N.D.A.G. Letter to Boucher (Feb. 26, 2001)

February 26, 2001

Honorable Merle Boucher
Minority Leader
House of Representatives
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Representative Boucher:

Thank you for your letter raising questions about section 6 of House Bill 1318 and the underlying statute, N.D.C.C. § 16.1-10-04.1. Since you submitted your letter, additional amendments were added to the bill including amendments to what was originally numbered section 6 and which is now section 5. What is now section 5 would amend N.D.C.C. § 16.1-10-04.1 which generally requires certain political advertisements to disclose the names of sponsors or persons paying for the ads. For the most part, the amendments appear to make minor language clarifications, but also explicitly add political parties to the list of those subject to the disclosure requirements. The additional amendments deleted reference to sponsors of ads and would require that ads paid for by candidates disclose that fact, but would not require listing the candidates' first and last names.

Your letter raises questions about the constitutionality of the underlying statute and what is now section 5 of the bill. However, as you acknowledge in your letter:

> Traditionally, this office has been very reluctant to question the constitutionality of a statutory enactment. E.g., 1980 N.D. Op. Att'y Gen. 1. This is due, in part, to the fact that in North Dakota the usual role of the Attorney General is to defend statutory enactments from constitutional attack and because "[a] statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution." Traynor v. Leclerc, 561 N.W.2d 644, 647 (N.D. 1997) (quoting State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996)). Further, Article VI, Section 4 of the North Dakota Constitution provides that "the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide."

1998 N.D. Op. Att'y Gen. L-197 (Nov. 24).

For these reasons, I, too, am reluctant to issue opinions questioning the constitutionality of current statutory enactments. Nevertheless, I do offer the following discussion for your information.

N.D.C.C. § 16.1-10-04.1 provides as follows:

> Every political advertisement by newspaper, pamphlet or folder, display card, sign, poster, or billboard, or by any other public means, on behalf of or in opposition to any candidate for public office, designed to assist, injure, or defeat the candidate by reflecting upon the candidate's personal character or political action, must disclose at the bottom of the advertisement the name or names of the sponsor or sponsors of the advertisement, and the name or names of the person, persons, associations, or partnerships paying for the advertisement. If the name of an association or partnership is used, the disclaimer must also include the name of the chairman or other responsible person from the association or partnership. The name or names of the person, persons, associations, or partnerships paying for any radio or television broadcast containing any advertising announcement for or against any candidate for public office must be announced at the close of the broadcast. If the name of an association or partnership is used, the disclaimer must also include the name of the chairman or other responsible person from the association or partnership. In every political advertisement in which the name of the sponsor or person, association, or partnership paying for the advertisement is disclosed, the first and last name of any named person must be disclosed. This section does not apply to campaign buttons.

A brief historical review of the statute and the case law is instructive. The predecessor to this statute, N.D.C.C. § 16-20-17.1, was declared unconstitutional by the North Dakota Supreme Court in State v. North Dakota Educ. Ass'n, 262 N.W.2d 731 (N.D. 1978), citing Talley v. California, 362 U.S. 60 (1960). The United States Supreme Court had ruled in Talley that a city ordinance prohibiting any distribution of any handbills without the name and address of the person who printed and distributed them was an unconstitutional violation of the free speech clause of the First Amendment to the United States Constitution. 362 U.S. at 64. The North Dakota Supreme Court noted that the state statute was not narrowly tailored to address those ads designed to injure or defeat by reflecting upon personal character or political action. 262 N.W.2d at 736.

In 1981, the statute was amended and recodified as N.D.C.C. § 16.1-10-04.1. See memorandum from Attorney General Nicholas J. Spaeth to Ben Meier (Oct. 13, 1986). In that memorandum, former Attorney General Spaeth, in explaining the recodified statute, stated that "[t]he conclusion to be drawn from the current political advertisement disclosure statute is that political advertisements by themselves do not require disclaimer statements. Instead, only those advertisements which are on behalf of or in opposition to any candidate for public office which are further designed to assist, injure, or defeat the candidate by reflecting upon the candidate's personal character or political action must contain the disclaimers." Thus, the revised statute met the North Dakota Supreme Court's objection raised in State v. North Dakota Educ. Ass'n.

In 1995, a United States Supreme Court decision again cast serious doubt upon statutes regulating anonymous political pamphlets or campaign literature. In McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), the Supreme Court examined an Ohio statute that prohibited the distribution of anonymous campaign literature and whether the statute violated the First Amendment free speech clause. The Ohio statute in question was somewhat similar to N.D.C.C. § 16.1-10-04.1 but did not include electronic or radio or television ads. The Court, thus, limited its opinion to written communications and particularly the anonymous leaflets of the type involved in that particular case which were distributed by an individual citizen. 514 U.S. 334, n.3. The Ohio statute provided, in part, that

> No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election . . . through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.

514 U.S. at 338 & n.3.

The Court described some of the historical background and need for anonymous political publishing:

> The freedom to publish anonymously extends beyond the literary realm. In Talley, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60, 80 S.Ct. 536. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." Id., at 64, 80 S.Ct., at 538. Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. Id., at 64-65, 80 S.Ct., at 538-539. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the

> identity of the speaker is an important component of many attempts to persuade," City of Ladue v. Gilleo, 512 U.S. 43, 56, 114 S.Ct. 2038, 2046, 129 L.Ed.2d 36 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity. The specific holding in Talley related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.

514 U.S. at 342-43 (footnotes omitted).

Although the statute was defended, in part, on the basis that it was attempting to identify those responsible for fraud, false advertising, and libel, it contained no language limiting its application to fraudulent, false, or libelous statements. It was also justified by the state on the basis of the state's interest "in providing the electorate with relevant information." 514 U.S. at 348.

North Dakota's statute also does not limit its application to fraudulent, false, or libelous statements. The United States Supreme Court in McIntyre viewed the Ohio statute as regulating core political speech and applied "exacting scrutiny" to it and would only uphold the regulation if narrowly tailored to serve an overriding state interest. 514 U.S. at 345-47. The Court reiterated that the category of speech regulated by the Ohio statute goes to the core of the First Amendment protections:

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484 [77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498] (1957). Although First Amendment protections are not confined to 'the exposition of ideas,' Winters v. New York, 333 U.S. 507, 510 [68 S.Ct. 665, 667, 92 L.Ed. 840] (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates. . . .' Mills v. Alabama, 384 U.S. 214, 218 [86 S.Ct. 1434, 1437, 16 L.Ed.2d 484] (1966). This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, 376 U.S. 254, 270 [84 S.Ct. 710, 721, 11 L.Ed.2d 686] (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 [91 S.Ct. 621, 625, 28 L.Ed.2d 35] (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct

> of campaigns for political office.'" Buckley v. Valeo, 424 U.S. 1, 14-15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976) (per curiam).

Id. at 346-47.

The Court noted that "the speech in which Mrs. McIntyre engaged -- handing out leaflets in the advocacy of a politically controversial viewpoint -- is the essence of First Amendment expression." Id. at 347. In striking down the Ohio statute, the Court noted that "[u]nder our Constitution, anonymous pamphleteering is not pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. . . . [P]olitical speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. . . . The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." Id. at 357.

The Court further explained:

> As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity. Moreover, as this case also demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the Election Code. Nor has the State explained why it can more easily enforce the direct bans on disseminating false documents against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection. We recognize that a State's enforcement interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here.

Id. at 351-53 (footnotes omitted).

The Court likewise disposed of the state's other justification of the statute:

> The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill

> written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message.

Id. at 348-49.

As such, I am very concerned about the serious constitutional questions raised by N.D.C.C. § 16.1-10-04.1, particularly as they relate to the ability of individual North Dakota citizens to distribute anonymous campaign literature and pamphlets, if not false or fraudulent. These questions based on the circumstances in the McIntyre case could be minimized, for example, by limiting the statute's application to false, misleading, or fraudulent ads, although it should be noted that North Dakota already has a statute prohibiting false information in political ads. See N.D.C.C. § 16.1-10-04. Alternatively, there could be an exception carved into the statute for distribution of anonymous campaign literature or pamphlets by individuals which are not false or libelous, or possibly by deleting references in the statute to the type of campaign literature involved in the McIntyre case, i.e., pamphlets, folders, and the like.

In response to your last question, I do not believe that either the original amendments or the additional amendments to N.D.C.C. § 16.1-10-04.1 contained in what is now section 5 of House Bill 1318 necessarily raise any additional constitutional questions about the statute.

I trust this discussion is helpful to you.

Sincerely,

Wayne Stenehjem
Attorney General

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