AGO 2000-29 CAMPAIGNS; CANDIDATES; ELECTIONS; FIRST AMENDMENT ACTIVITIES: The law that requires the media to make selected information regarding elections available for inspection is neither illegally discriminatory nor a violation of the First Amendment right of freedom of the press.

Carson City, October 17, 2000

The Honorable Dean Heller, Secretary of State, 101 North Carson Street, Suite 3, Carson City, Nevada 89701

Dear Mr. Heller:

You have requested an opinion from this office regarding the constitutionality of an election statute requiring disclosure of certain information by the media.

QUESTION

Are the provisions of NRS 294A.370 discriminatory and therefore a violation of the media's First Amendment rights?

ANALYSIS

The statute under analysis here, NRS 294A.370, enjoys a strong presumption of constitutionality. *Universal Elec. v. State, Office of Labor Comm'n*, 109 Nev. 127, 129, 847 P.2d 1372, 1373 (1993). ("Legislation is presumed constitutional absent a clear showing to the contrary. . . . A party attacking a statute's validity is faced with a formidable task.") *Starlets Int'l v. Christensen*, 106 Nev. 732, 735, 801 P.2d 1343, 1344 (1990). ("A legislative enactment is presumed to be constitutional absent a clear showing to the contrary.") *Wise v. Bechtel Corp.*, 104 Nev. 750, 754, 766 P.2d 1317, 1319 (1998). ("There is a strong presumption in favor of the constitutionality of statutes, which can only be overcome by clear and fundamental violations of the law.") To overcome this strong presumption, it must be shown that the statute in some way violates the United States Constitution.

NRS 294A.370 requires the media and certain other businesses to make selected information regarding elections available for inspection. The statute states:

1. A newspaper, radio broadcasting station, outdoor advertising company, television broadcasting station, direct mail advertising company, printer or other person or group of persons which accept, broadcasts, disseminates, prints or publishes:

(a) Advertising on behalf of any candidate or group of candidates;

(b) Political advertising for any person other than a candidate; or

(c) Advertising for a passage or defeat of a question or group of question son the ballot, shall make available for inspection at any reasonable time beginning at least 10 days each primary election, primary city election, general election or general city election and ending at least 30 days after the election, information setting forth the cost of all such advertisements accepted and broadcast, disseminated or published.

2. For purposes of this section the necessary cost information is made available if a copy of each bill, receipt or other evidence of payment made out for any such advertising is kept in a record or file, separate from the other business records of the enterprise and arranged alphabetically by name of the candidate or the person or group with requested the advertisement, at the principal place of business of the enterprise.

A. First Amendment, United States Constitution

The First Amendment of the United States Constitution guarantees, among other rights, the freedom of speech and of the press. U. S. CONST. amend. I. Freedom of speech and of the press is dear to every American citizen, and political speech lies at the very core of the First Amendment's protection. These rights of free speech and of the press are among the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment of state action.

A review of the language of NRS 294A.370 reveals the statute does not restrict free speech or free press. There is no censorship or restraint on speech, no restriction on the content of any publication, no limitation on

publishing or on distribution, and speech is not compelled or coerced. There are no time, place, or manner restrictions, and there is no interference with the news-gathering function. What this statute requires is that the media and certain other businesses make information regarding the cost of broadcasting, disseminating, or publishing certain advertisements dealing with elections available during a specific period of time just before and after elections.

In 1946, a New Hampshire statute that limited rates charged for political advertising in newspapers and on radio was challenged as being arbitrary and discriminatory because its regulations were confined to advertisements in newspapers and on radio. The challengers argued that the statute was discriminatory because it did not regulate political advertising by, and in, automotive equipment, aircraft and transportation systems, nor such advertising by job printers or billboards advertisers. The New Hampshire Supreme Court's reply to this argument was that "the State is not bound to cover the whole field of possible abuses." *Chronicle & Gazette Publishing Co. v. Attorney General*, 48 A.2d 478, 481 (N.H. 1946), *reh'g denied*, 329 U.S. 835 (1947) (citations omitted).

The court also found that the rate regulation did not abridge any freedom of the press.

> It cannot be successfully argued that freedom of the press is abridged. We do not have here a statute imposing a license tax on newspapers as in *Grosjean v. American Press Co.*, 297 U. S. 233. Neither does the statute suppress or censor newspapers as was attempted in *Near v. Minnesota*, 283 U.S. 697. The statute does not directly or indirectly exercise any previous restraint on the publication of news by newspapers. Freedom of the press is not an absolute right.

Id. [Citation omitted.] The regulation was found to be a legitimate exercise of the state's police power. *Id.* at 482.

An example of a statute that was found to abridge the freedom of the press was a statute in Florida which granted a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper. In *Miami Herald Publishing Co. v. Tornillo*, 481 U.S. 241, 257 (1974), the Supreme Court held that the statute was unconstitutional because it violated the First Amendment guarantee of a free press. NRS 294A.370 does not require a

newspaper to publish any political advertisement, nor is there any intrusion into the function of editors.

It should also be noted that Federal Communications Commission regulations require all broadcast licensees to keep and permit public inspection of a complete and orderly record of all requests for broadcast time made by or on behalf of a candidate for public office. Records must include the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased. *See* 47 C.F.R. § 73.1943 (2000). It does not appear that this regulation has ever been challenged in federal court.

NRS 294.A370 requires information setting forth the cost of political advertisements to be made available for public inspection immediately before and after elections. The disclosure of this information is also required by candidates (NRS 294A.125 and 294A.200), those who make independent expenditures (NRS 294A.210), those who make independent expenditures for or against ballot questions (NRS 294A.220), and recall committees (NRS 294A.280). The form to report campaign expenses requires the inclusion of categories of expenditures for expenses related to advertising such as television, newspapers, radio, billboards, printed signs, posters, fliers, brochures, and direct mail. NRS 294A.365(2)(d).

In the seminal campaign financing case, *Buckley v. Valeo*, 424 U.S. 1 (1976), the U.S. Supreme Court analyzed disclosure requirements in relation to the First Amendment rights of free speech and association. *Id.* at 64-68. The Court explained why a statute requiring disclosure would have to survive "exacting scrutiny" by a reviewing court. *Id.* at 64-65. That is, there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.* at 64 (footnote omitted). The Court noted, "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

> The strict test . . . is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of

> infringement, particularly when the "free functioning of our national institutions" is involved. . . .
>
> The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude.

Id. a 66 (citation omitted).

The Court then described the three categories of governmental interest: "First, disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent . . .'" *Id*. at 66. "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id*. at 67. "Third, and not least significant, record keeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations . . . ." *Id*. at 67-68

The Court went on to examine the extent of the burden these substantial governmental interests place on individual rights and concluded "that disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption . . ." *Id. at 68*.

We are of the opinion that this statute is simply commercial regulation, requiring a business to make its charges for certain services rendered during certain periods of time, and that no First Amendment rights are implicated. Assuming, for sake of argument, that a First Amendment right is implicated, the statute survives "exacting scrutiny" under *Buckley* because of the substantial government interest involved.

B. Fourteenth Amendment, United States Constitution

The United States Supreme Court in a 1996 decision recognized that "[t]he Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citations omitted). The Court went on to state, "We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so

long as it bears a rational relation to some legitimate end." *Id.* [Citation omitted.] If a statute applies only to a suspect class, the statute must be narrowly tailored to advance a compelling state interest, the strict scrutiny test. "Suspect classifications deserving of strict scrutiny include those based on race or national origin, religion, alienage, nonresidency (at least in some instances), and wealth." 16B AM. JUR. 2d *Constitutional Law* § 817 (1998).

As previously discussed, it is our opinion that NRS 294A.370 does not burden fundamental rights of free speech or free press. It merely requires disclosure of certain costs for services. Even if free speech or free press rights were deemed to be implicated by the statute, the burdens imposed are minimal and pass constitutional muster. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

The media and other business entities are not a suspect class, and Nevada's important interest in informing the public as to the cost of political advertisements just before and after an election justifies this statute. This is a reasonable requirement and is not discriminatory, in that it includes newspapers, radio broadcasting stations, outdoor advertising companies, television broadcasting stations, direct mail advertising companies, printers, and others that provide similar services. NRS 294A.370(1).

Ordinarily, classifications are to be set aside as violative of equal protection only if they are based solely on reasons totally unrelated to the pursuit of the state's goals and only if no grounds can be conceived to justify them. The Court has stated:

> The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them.

Clements v. Fashing, 457 U.S. 957, 962-63 (1982), *reh'g denied*, 458 U.S. 1133 (1982).

Nevada has chosen to apply this statute only to businesses that advertise political ads because of the public's interest in knowing what these political advertisements cost and who requested the advertisement. There is no violation of the Equal Protection Clause by NRS 294A.370.

CONCLUSION

NRS 294A.370 is neither illegally discriminatory nor a violation of the First Amendment right of freedom of the press.

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