

**FIRST DAY - NOVEMBER 14, 2008****LEGISLATIVE JOURNAL****ONE HUNDREDTH LEGISLATURE  
FIRST SPECIAL SESSION****FIRST DAY**

Legislative Chamber, Lincoln, Nebraska  
Friday, November 14, 2008

**PRAAYER**

The prayer was offered by Senator Kruse.

**ROLL CALL**

Pursuant to a proclamation by the Honorable Governor of the State of Nebraska, Dave Heineman, the One Hundredth Legislature, First Special Session of the Legislature of Nebraska, assembled in the George W. Norris Legislative Chamber of the State Capitol, at the hour of 3:00 p.m., Friday, November 14, 2008, and was called to order by Speaker Flood.

The roll was called and the following members were present:

Adams, Greg L.	Hansen, Thomas F.	Nantkes, Danielle
Ashford, Brad	Harms, John N.	Nelson, John E.
Avery, Bill	Heidemann, Lavon L.	Pahls, Rich
Burling, Carroll	Howard, Gwen	Pankonin, Dave
Carlson, Tom	Janssen, Ray	Pedersen, Dwite
Chambers, Ernie	Johnson, Joel T.	Pirsch, Pete
Cornett, Abbie	Karpisek, Russ	Preister, Don
Dierks, Cap	Kopplin, Gail F.	Raikes, Ronald E.
Dubas, Annette M.	Kruse, Lowen	Rogert, Kent
Engel, L. Patrick	Langemeier, Chris	Schimek, DiAnna R.
Erdman, Philip	Lathrop, Steve	Stuthman, Arnie
Fischer, Deb	Lautenbaugh, Scott	Synowiecki, John F.
Flood, Mike	Louden, LeRoy J.	Wallman, Norm
Friend, Mike	McDonald, Vickie D.	White, Tom
Fulton, Tony	McGill, Amanda	Wightman, John
Gay, Tim		

The following members were excused:

Aguilar, Raymond	Christensen, Mark	Hudkins, Carol
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**DECLARATION**

Pursuant to a proclamation issued by the Honorable Dave Heineman, Governor of Nebraska, we are here and now assembled in the One Hundredth Legislature, First Special Session of the Nebraska Legislature. I, as President of the Legislature, declare that we are now open for the transaction of business.

(Signed) Speaker Flood  
President of the Legislature

**PROCLAMATION**

BY VIRTUE OF THE AUTHORITY VESTED in the Governor by Article IV, Section 8 of the Nebraska Constitution, I, Dave Heineman, as Governor of the State of Nebraska, believing that an extraordinary occasion has arisen, DO HEREBY CALL the Legislature of Nebraska to convene in extraordinary session at the State Capitol on November 14, 2008, at 3:00 p.m. for the purpose of considering and enacting legislation on only the following subjects:

1. Enacting legislation to limit the application of 2008 Neb. Laws LB 157, Neb. Rev. Stat. § 29-121, by reducing the maximum age of children to whom the statute applies; and
2. To appropriate funds to the Legislative Council for the necessary expenses of the extraordinary session herein called.

I direct that members of the Legislature of the State of Nebraska be notified of the convening of this extraordinary session by presenting to each of them a copy of this Proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the Great Seal of the State of Nebraska to be affixed this 29th day of October, 2008.

(Signed) Dave Heineman  
Governor

Attest:

(Signed) John Gale  
Secretary of State

**CERTIFICATE**

State of Nebraska

United States of America, )  
 ) ss. Secretary of State  
 State of Nebraska )

I, John A. Gale, Secretary of State of the State of Nebraska do hereby certify that the attached is a true and correct copy of the Official Roster of members of the Nebraska Unicameral Legislature elected or appointed to serve in the One Hundredth Legislature, Special Session, 2008.

Further, I hereby certify that the members so listed on the Official Roster attached hereto are the duly elected or appointed members of the Unicameral Legislature in the State of Nebraska for the One Hundredth Legislature, Special Session, 2008.

Finally, I hereby certify that all election returns, abstracts, canvass and appointment records with reference to said members are on file in the office of the Secretary of State and are a matter of public record.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Nebraska.

Done at Lincoln this Tenth day of November in the year of our Lord, two thousand and eight.

(SEAL)

John A. Gale, Secretary of State

DISTRICT/NAME	ELECTED
1 Lavon L. Heidemann	November 2, 2004
2 Dave Pankonin	November 7, 2006
3 Gail F. Kopplin	November 2, 2004
4 Pete Pirsch	November 7, 2006
5 Don Preister	November 2, 2004
6 John E. Nelson	November 7, 2006
7 John F. Synowiecki	November 2, 2004
8 Tom White	November 7, 2006
9 Gwen Howard	November 2, 2004
10 Mike Friend	November 7, 2006
11 Ernie Chambers	November 2, 2004
12 Steve Lathrop	November 7, 2006
13 Lowen Kruse	November 2, 2004
14 Tim Gay	November 7, 2006
15 Ray Janssen	November 2, 2004
16 Kent Rogert	November 7, 2006
17 L. Patrick Engel	November 2, 2004
18 Scott Lautenbaugh	Appointed November 2, 2007

19	Mike Flood	November 2, 2004
20	Brad Ashford	November 7, 2006
21	Carol Hudkins	November 2, 2004
22	Arnie Stuthman	November 7, 2006
23	Chris Langemeier	November 2, 2004
24	Greg L. Adams	November 7, 2006
25	Ronald E. Raikes	November 2, 2004
26	Amanda M. McGill	November 7, 2006
27	DiAnna R. Schimek	November 2, 2004
28	Bill Avery	November 7, 2006
29	Tony Fulton	Appointed January 3, 2007
30	Norman Wallman	November 7, 2006
31	Rich Pahls	November 2, 2004
32	Russ Karpisek	November 7, 2006
33	Carroll Burling	November 2, 2004
34	Annette M. Dubas	November 7, 2006
35	Raymond Aguilar	November 2, 2004
36	John Wightman	November 7, 2006
37	Joel T. Johnson	November 2, 2004
38	Tom Carlson	November 7, 2006
39	Dwite Pedersen	November 2, 2004
40	Cap Dierks	November 7, 2006
41	Vickie D. McDonald	November 2, 2004
42	Thomas F. Hansen	November 7, 2006
43	Deb Fischer	November 2, 2004
44	Mark Christensen	November 7, 2006
45	Abbie Cornett	November 2, 2004
46	Danielle Nantkes	November 7, 2006
47	Philip Erdman	November 2, 2004
48	John N. Harms	November 7, 2006
49	LeRoy J. Louden	November 2, 2004

### **MOTION - Election of Officers**

Senator Engel moved that the following officers, recommended by the Executive Board, be elected to serve for the One Hundredth Legislature, First Special Session:

Clerk of the Legislature  
 Assistant Clerk of the Legislature  
 Sergeant at Arms

Patrick J. O'Donnell  
 Richard K. Brown  
 Ron Witkowski

The motion prevailed.

**MESSAGES FROM THE GOVERNOR**

May 6, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed to the Crime Victim's Reparations Committee:

Derek Vaughn, 8328 Sheffield St., Omaha, NE 68122

The aforementioned appointee is respectfully submitted for your consideration. Copies of the appointment certificate and application are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

May 9, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed to the Nebraska Highway Commission:

Rodney Vandenberg, 2202 Chase Street, Falls City, NE 68355

The aforementioned appointee is respectfully submitted for your consideration. Copies of the appointment certificate and application are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

May 28, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed as Director of the Nebraska Energy Office:

Neil Moseman, 337 South 92nd Street, Omaha, NE 68114-3935

The aforementioned appointee is respectfully submitted for your consideration. Copies of the certificate of appointment and resume are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

July 7, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed as a member of the Nebraska Liquor Control Commission:

Robert Batt, 9820 Nottingham Dr., Omaha, NE 68114

The aforementioned appointee is respectfully submitted for your consideration. Copies of the certificate of appointment and application are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

July 9, 2008

Mr. President, Speaker Flood  
and Members of the Legislature

State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed as a member of the Nebraska Board of Parole:

Rosalyn Cotton, 17189 Manderson Street, Omaha, NE 68116

The aforementioned appointee is respectfully submitted for your consideration. Copies of the certificate of appointment and application are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

July 9, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed as a member of the Nebraska Natural Resources Commission:

Richard Mercer, 5815 4th Avenue, Kearney, NE 68845

The aforementioned appointee is respectfully submitted for your consideration. Copies of the certificate of appointment and application are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

July 9, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed as a member of the Nebraska Accountability and Disclosure Commission:

Paul Hosford, 966 South 4th Street, Albion, NE 68620

The aforementioned appointee is respectfully submitted for your consideration. Copies of the certificate of appointment and application are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

August 1, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed as a member of the Nebraska Environmental Trust Board:

James Stuart, Jr., 2425 Ridge Road, Lincoln NE 68512

The aforementioned appointee is respectfully submitted for your consideration. Copies of the certificate of appointment and application are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

August 5, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individuals are being

reappointed to the Nebraska Motor Vehicle Industry Licensing Board:

Darlene Noah, 900 S. Myrtle, Kimball, NE 69145  
Charles Borgmann, 606 Magnet, Norfolk, NE 68701

Contingent upon your approval, the following individual is being appointed to the Nebraska Motor Vehicle Industry Licensing Board:

Sammy Reagan, 709 S. 210th Circle, Elkhorn, NE 68022

The aforementioned appointees are respectfully submitted for your consideration. Copies of the appointment certificates and applications are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

August 5, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individuals are being reappointed to the Crime Victim's Reparation Committee:

Scot Ford, P.O. Box 861, So. Sioux City, NE 68776  
William Brueggemann, 809 1st Avenue, Plattsmouth, NE 68048  
Derek Vaughn, 8328 Sheffield St., Omaha, NE 68122

The aforementioned appointees are respectfully submitted for your consideration. Copies of the appointment certificates and applications are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

August 22, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building

Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being reappointed as a member of the Nebraska Ethanol Board:

Charles "Tod" Brodersen, 2405 11th, Hastings, NE 68901

The aforementioned appointee is respectfully submitted for your consideration. Copies of the certificate of appointment and application are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

August 25, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being reappointed to the State Board of Health:

Dr. Paul Salansky, 2521 Whitaker Road, Nebraska City, NE 68410

Contingent upon your approval, the following individuals are being appointed to the State Board of Health:

Dr. Theodore Evans, Jr., 72815 620 Ave., Tecumseh, NE 68450  
Dr. John Tennity, 5114 Deer Ridge Drive, Eagle, NE 68347  
Eric Berggren, 21795 Quail Drive, Gretna, NE 68028  
Dr. Dan Bizzell, 4306 Central Ave., Kearney, NE 68847  
Kenneth Kester, 1835 High St., Lincoln, NE 68502

The aforementioned appointees are respectfully submitted for your consideration. Copies of the appointment certificates and background information are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

August 25, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed as the Commissioner of Labor:

Catherine D. Lang, 5932 Fieldcrest Way, Lincoln, NE 68512

The aforementioned appointee is respectfully submitted for your consideration. Copies of the certificate of appointment and background information are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

August 25, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being reappointed to the Child Abuse Prevention Fund Board:

Jennie Cole-Mossman, 2710 Sewell, Lincoln, NE 68502

Contingent upon your approval, the following individual is being appointed to the Child Abuse Prevention Fund Board:

Joni Kuzma, 2510 Brahma St., Grand Island, NE 68801

The aforementioned appointees are respectfully submitted for your consideration. Copies of the appointment certificates and background information are included for your review.

Sincerely,  
(Signed) Dave Heineman

Governor

Enclosures

August 28, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being  
reappointed to the Board of Educational Lands and Funds:

DeMarus Carlson, P.O. Box 100, Crofton, NE 68730

The aforementioned appointee is respectfully submitted for your  
consideration. Copies of the certificate of appointment and background  
information are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

August 29, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being  
reappointed to the State Personnel Board:

Amber Brown, 1003 East 65th Street Place, Kearney, NE 68847

The aforementioned appointee is respectfully submitted for your  
consideration. Copies of the certificate of appointment and background  
information are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

October 28, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individuals are being appointed to the Board of Emergency Medical Services:

Timothy Hoffman, 1708 West 14th, Kearney, NE 68845  
Donald Harmon, 2309 Grant, Beatrice, NE 68310  
Judith Henning, 335 Norman, Crete, NE 68333

Contingent upon your approval, the following individual is being reappointed to the Board of Emergency Medical Services:

Dr. George Tom Surber, 1202 Norfolk Avenue, Norfolk, NE 68701

The aforementioned appointees are respectfully submitted for your consideration. Copies of the appointment certificates and background information are included for your review.

Sincerely,  
(Signed) Dave Heineman  
Governor

Enclosures

October 30, 2008

Mr. President, Speaker Flood  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Flood and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed to the Nebraska Educational Telecommunications Commission:

Darlene Starman, 1030 Rockhurst Drive, Lincoln, NE 68510

The aforementioned appointee is respectfully submitted for your consideration. Copies of the certificate of appointment and background information are included for your review.

Sincerely,

(Signed) Dave Heineman  
Governor

Enclosures

## ATTORNEY GENERAL'S OPINIONS

### Opinion 08004

DATE: June 6, 2008

SUBJECT: Constitutional Rights Of Petition Circulators And Blockers On Private Property In Nebraska.

REQUESTED BY: Senator Michael J. Flood  
Speaker of the Nebraska Legislature

WRITTEN BY: Jon Bruning, Attorney General  
Dale A. Comer, Assistant Attorney General  
Charles E. Lowe, Assistant Attorney General

In a letter to the Attorney General, you indicated that you are contemplating the introduction of "legislation that would amend the existing statutes dealing with criminal and civil trespass." You indicated further that it has come to your attention that there is concern about the activities of initiative petition circulators and "blockers" on private property in Nebraska. In that context, you asked for an Attorney General's opinion "as to whether or not petition circulators and 'blockers' have a constitutional right to remain on private property once they have been asked to leave by property owners or managers."

The primary constitutional question at issue in your opinion request is whether or not the rights to freedom of speech and assembly found in the United States and Nebraska Constitutions are implicated when the owner or manager of private property prohibits petition circulators and "blockers" from engaging in their activities on that private property. In other words, do petition circulators and "blockers" have a right under the First Amendment or art. I, § 5 of the Nebraska Constitution to continue their activities on private property after the owner or manager of that property has asked them to leave?

For purposes of this opinion we assume that "petition circulators" are individuals acting under the initiative and referendum provisions of the Nebraska Constitution, Neb. Const. art. III, §§ 1- 4, who solicit and gather the signatures of registered voters on petitions so as to place measures on the ballot adopting new laws, amending the Nebraska Constitution, or revoking laws passed by the Legislature. We also assume that "blockers" are individuals who appear at locations where petition circulators are gathering signatures and seek to dissuade people from signing the petitions.

ANALYSIS  
United States Constitution

So long as petition circulators and "blockers" engage in their activities peacefully, those activities of soliciting signatures and seeking to dissuade signatures are considered to be core political speech which is generally protected from governmental interference by the First and Fourteenth Amendments. See, *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 199 (1999); *Bernbeck v. Moore*, 936 F.Supp. 1543, 1561 (D. Neb. 1996), *aff'd* 126 F.3d 1114 (8th Cir. 1997).

The United States Supreme Court has made clear, however, that the First and Fourteenth Amendments protect the rights of free speech and assembly from governmental interference only; not from interference by owners of private property. In *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551 (1972), Vietnam War protesters sought to enter a large, privately-owned shopping center to distribute handbills critical of the war. They were prohibited from doing so by the owner of the shopping center which had a policy against distributing handbills on the property which were not related to the shopping center's operations. The lower courts found in favor of the protesters and enjoined the shopping center from prohibiting the handbilling. The Supreme Court reversed, holding that the First and Fourteenth Amendments do not apply to guarantee the rights of free speech and assembly on private property. In doing so the Court stated:

The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses and Fifth and Fourteenth Amendments are also relevant to this case. They provide that '(n)o person shall . . . be deprived of life, liberty, or property, without due process of law.' There is the further proscription in the Fifth Amendment against the taking of 'private property . . . for public use, without just compensation.'

Although accommodations between the values protected by these three Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guaranteees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.

*Id.*, 407 at 567-68. (Emphasis supplied.)

Subsequently, in *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976), the Court made clear that Lloyd had, in effect, overruled an earlier decision, *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), which suggested that the owners of a shopping center could not bar peaceful labor picketing on its privately owned property.

[W]e make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case. Not only did the *Lloyd* opinion incorporate lengthy excerpts from two of the dissenting opinions in *Logan Valley* . . . ; the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*.

*Hudgens*, 424 U.S. at 518. (Citation and footnotes omitted.) The *Hudgens* Court concluded that "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this [involving labor picketing in front of a store located in a privately owned shopping center]." *Id.* at 521. See also, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80-81 (1980) (again explaining that *Lloyd* repudiated the rationale of *Logan Valley* to the extent that *Logan Valley* had concluded that because a privately owned shopping center was open to the public free speech rights necessarily applied to the property).

Citing the *Hudgens* decision, the Eighth Circuit Court of Appeals has recently set forth the basic rule succinctly: "The first Amendment guarantee of free speech guards against abridgment through state action alone. It does not inhibit private restrictions on speech." *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir.), cert. denied sub nom *Memorial Weekend Salute to Veterans Corp v. Wickersham*, 128 S.Ct. 387 (2007). See, *Reimers v. Super Target of Grand Forks*, 363 F.Supp. 2d 1182, 1185 (D. N.D. 2005) (noting that in *Pruneyard Shopping Center* the Supreme Court "reiterated that the federal constitution did not grant First Amendment rights on private property . . .").

Based on the foregoing review of pertinent case authorities, we conclude that the federal constitutional guarantees of free speech and assembly do not apply on privately owned property used nondiscriminatorily for private purposes only, and that, therefore, petition circulators and "blockers" do not have a federal constitutional right to remain on such private property when asked by its owner to leave.

### Nebraska Constitution

The constitutional guarantee of free speech in Nebraska is found in art. I, § 5 of the Nebraska Constitution. However, the Nebraska Supreme Court has repeatedly and consistently held that the guarantee of freedom of speech under the Nebraska Constitution is the same as the guarantee of freedom of speech under the First Amendment to the United States Constitution. *Pony Lake School District 30 v. State Committee for the Reorganization of*

School Districts, 271 Neb. 173, 710 N.W.2d 609 (2006); *Dossett v. First State Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001); *State v. Moore*, 258 Neb. 738, 605 N.W.2d 440 (2000); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). Moreover, in order to bring a claim for violation of the free speech provision in art. I, § 5 of the Nebraska Constitution, the alleged violation must involve state action. *Dossett v. First State Bank*, 261 Neb. at 967, 627 N.W.2d at 138 (2001). That state action requirement also formed part of the basis for the decision in the *Hudgens* case cited above, where the United States Supreme Court found that the First Amendment did not apply to the actions of a private commercial property owner. As a result, while there are no Nebraska cases directly on point, we do not believe that art. I § 5 of the Nebraska Constitution creates a state constitutional right for petition circulators or "blockers" to remain on private property and continue their activities after the owner has asked them to stop.

Apart from state constitutional provisions dealing with free speech, some courts from other jurisdictions have found a state constitutional right to engage in political activity including solicitation of signatures on private commercial property based upon state constitutional provisions dealing with free elections or the initiative and referendum right. *Batchelder v. Allied Stores International, Inc.*, 388 Mass. 83, 445 N.E.2d 590 (1983)(holding that an individual had a constitutional right to solicit signatures in support of his nomination as a third party candidate in the mall of a large shopping center without the owners' permission based upon free elections provision in the state constitution); *Alderwood Associates v. Washington Environmental Council*, 96 Wash.2d 230, 635 P.2d 108 (1981)(determining that the initiative provisions in the state constitution gave individuals the right to solicit initiative signatures in a large regional shopping mall without permission of mall owners). However, those cases are older cases dealing with the common, public areas of shopping malls. More recent cases have reached a different conclusion. *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 11 P.3d 228 (2000)(ruling that the state constitutional right to initiate laws and constitutional amendments does not confer the right to solicit signatures for initiative petitions on private property over the owner's objection); *People v. DiGuida*, 152 Ill.2d 104, 604 N.E.2d 336 (1992)(stating that the invocation of a criminal trespass statute to exclude the circulator of a political nominating petition from a private store's premises did not violate free elections provisions in the Illinois Constitution); *Fiesta Mall Venture v. Mecham Recall Committee*, 159 Ariz. 371, 767 P.2d 179 (1989)(holding that a recall committee did not have a constitutionally protected right to solicit signatures on private property under the initiative, referendum and recall provisions of the Arizona Constitution); *Woodland v. Michigan Citizens Lobby*, 423 Mich 188, 378 N.W.2d 337 (1985)(determining that constitutional provisions with respect to initiating legislation and amending the state constitution did not prohibit owners of large private malls from denying or restricting access to private individuals seeking to exercise those rights). Consequently, while art. I, § 22 and art. III, §§ 2,3 and 4 of the Nebraska Constitution provide for free elections and initiative and referendum rights in Nebraska, we do not believe it likely that our supreme

court would hold that those provisions create a state constitutional right to conduct petition circulation or "blocking" activities on private commercial property contrary to the owner's wishes.

### CONCLUSION

For the various reasons discussed above, we do not believe that petition circulators and "blockers" have either a federal or state constitutional right to remain on private property which is used nondiscriminatorily for private purposes when asked by the owner or manager of that property to leave. As a result, owners of private property in Nebraska which is used for private purposes may generally prohibit petition circulators and "blockers" from conducting such activities on their property.

Sincerely,

JON BRUNING

Attorney General

(Signed) Dale A. Comer

Assistant Attorney General

(Signed) Charles E. Lowe

Assistant Attorney General

cc: Patrick J. O'Donnell  
Clerk of the Legislature  
17-027-20

### Opinion 08007

DATE: October 3, 2008

SUBJECT: Whether the Nebraska fireworks statutes, Neb. Rev. Stat. §§28-1239.01, 28-1241 through 28-1250, and 28-1252 are preempted by federal law

REQUESTED BY: Senator Michael J. Flood  
Speaker of the Nebraska Legislature

WRITTEN BY: Jon Bruning, Attorney General  
Natalee J. Hart, Assistant Attorney General

You have requested a formal opinion from the Attorney General's Office regarding the state's fireworks statutes, Neb. Rev. Stat. §§28-1239.01, 28-1241 through 28-1250, and 28-1252 (Reissue 1995, Cum. Supp. 2006), the Fire Marshal's authority to regulate fireworks, and whether the state's statutes and regulations are constitutional, including whether they are preempted by federal law. After further consultation with your staff, it appears that the primary focus of your inquiry is whether the state's fireworks statutes are preempted by federal law, and not any other constitutional issues. Accordingly, we will offer our opinion with respect to the following question:

- (1) Does federal law preempt the current Nebraska fireworks statutes, Neb. Rev. Stat. §§28-1239.01, 28-1241 through 28-1250, and 28-1252?

For the reasons set forth herein, we believe that the state's fireworks statutes are not preempted by federal law, and the Fire Marshal has the authority to regulate fireworks in Nebraska pursuant to Neb. Rev. Stat. §§28-1239.01, 28-1241 through 28-1250, and 28-1252.

#### Scope of Nebraska Statutes

The Nebraska fireworks statutes, Neb. Rev. Stat. §§28-1239.01, 28-1241 through 28-1250, and 28-1252, define fireworks and related terms; provide authority to the State Fire Marshal to promulgate rules and regulations and to enforce the fireworks statutes; make it unlawful for any person to "possess, sell, offer for sale, bring into this state, or discharge any fireworks other than permissible fireworks;" allow the State Fire Marshal to determine what fireworks shall be permissible fireworks in the state; require certain permits and licenses; regulate the time and permissible locations for the sale of fireworks; and provide penalties for the violation of the fireworks statutes, among other things.

#### Scope of Federal Statutes

The federal laws which appear relevant to your question are the Federal Hazardous Substances Act, 15 U.S.C. §§1261 through 1278a, the Hazardous Material Transportation Act, 49 U.S.C. §§5101 through 5128 (formerly codified at 49 U.S.C. §§1802 through 1812), and 18 U.S.C. §§836, 841-848.

The Federal Hazardous Substances Act defines and regulates hazardous substances, including those that are flammable or combustible, and prohibits the interstate transportation of any mislabeled or banned hazardous substance. 15 U.S.C. §1261(q)(1) also provides that the Consumer Product Safety Commission shall exempt "common fireworks" from the definition of hazardous substances, and shall provide for the labeling of common fireworks to protect purchasers. The Consumer Product Safety Commission is delegated the responsibility to promulgate regulations pursuant to this act, and in doing so they have established performance standards for fireworks. Those fireworks that violate the performance standards are then classified as "banned hazardous substances" under 15 U.S.C. §1261(f)(1)(A). See *Shelton v. Consumer Products Safety Com'n*, 277 F.3d 998 (8th Cir., 2002).

The Hazardous Materials Transportation Act defines hazardous materials and allows the promulgation of regulations by the Secretary of Transportation for the safe transport of the hazardous materials; pursuant to such authority, the transportation of fireworks is regulated, and regulations have been developed regarding shipping papers, marking, labeling, placarding, packaging, and accepting for shipment hazardous materials,

including fireworks. 49 U.S.C. §§5101 through 5103; 49 CFR 173; Colorado Pyrotechnic Ass'n v. Meyer, 740 F. Supp. 792 (D.Colo.,1990).

18 U.S.C. §836 prohibits the transportation of fireworks into any State knowing that they are to be "delivered, possessed, stored, transshipped, distributed, sold, or otherwise dealt with in a manner or for a use prohibited by the laws of such State specifically prohibiting or regulating the use of fireworks . . . [and] the definitions of fireworks contained in the laws of the respective States shall be applied." 18 U.S.C. §§841-848 regulates and requires a license for the interstate importing, manufacture, distributing, and storing of explosive materials, which includes fireworks. See *City of Wisconsin Dells v. Dells Fireworks Inc.*, 197 Wis.2d 1, 11, 539 N.W.2d 916, 919 (1995).

### Legal Standard for Preemption

In evaluating whether the Nebraska fireworks statutes are preempted by federal law, certain legal standards must be met. "Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002), citing U.S. Const. art. VI, cl. 2." In *re Lincoln Elec. System*, 265 Neb. 70, 76, 655 N.W.2d 363, 369 (2003). However, "not all acts of Congress constitute preemption thereby precluding state action in a similar field." *ATS Mobile Telephone, Inc. v. General Communications Co., Inc.*, 204 Neb. 141, 145-146, 282 N.W.2d 16, 19 (1979).

Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.

*Stewart Trucking, Inc. v. PBX, Inc.*, 238 Neb. 958, 963-964, 473 N.W.2d 123, 127 (1991)(internal citations omitted).

Congress explicitly may define the extent to which its enactments preempt state law. In the absence of an express Congressional command, state law is preempted if the law actually conflicts with federal law or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to

supplement it.

*Stajos v. City of Lansing*, 221 Mich.App. 223, 235, 561 N.W.2d 116, 122 (1997)(internal citations omitted).

#### Nebraska Fireworks Statutes are not Preempted by Federal Statutes

Several of the federal laws at issue herein address to some degree the issue of state regulation, or the preemption of state statutes. 18 U.S.C. §848 states:

No provision of this chapter [18 U.S.C.A. §§841-848] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

The notes<sup>1</sup> to the Federal Hazardous Substances Act, 15 U.S.C.A. § 1261, state:

(4) Paragraph [f](1)(B)<sup>2</sup> does not prohibit a State or a political subdivision of a State from establishing or continuing in effect a requirement which is designed to protect against a risk of illness or injury associated with fireworks devices or components thereof and which provides a higher degree of protection from such risk of illness or injury than a requirement in effect under a regulation of the Commission described in such paragraph.

The Hazardous Material Transportation Act also contains language regarding preemption:

(a) General. Except as provided [herein] and unless authorized by another law of the United States, a requirement of a State. . . is preempted if --

- (1) [complying with both the state and federal requirement under the Hazardous Materials Transportation Act] is not possible; or
- (2) the requirement of the State . . .as applied or enforced, is an obstacle to accomplishing and carrying out [a requirement of the Hazardous Materials Transportation Act].

(b) Substantive differences. --

(1) Except as provided [herein] and unless authorized by another law of the United States, a [state law] about any of the following subjects, that is not substantially the same as a provision of [the Hazardous Material Transportation Act or a regulation promulgated thereunder] is preempted:

- (A) the designation, description, and classification of hazardous material.
- (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

- (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.
- (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.
- (E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

49 U.S.C. § 5125. The Nebraska fireworks statutes do not regulate fireworks in any of the above manners, thus Nebraska law is not occupying the same sphere as that of the federal regulation. Based on the language of the federal laws alone, Nebraska statutes regulating the use and sale of fireworks are unlikely to be preempted.

In addition, courts have specifically addressed the issue of whether state fireworks statutes or municipal ordinances regulating the sale or use of fireworks are preempted by federal law. The overwhelming consensus is that they are not. "Although the federal government has partly pre-empted the field of fireworks regulation by passing the Hazardous Materials Transportation Act (49 U.S.C.A. §§1801 et seq.)<sup>3</sup> and the Federal Hazardous Substances Act (15 U.S.C.A. §§1261 et seq.), plenty of room has been left for state and local governments to further regulate the sale, possession, use, and transportation of fireworks." 48 A.L.R. 5th 659, §2(a)(1997). The federal government regulates the area of fireworks, primarily concerning the transportation, packaging and labeling of fireworks shipped across state lines as a hazardous material. See *Cohen v. Bredehoeft*, 290 F.Supp. 1001, 1004 (D.C.Tex. 1968). This allows state and local governments the deference to regulate the retail sale and use of fireworks. These are separate spheres of regulation and the federal laws do not preclude or preempt this type of state or local regulation. "Ordinances prohibiting the possession for sale of fireworks are almost universally sustained." *Stoughton v. City of Fort Worth*, 277 S.W.2d 150, 153 (Tex. 1955).

The only area in which the current Nebraska fireworks statutes may potentially be preempted is with respect to transportation, which is contemplated by the exemption found in Neb. Rev. Stat. §28-1245(3)(1995)<sup>4</sup>. The remaining statutes directly regulate the use and sale of fireworks in the borders of the state. The following case authorities provide further indication that the Nebraska fireworks statutes are not preempted.

When it enacted the Hazardous Materials Transportation Act in 1974, Congress included an express provision concerning preemption:

- (a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued

under this chapter, is preempted. 49 U.S.C.A.App. § 1811 (West 1976) (emphasis supplied)<sup>5</sup>.

By this language, Congress has unmistakably ordained a limited form of preemption.

\* \* \*

The voluminous regulations concerning shipping, marking, labeling, placarding, and packaging are designed not to regulate the public's ultimate use of hazardous materials, but to ensure that the materials are safely transported in commerce. Still other regulations prescribe details concerning the manner in which hazardous materials may be transported. See, e.g., 49 C.F.R. §§ 177.853-177.870 (1989). A review of the statutes and regulations as a whole demonstrates that Congress and the Department of Transportation intended only to regulate the transportation of hazardous materials in commerce, leaving to the states the task of regulating sales to the public and the public's ultimate use of such materials.

Colorado Pyrotechnic Ass'n v. Meyer, 740 F.Supp. at 795 -796(emphasis added).

There is no preemption because the federal regulations cited by plaintiff<sup>6</sup> address only the packaging and classification of fireworks for interstate shipment and do not address the sale or use of fireworks within a state. Further, 18 U.S.C. 836 imposes criminal penalties on a person who knowingly transports fireworks 'in a manner or for a use prohibited by the laws of such State specifically prohibiting or regulating the use of fireworks.' This provision also indicates that the definitions of fireworks contained in the laws of the respective states shall be applied. It is thus apparent that the federal regulations contemplate that states are not preempted from regulating the intrastate sale and use of fireworks.

Stajos v. City of Lansing, 221 Mich.App. at 235, 561 N.W.2d at 122 (upholding a Michigan statute prohibiting the sale or use of certain fireworks without a permit.)

[T]here is no reason to suppose that Congress intended to preempt the states from legislating in this area [fireworks]. On the contrary, 18 U.S.C. Sec. 836 indicates an intent to encourage state legislation regulating fireworks. The requirement that congressional intent to displace local laws must be clearly manifested is obviously not satisfied in this case.

Cohen v. Bredehoeft, 290 F. Supp. at 1004 (holding that a municipal ordinance prohibiting the presence of any fireworks within the city was not in conflict with or preempted by federal statutes and regulations, including the Federal Hazardous Substances Act, or 18 U.S.C. §836.) See also Stoughton v. City of Fort Worth, 277 S.W.2d 150 (upholding a permanent injunction based upon a local ordinance prohibiting all manner of fireworks within the city limits and 5,000 feet thereof;) Parker v. City of Fort Worth,

281 S.W.2d 721 (Tex. 1955) (upholding validity of ordinance prohibiting the keeping of fireworks in the city limits and within 5,000 feet thereof;) *City of Wisconsin Dells v. Dells Fireworks Inc.*, 197 Wis.2d 1, 539 N.W.2d 916 (affirming an injunction that prohibited the sale of fireworks without a permit issued by the local municipality pursuant to Wisconsin statute, even though the seller held a federal permit under 18 U.S.C. §§843 for explosive materials.) But see *City of Fort Worth v. Atlas Enterprises*, 311 S.W.2d 922 (Tex. 1958)(holding city ordinance prohibiting the transportation of fireworks through the city invalid in conflict with the laws of Texas, and as discriminatory against interstate commerce and preempted by 18 U.S.C. §835<sup>7</sup>.)

Appellants point to the Consumer Product Safety Act (C.P.S.A.), 15 U.S.C. s 2051, et seq., and the Federal Hazardous Substances Act (F.H.S.A.), 15 U.S.C. s 1261, et seq. . . [which] deal with the labeling, transportation and other minimum safety standards which apply to those fireworks which are otherwise legally capable of being possessed under state law. Neither C.P.S.A. nor the F.H.S.A. prohibit the possession of the type of fireworks encountered here.

The F.H.S.A. was enacted to proscribe interstate commerce in certain ultrahazardous substances and to ensure that other hazardous substances not totally banned were properly labeled, describing the substance and the possible hazard to be expected therefrom. 15 U.S.C. s 1263. In dealing with common fireworks, it is clear that Congress did not totally ban interstate dealings in such items, but rather required that they be properly labeled. 15 U.S.C. s 1261(q)(1)(ii). The legislative history of the F.H.S.A. discloses Congressional intent not to restrict states from otherwise prohibiting fireworks:

Moreover, the limited preemption amendment relates only to labeling and would not preclude States or localities from prohibiting altogether an article, such as fireworks, which would not be banned under the Federal act if properly labeled.

*U.S. v. Marcyes*, 557 F.2d 1361, 1365 (9th Cir. 1977).

Based on the discussion above, the requirements for federal preemption do not appear to be met. The federal laws at issue specifically address the issue of preemption and indicate that the Nebraska fireworks statutes are not preempted. In addition, based on the case authorities from around the United States, we do not believe that Congress has explicitly preempted state regulation of fireworks. There is no discernable conflict between federal and state law, and it is not impossible to comply with both federal and Nebraska law in the area of fireworks. We also do not believe that federal law so thoroughly occupies the field of fireworks regulation that there is no room for state regulation, or that the state law at issue here is an obstacle to federal regulation. Thus, we do not believe the Nebraska Fireworks statutes are preempted by federal law.

## Conclusion

For the reasons set out above, it is our opinion that the Nebraska fireworks statutes, Neb. Rev. Stat. §§28-1239.01, 28-1241 through 28-1250 and 28-1252, are not preempted by federal law.

<sup>1</sup> Pub.L. 86-613, § 18, formerly § 17, July 12, 1960, 74 Stat. 380, as amended Pub.L. 89-756, § 4(a), Nov. 3, 1966, 80 Stat. 1305; renumbered and amended Pub.L. 91-113, § 4(a), (b)(1), Nov. 6, 1969, 83 Stat. 189, 190; Pub.L. 94-284, § 17(a), May 11, 1976, 90 Stat. 510; Pub.L. 110-314, Title II, § 204(b)(4)(J), Aug. 14, 2008, 122 Stat. 3042

<sup>2</sup> This paragraph of the act allows hazardous substances to include "any substances which the Commission by regulation finds. . . meets the requirements" elsewhere in subsection (f)

<sup>3</sup> Now codified as 49 U.S.C. §§5101 through 5128

<sup>4</sup> Neb. Rev. Stat. §28-1245(3) states: "Section 28-1244 [unlawful acts includes bringing into the state any fireworks other than permissible fireworks] shall not apply to: any fireworks brought into this state for storage by a licensed distributor and held for sale outside of this state."

<sup>5</sup> Similar language is still found in the Hazardous Materials Transportation Act, as recodified in 49 U.S.C. §§5101 through 5128, specifically in 49 U.S.C. § 5125 (2008)

<sup>6</sup> Which are never fully identified by the Court, but which do include 18 U.S.C. §836

<sup>7</sup> 18 U.S.C. §835 was repealed in 1979

Sincerely,  
JON BRUNING  
Attorney General  
(Signed) Natalee J. Hart  
Assistant Attorney General

## REPORTS

The following reports were received by the Legislature:

### **Agriculture, Department of**

Commercial Dog and Cat Operator Inspection Act Fiscal Report for  
2007/2008

### **Arts Council, Nebraska**

Nebraska Arts and Humanities Cash Fund Report

### **Attorney General, Nebraska**

2007 Annual Report, Leadership in Action

**Auditor of Public Accounts**

Retirement Systems, Public Employees Retirement Systems - State and County Employees Retirement Plans, Audit Report  
 Revenue, Department of, Cigarette Tax Receipts, Attestation Report  
 Revenue, Department of, Motor Fuel Tax Enforcement and Collections Division, Attestation Report

**Coordinating Commission for Postsecondary Education**

Capital Construction Budget Recommendations and Prioritization for 2009-2011 Biennium  
 Postsecondary Education Operating Budget Recommendations for 2009-2011 Biennium

**Criminal Justice, Commission on Law Enforcement and**

Nebraska Crime Victim's Reparation Program, Twenty-First Report, July 1, 2006 - June 30, 2007

**Fiscal Office, Legislative**

Certification of General Fund net receipts for fiscal year beginning July 1, 2008. Monthly receipt estimates derived from the annual net receipt estimate of the Economic Forecasting Advisory Board produced February 22, 2008

**Economic Development, Department of**

Proposed 2007 Annual Performance Report  
 Proposed 2009 Annual Action Plan

**Fire Marshal, State**

Annual Volunteer Numbers Report

**Game and Parks Commission**

Game Law Investigation Cash Fund Annual Report

**GIS Steering Committee**

Building a Spatial Data Infrastructure for Nebraska Annual Report

**Health and Human Services**

Beatrice State Developmental Center Discharge Report (LB959)  
 Child Welfare Services 2007 Annual Report  
 Developmental Disabilities, Division of, Beatrice State Developmental Center, Quarterly Report  
 Women's Health Initiative Annual Report

**Insurance, Department of**

2007 Annual Report of the Interstate Insurance Receivership Commission

**Investment Council**

Sustainability of Healthcare Transfer Report  
 Sustainability of Healthcare Transfer Report, Revised Report

**Investment Finance Authority, Nebraska (NIFA)**

2006 Series A, B, C, D, E and F Community Development Loan Notes (City of Lincoln Program-2006) Report  
 2008 Series CDE Single Family Housing Revenue Bonds Notice  
 2008 Series FGH Single Family Housing Revenue Bonds Notice  
 2008B Clean Water State Revolving Fund Revenue Bonds Notice  
 Agricultural Loans Report, Fiscal Year Ending June 30, 2008  
 Clean Water State Revolving Fund Revenue Bonds Notice  
 Drinking Water State Revolving Fund Revenue Bonds Notice  
 Single Family Housing Bonds and General Obligation Bonds  
 Single Family Housing Revenue Bonds Series 2007 IJK Quarterly Report

Single Family Housing Revenue Bonds Series 2008 AB Quarterly Report  
 Single Family Housing Revenue Bonds Series 2008 CDE Quarterly Report

**Labor, Department of**

PY 2007 Annual Report, Workforce Investment Act

**Legislative Fiscal Office (See Fiscal Office, Legislative)**

**Legislative Performance Audit (See Performance Audit, Legislative)**

**Natural Resources, Department of**

2008 Biennial Report on the Nebraska Resources Development Fund

Annual Report and Plan of Work for the Nebraska State Water Planning and Review Process

**Performance Audit, Legislative**

FY 2007-2008 Annual Report

Personal Services Contracts: An Examination of Compliance and Oversight

**Parole, Board of**

Annual Report

**Power Review Board**

Fifteenth Biennial Report

**Propane Education and Research Safety Council, Nebraska**

Independent Auditors' Report Years Ended December 31, 2007 and 2006

**Public Service Commission**

2008 Annual Report on Telecommunications

**Retirement Systems, Public Employees**

2008 Annual Report to the Legislative Retirement Committee

County Employees' Retirement System Cash Balance Benefit Fund Actuarial Valuation Results as of January 1, 2008 for County Fiscal Year Ending June 30, 2010

County Equal Retirement Benefit Fund Actuarial Valuation Results as of January 1, 2008 for Fiscal Year Ending June 30, 2009

Retirement Plan Review

State Employees' Retirement System Cash Balance Benefit Fund Actuarial Valuation Results as of January 1, 2008 for State Fiscal Year Ending June 30, 2010

State Equal Retirement Benefit Fund Actuarial Valuation Results as of January 1, 2008 for State Fiscal Year Ending June 30, 2009

**Revenue, Nebraska Department of**

2007 Nebraska Tax Incentives Annual Report to the Nebraska Legislature

2008 Tax Expenditure Report and Summary

Certification of General Fund net receipts for fiscal year beginning July 1, 2008. Monthly receipt estimates derived from the annual net receipt estimate of the Economic Forecasting Advisory Board produced February 22, 2008

Nebraska Lottery 2008 Annual Report

**Roads, Nebraska Department of**

Board of Public Roads Classifications and Standards Minutes for April, May, and July 2008

State Highway Commission Quarterly Reports

Thirty-Eighth Annual Report of the Board of Examiners for County

Highway and City Street Superintendents for the Period January 1, 2007 to December 31, 2007

Traffic Crash Facts Annual Report

**State Fair, Nebraska**

Expenditures from State Fair Funds Account, July 1, 2007 - June 30, 2008

**University of Nebraska**

Progress Report on Increasing Women and Minority Faculty

**COMMUNICATIONS**

Received communication from the Nebraska Supreme Court regarding the August 12, 2008, meeting of the Judicial Resources Commission.

Received communication from the Nebraska Supreme Court regarding the October 16, 2008, meeting of the Judicial Resources Commission.

Received a copy of House Resolution 1325 from the state of Illinois relating to the observance of Memorial Day and the Illinois House of Representatives' continued tradition of honoring our fallen brethren by reading an annual list of all of the names of those American soldiers, sailors, airman, and marines from the State of Illinois that have given the ultimate sacrifice in the preceding year.

**BILLS ON FIRST READING**

The following bills were read for the first time by title:

**LEGISLATIVE BILL 1.** Introduced by Speaker Flood, 19; at the request of the Governor.

A BILL FOR AN ACT relating to juveniles; to amend section 29-121, Reissue Revised Statutes of Nebraska; to change provisions relating to prohibition of prosecution for leaving a child at a hospital and duties for the hospital; to repeal the original section; and to declare an emergency.

**LEGISLATIVE BILL 2.** Introduced by Engel, 17.

A BILL FOR AN ACT relating to appropriations; to appropriate funds for the expenses incurred during the One Hundredth Legislature, First Special Session, 2008; and to declare an emergency.

**LEGISLATIVE BILL 3.** Introduced by Dubas, 34.

A BILL FOR AN ACT relating to children; to adopt the Nebraska Infant Safe Haven Act; to adopt the Nebraska Children's Safe Haven Act; to provide a termination date; to eliminate provisions relating to leaving a child with an employee on duty at a hospital; to outright repeal section 29-121, Reissue Revised Statutes of Nebraska; and to declare an emergency.

**EASE**

The Legislature was at ease from 3:25 p.m. until 3:33 p.m.

**REFERENCE COMMITTEE REPORT**

The Legislative Council Executive Board submits the following report:

<b>LB/LR</b>	<b>Committee</b>
LB1	Judiciary
LB2	General File
LB3	Judiciary

Batt, Robert - Nebraska Liquor Control Commission - General Affairs  
 Berggren, Eric - State Board of Health - Health and Human Services  
 Bizzell, Dan - State Board of Health - Health and Human Services  
 Borgmann, Charles - Nebraska Motor Vehicle Industry Licensing Board -  
 Transportation and Telecommunications  
 Brodersen, Charles "Tod" - Nebraska Ethanol Board - Natural Resources  
 Brown, Amber - State Personnel Board - Government, Military and  
 Veterans Affairs  
 Brueggemann, William - Crime Victim's Reparations Committee - Judiciary  
 Carlson, DeMarus - Board of Educational Lands and Funds - Education  
 Cole-Mossman, Jennie - Child Abuse Prevention Fund Board - Health and  
 Human Services  
 Cotton, Rosalyn - Nebraska Board of Parole - Judiciary  
 Evans, Theodore, Jr. - State Board of Health - Health and Human Services  
 Ford, Scot - Crime Victim's Reparations Committee - Judiciary  
 Harmon, Donald - Board of Emergency Medical Services - Health and  
 Human Services  
 Henning, Judith - Board of Emergency Medical Services - Health and  
 Human Services  
 Hoffman, Timothy - Board of Emergency Medical Services - Health and  
 Human Services  
 Hosford, Paul - Nebraska Accountability and Disclosure Commission -  
 Government, Military and Veterans Affairs  
 Kester, Kenneth - State Board of Health - Health and Human Services  
 Kuzma, Joni - Child Abuse Prevention Fund Board - Health and Human  
 Services  
 Lang, Catherine D. - Commissioner of Labor, Department of Labor -  
 Business and Labor  
 Mercer, Richard - Nebraska Natural Resources Commission - Natural  
 Resources  
 Moseman, Neil - Director, Nebraska Energy Office - Natural Resources  
 Noah, Darlene - Nebraska Motor Vehicle Industry Licensing Board -  
 Transportation and Telecommunications  
 Reagan, Sammy - Nebraska Motor Vehicle Industry Licensing Board -  
 Transportation and Telecommunications

Salansky, Paul - State Board of Health - Health and Human Services  
 Starman, Darlene - Nebraska Educational Telecommunications Commission  
 - Education  
 Stuart, James, Jr. - Nebraska Environmental Trust Board - Natural  
 Resources  
 Surber, George Tom - Board of Emergency Medical Services - Health and  
 Human Services  
 Tenny, John - State Board of Health - Health and Human Services  
 Vandeberg, Rodney - Nebraska Highway Commission - Transportation and  
 Telecommunications  
 Vaughn, Derek - Crime Victim's Reparations Committee - Judiciary

(Signed) L. Patrick Engel, Chairperson  
 Legislative Council, Executive Board

### **ATTORNEY GENERAL'S OPINION**

#### Opinion 08008

DATE: November 14, 2008

SUBJECT: Whether certain proposed legislation is within the scope  
 of the Governor's call for a special session of the  
 Legislature relating to child abandonment

REQUESTED BY: Nebraska State Senator Rich Pahls

WRITTEN BY: Jon Bruning, Attorney General  
 Charles E. Lowe, Assistant Attorney General

#### Introduction

In a letter dated November 5, 2008, you have asked this office for its opinion as to whether a proposed legislative bill you intend to offer at the Legislature's special session beginning on November 14, 2008, is "constitutional under the restrictions of the Governor's Proclamation" calling the Legislature into session.

The proclamation you refer to was issued by Governor Dave Heineman on October 29, 2008. It calls the Legislature into special session "for the purpose of considering and enacting legislation on only" two subjects. These subjects are:

1. Enacting legislation to limit the application of 2008 Neb. Laws LB 157, Neb. Rev. Stat. § 29-121, by reducing the maximum age of children to whom the statute applies; and
2. To appropriate funds to the Legislative Council for the necessary expenses of the extraordinary session herein called.

Neb. Rev. Stat. § 29-121, the statute specifically addressed in the Governor's proclamation, reads as follows:

No person shall be prosecuted for any crime based solely upon the act of leaving a child in the custody of an employee on duty at a hospital licensed by the State of Nebraska. The hospital shall promptly contact appropriate authorities to take custody of the child.

Your proposed bill contains twelve sections. The proposed bill places a thirty day limit on the age of a child who can be left at a licensed hospital without threat of criminal prosecution, but it also contains numerous other provisions dealing generally with the rights, responsibilities and duties of the parent, the hospital and the Department of Health and Human Services in legal child abandonment situations. Section 11 of your proposed bill would repeal § 29-121 outright. If enacted, the bill would be known as the Nebraska Safe Haven Act.

The issue for decision is whether enactment of your proposed bill establishing the Nebraska Safe Haven Act would fall outside the scope of the Governor's call of the Legislature into special session which appears to limit the session to the consideration and enactment of legislation to amend § 29-121 to place an age limit on children to whom that statute applies.

#### Applicable Law

The special session of the Legislature has been called by the Governor using the authority vested in him by Neb. Const. art. IV, § 8. That constitutional provision states:

The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the Legislature shall enter upon no business except that for which they were called together.

In *Arrow Club, Inc. v. Nebraska Liquor Control Commission*, 177 Neb. 686, 689-90, 131 N.W.2d 134, 137 (1964), the Nebraska Supreme Court stated the basic legal principles applicable under art. IV, § 8.

It is well established that the legislature while in special session can transact no business except that for which it was called together. . . . The proclamation may state the purpose for which the Legislature is convened in broad, general terms or it may limit the consideration to a specified phase of a general subject. The Legislature is free to determine in what manner the purpose shall be accomplished, but it must confine itself to the matters submitted to it by the proclamation. . . .

The guiding principle in sustaining legislation of a special session is that it be germane to, or within, the apparent scope of the subjects which have

been designated as proper fields of legislation. . . .

The Legislature while in special session may enact legislation relating to, germane to, and having a natural connection with the purpose for which it was convened. . . . The purpose or subject as stated in the proclamation is to be determined by an analysis and construction of the proclamation as in the case of any written instrument. . . . The presumption is always in favor of the constitutionality of legislation, and an act should be held to be within the call if it can be done by any reasonable construction.

Applying the foregoing principles, in *Arrow Club* the supreme court found that legislation relating to the regulation and operation of bottle clubs was outside the scope of a special session proclamation calling for consideration of amendments to the Liquor Control Act relating to the licensing of nonprofit corporations, even though both bottle clubs and nonprofit corporation liquor licenses fell within the ambit of that act.

In *Jaksha v. State*, 222 Neb. 690, 696, 385 N.W.2d 922, 926 (1986), the supreme court quoted favorably from *Stickler v. Higgins*, 269 Ky. 260, 265, 106 S.W.2d 1008, 1011 (1937), to the effect that a Kentucky constitutional provision very similar to Neb. Const. art. IV, § 8 confers upon the Governor "the power and authority to limit . . . the subjects that the Legislature might consider at [an] extraordinarily called session." The *Jaksha* court then went on to state:

We conclude that Neb. Const. art. IV, § 8, as part of the power of the executive branch of government, permits the Governor to determine when an extraordinary occasion exists, necessitating convention of a special session the Nebraska Legislature. The subject matter restriction envisioned in Neb. Const. art. IV, § 8, empowers the Governor to set the boundaries of legislative action permissible at a special session of the Nebraska Legislature.

222 Neb. at 698, 385 N.W.2d at 927.

It is important to note in this regard that, while the supreme court has stated that during a special session the Legislature may enact legislation "relating to, germane to, and having a natural connection with the purpose for which it was convened," *Arrow Club*, 177 Neb. at 690, 131 N.W.2d at 137, the court, in fact, has "adopted a narrow view of germaneness, limiting it to 'a specified phase of a general subject.'" *Op. Att'y Gen. No. 01034* (Oct. 31, 2001) (quoting *Arrow Club*, 177 Neb. at 689, 131 N.W.2d at 137). As stated in *Opinion No. 01034*: "In light of the *Arrow Club* decision, it appears the Nebraska Supreme Court would take a restrictive view of what legislation is considered germane to a Governor's special session call."

As he is empowered to do, the Governor has issued a proclamation calling the Legislature into special session and set narrow boundaries on legislative action which may be taken during that session. Reading and construing the first subparagraph of the proclamation in the same manner as any other written instrument, it appears clear that the Governor has limited the special session to legislating on "a specified phase of a general subject." *Arrow Club*, 177 Neb. at 689, 131 N.W.2d at 137.

A review of § 29-121, to which the proclamation specifically refers, shows that the general subject of that statute is (1) the exemption of persons who leave children with employees of licensed hospitals from criminal prosecution based solely upon that act and (2) the duty of hospitals to promptly notify appropriate authorities to take custody of children left with them. The Governor's proclamation, however, limits the Legislature to considering legislation which would deal with only a specified phase of this general subject – namely, the parameters of the exemption from criminal prosecution for a person leaving a child at a licensed hospital with regard to placing an upper limit on the age of a child who is abandoned in this way. Put another way, the Governor has called the Legislature for the narrow purpose of considering legislation limiting the exemption from prosecution by placing an age limit on a child who may be left at a hospital. He has not summoned the Legislature to consider and legislate with regard to other legal, medical or administrative ramifications that might flow from the relinquishment of a child at a licensed hospital or from the exemption from criminal prosecution itself.

Section 4 of your proposed bill would limit the age of a child who may be relinquished without threat of prosecution to thirty days; and such proposed limitation falls readily within the scope of the Governor's call. Bearing in mind, however, the very limited nature of the call, it appears that all the remaining provisions of the proposed bill exceed it.

Generally speaking, the proposed bill contains a definition and terminology not found in § 29-121, sets out some of the civil legal ramifications of leaving a child at a hospital, and places a number of duties and responsibilities in connection with abandonment of children at hospitals on the hospitals and the Department of Health and Human Services. None of these proposals is encompassed within the Governor's call, which is limited to consideration of a limitation on the exemption from criminal prosecution set forth in § 29-121. For example, sections 7, 8 and 9 of the proposed bill would require the department to "develop and implement a public information program to inform the general public of the procedures of and alternatives to the Nebraska Safe Haven Act," to develop several other methods and programs relating generally to the proposed act and to prepare and submit an annual report to the Legislature including specified data about the implementation and operation of the proposed act. Similarly, sections 3, 5 and 6 and the last sentence of section 4 of the proposed bill place duties and responsibilities on hospital personnel and the department to be carried out when a child is relinquished to a hospital under the act. It is apparent

these provisions, while related to the general subject of legal child abandonments, do not deal with and are not germane to the phase of that subject specified in the Governor's call – i.e., limiting the exemption from criminal prosecution found in § 29-121 by considering a reduction in the maximum age of children covered by that statute.

It seems to us that the present situation is analogous to the situation described in *Arrow Club* in which the supreme court found that a Governor's call for a special legislative session to consider amendments to the Liquor Control Act relating to the licensing of nonprofit corporations did not encompass legislation relating to the regulation and operation of bottle clubs, even though both bottle clubs and nonprofit corporation liquor licenses fell within the ambit of that act. While your proposed bill's provisions do have a nexus with the general subject of the legal abandonment of children in Nebraska (just as the bottle club legislation in *Arrow Club* had a nexus with the general subject of the regulation of liquor), they do not have direct connection with the narrow subject of the Governor's call – limiting the exemption from criminal prosecution for abandoning a child by lowering the maximum age of covered children – (just as the bottle club legislation in *Arrow Club* did not have a sufficient direct connection to the narrow subject of the liquor licensing of nonprofit corporations). Accordingly, it is our view that, as it did in *Arrow Club*, the Nebraska Supreme Court would likely conclude that the proposed Nebraska Safe Haven Act, if enacted during the special session, is in violation of the Nebraska Constitution and void.

#### Conclusion

For the reasons set forth above, it is our opinion that, with the exception of the setting of a maximum age of thirty days for a child who could be relinquished to a licensed hospital without criminal prosecution for that act alone, your proposed bill, if enacted and then challenged in court, would likely be deemed to be outside the scope of the Governor's call for the special session.

Sincerely yours,  
JON BRUNING  
Attorney General

(Signed) Charles E. Lowe  
Assistant Attorney General

pc: Patrick J. O'Donnell,  
Clerk of the Nebraska Legislature  
17-034-20

**RESOLUTIONS****LEGISLATIVE RESOLUTION 1.** Introduced by Stuthman, 22.

WHEREAS, the Lindsay Holy Family School Boys' Cross Country Team won their first Class D State Cross Country Championship; and

WHEREAS, the 2008 Lindsay Holy Family School cross country team consisted of Kevin Weeder, Kyle Wegener, Robert Plugge, Kelan Schumacher, Jerret Sueper, and Shawn Korth; and

WHEREAS, Kevin Weeder won first place in the individual competition with a time of 17:21.0; and

WHEREAS, the Legislature recognizes the academic, athletic, and artistic achievements of the youth of our state.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDREDTH LEGISLATURE OF NEBRASKA, FIRST SPECIAL SESSION:

1. That the 2008 Lindsay Holy Family School Boys' Cross Country Team be congratulated for their exemplary effort this season.

2. That a copy of this resolution be sent to Coach Nathan Vitosh and the Lindsay Holy Family School Boys' Cross Country Team.

Laid over.

**LEGISLATIVE RESOLUTION 2.** Introduced by Heidemann, 1.

WHEREAS, Thomas Wilson Hall of Troop #334, Palmyra, Nebraska, has completed the requirements for the rank of Eagle Scout in the Boy Scouts of America; and

WHEREAS, to earn the rank of Eagle Scout, the highest advancement of rank in scouting, a Boy Scout must fulfill requirements in the areas of leadership, service, and outdoor skills. Although many options are available to demonstrate proficiency in these areas, a number of specific skills are required to advance through the ranks of Tenderfoot, Second Class, First Class, Star, Life, and Eagle. Throughout his scouting experience, Thomas has learned, been tested on, and been recognized for various scouting skills; and

WHEREAS, to achieve the rank of Eagle Scout, a Boy Scout is required to earn 21 merit badges, 12 of which are in required areas, and complete an approved community service project which consisted of building shelves inside the fire department; and

WHEREAS, only a small percentage of the boys who join the Boy Scouts of America achieve the rank of Eagle Scout; and

WHEREAS, Thomas Wilson Hall has achieved the rank of Eagle Scout through his hard work and perseverance.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDREDTH LEGISLATURE OF NEBRASKA, FIRST SPECIAL SESSION:

1. That the Legislature congratulates Thomas Wilson Hall on achieving the rank of Eagle Scout.

2. That a copy of this resolution be sent to Thomas Hall.

Laid over.

**LEGISLATIVE RESOLUTION 3.** Introduced by Heidemann, 1.

WHEREAS, Matthew Willaert Wallen of Troop #334, Palmyra, Nebraska, has completed the requirements for the rank of Eagle Scout in the Boy Scouts of America; and

WHEREAS, to earn the rank of Eagle Scout, the highest advancement of rank in scouting, a Boy Scout must fulfill requirements in the areas of leadership, service, and outdoor skills. Although many options are available to demonstrate proficiency in these areas, a number of specific skills are required to advance through the ranks of Tenderfoot, Second Class, First Class, Star, Life, and Eagle. Throughout his scouting experience, Matthew has learned, been tested on, and been recognized for various scouting skills; and

WHEREAS, to achieve the rank of Eagle Scout, a Boy Scout is required to earn 21 merit badges, 12 of which are in required areas, and complete an approved community service project which consisted of replacing the cement in the picnic shelter and adding a sidewalk with a handicap accessible ramp at Taggart Park; and

WHEREAS, only a small percentage of the boys who join the Boy Scouts of America achieve the rank of Eagle Scout; and

WHEREAS, Matthew Willaert Wallen has achieved the rank of Eagle Scout through his hard work and perseverance.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDREDTH LEGISLATURE OF NEBRASKA, FIRST SPECIAL SESSION:

1. That the Legislature congratulates Matthew Willaert Wallen on achieving the rank of Eagle Scout.

2. That a copy of this resolution be sent to Matthew Wallen.

Laid over.

**NOTICE OF COMMITTEE HEARINGS**

Business and Labor

Room 2102

Monday, November 17, 2008 10:30 a.m.

Lang, Catherine D. - Department of Labor

(Signed) Abbie Cornett, Chairperson

Education

Room 1524

Monday, November 17, 2008 10:30 a.m.

Starman, Darlene - Nebraska Educational Telecommunications Commission

Room 1525

Tuesday, November 18, 2008 8:30 a.m.

Carlson, DeMarus - Board of Educational Lands and Funds

(Signed) Ron Raikes, Chairperson

General Affairs

Room 1510

Monday, November 17, 2008 10:30 a.m.

Batt, Robert - Nebraska Liquor Control Commission

(Signed) Vickie McDonald, Chairperson

Government, Military and Veterans Affairs Committee

Room 2102

Monday, November 17, 2008 2:30 p.m.

Hosford, Paul - Nebraska Accountability and Disclosure Commission

Brown, Amber - State Personnel Board

(Signed) Kent Rogert, Vice Chairperson

Health and Human Services

Room 1510

Monday, November 17, 2008 1:30 p.m.

Berggren, Eric - State Board of Health

Bizzell, Dan - State Board of Health

Evans, Theodore, Jr. - State Board of Health

Kester, Kenneth - State Board of Health

Salansky, Paul - State Board of Health

Tennity, John - State Board of Health

Harmon, Donald - Board of Emergency Medical Services  
 Henning, Judith - Board of Emergency Medical Services  
 Hoffman, Timothy - Board of Emergency Medical Services  
 Surber, George Tom - Board of Emergency Medical Services  
 Cole-Mossman, Jennie - Child Abuse Prevention Fund Board  
 Kuzma, Joni - Child Abuse Prevention Fund Board

(Signed) Joel Johnson, Chairperson

Judiciary

Room 1113

Tuesday, November 18, 2008 12:00 p.m.

Cotton, Rosalyn - Nebraska Board of Parole  
 Ford, Scot - Crime Victim's Reparations Committee  
 Brueggemann, William - Crime Victim's Reparations Committee  
 Vaughn, Derek - Crime Victim's Reparations Committee

(Signed) Brad Ashford, Chairperson

Natural Resources

Room 1113

Monday, November 17, 2008 12:00 p.m.

Stuart, James, Jr. - Nebraska Environmental Trust Board  
 Brodersen, Charles Tod - Nebraska Ethanol Board  
 Mercer, Richard - Nebraska Natural Resources Commission  
 Moseman, Neil - Nebraska Energy Office

(Signed) LeRoy Louden, Chairperson

Transportation and Telecommunications

Room 1113

Monday, November 17, 2008 10:00 a.m.

Vandeberg, Rodney - Nebraska Highway Commission  
 Noah, Darlene - Nebraska Motor Vehicle Industry Licensing Board  
 Borgmann, Charles - Nebraska Motor Vehicle Industry Licensing Board  
 Reagan, Sammy - Nebraska Motor Vehicle Industry Licensing Board

(Signed) Deb Fischer, Chairperson

**VISITORS**

Visitors to the Chamber were students from Madison High School, Madison.

**ADJOURNMENT**

At 3:37 p.m., on a motion by Senator Lathrop, the Legislature adjourned until 9:00 a.m., Saturday, November 15, 2008.

Patrick J. O'Donnell  
Clerk of the Legislature

