (citing § 32-516 and 32-532, R.R.S. 1943).

Finally, in 1968, the Attorney General concluded that a Merrick county board member who switched from the Democratic to Republican party too late to be listed on the Republican primary ballot could nonetheless be the Republican nominee by virtue of receiving the most write-in votes in the Republican primary. 1967-68 Rep. Att'y Gen. 247 (July 15, 1968).

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