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DATE: February 4, 1992

SUBJECT: Constitutionality of LB 529, a bill which would impose an income tax on campaign contributions for political campaigns.

REQUESTED BY: Senator Dennis Byars

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

LB 529 would establish the Campaign Committee Income Tax Act. Among other things, the bill would impose an income tax on the income received by the campaign committees of various candidates for political office at a rate of 80 per cent over a specified, exempted floor amount. For example, any sums raised by a campaign committee for a candidate for governor exceeding one million dollars would be taxed at 80 per cent under the bill. (Proposed amendments would lower that tax rate to 50 per cent.) Presumably, the impetus for LB 529 is the Legislature's finding, set out in Section 2 of the bill, that "...the rapid growth of spending for election campaigns is a concern for the citizens of the state and impairs the ability of qualified candidates to run for office." You have now requested our opinion "...on the constitutionality of LB 529." For the reasons discussed below, we believe there are constitutional problems with the legislation.

At the outset, we must note, as we have done frequently in the past, that an opinion request on the general constitutionality of a legislative bill will necessarily result in a general response from this office. In essence, you have simply asked us if LB 529 is constitutional, without any indication of what specific portions of our state or federal constitutions you might believe are implicated. Such an opinion request requires us to make a general response, and, as a result, we may not address the issues which led to your inquiry.

The landmark case in the area of governmental limitations on campaign spending by candidates for political office is the decision of the United States Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976). In that case, the Supreme Court considered the constitutionality of the Federal Election Campaign Act. That federal legislation placed limits on the amounts individuals and groups could contribute to candidates for federal elective office, and placed limits on the amounts of campaign expenditures by candidates for federal elective office.

The Court began its constitutional analysis of the federal legislation by noting that campaigns for political office involve free speech rights and rights of political association which are both fundamental interests protected by the First Amendment to the United States Constitution. Id. at 14, 15. Limitations on the amount that any one person or group may contribute to a political campaign entail "...only a marginal restriction upon the contributor's ability to engage in free communication." Id. at 20, 21. On the other hand, expenditure limitations upon candidates represent "...substantial...restraints on the quantity and diversity of political speech." Id. at 19. The Court went on to hold that the limits on campaign contributions in the act were constitutional, while the limits on campaign expenditures were unconstitutional as a violation of the First Amendment. In the course of its opinion, the Court noted that the expenditure limits in the federal act were designed primarily to reduce "...the allegedly skyrocketing costs of political campaigns." Id. at 57. With respect to such a legislative purpose, the Court stated:

> ...the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise.

Id. at 57.

The Buckley case focused on federal legislation which directly limited the amount of campaign expenditures by candidates for federal elective office. Obviously, LB 529 does not involve such a direct limitation. Instead, it creates an income tax which would tax campaign committee income over specified amounts at a flat rate of 80 per cent. While LB 529 is thus distinguishable from the legislation at issue in Buckley, we do not believe that the distinction involved is dispositive.

It is clear that the power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Follett v. Town

of McCormick, 321 U.S. 573 (1944); Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943). Moreover, a tax that burdens rights protected by the First Amendment cannot stand unless the burden of the tax is necessary to achieve an overriding governmental interest. Minneapolis Star v. Minnesota Commission of Revenue, 460 U.S. 575 (1983). Our state supreme court has also indicated that the Legislature cannot circumvent an express provision of the Constitution by doing indirectly what the Constitution prohibits it from doing directly. Rock County v. Spire, 235 Neb. 434, 455 N.W.2d 763 (1990).

It appears to us that it is quite probable that a court would hold that LB 529 is an unconstitutional limitation on campaign expenditures under the First Amendment analysis set out in the Buckley case. While the bill would not limit campaign expenditures directly, the tax created by its provisions is not general in nature and would have the effect of restricting the quantity of campaign spending and the scope of future political campaigns. More importantly, as noted above, Sec. 2 of the bill expressly indicates that the concern underlying the legislation is the "rapid growth of spending for election campaigns," and we must assume that the purpose of the bill is to reduce that growth in spending through the mechanism of the income tax imposed. The Supreme Court in Buckley specifically rejected such a governmental purpose as insufficient to override the protected First Amendment interests involved in political campaigns. Finally, when all facets of LB 529 are considered, it seems quite plausible to argue that the legislation is simply an attempt by the Legislature to indirectly limit campaign spending in political campaigns, something it cannot do directly under Buckley. For all of these various reasons, we believe that a court would likely hold LB 529 unconstitutional.

Sincerely yours,

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Approved by:

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