

HUSCH BLACKWELL

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January 19, 2022

BY EMAIL AND FIRST-CLASS U.S. MAIL

Mr. David J. Shively
Lancaster County Election Commissioner
601 North 46th Street
Lincoln, NE 68503-3720
dshively@lancaster.ne.gov

Subject: Objections to Adam Morfeld's Candidate Filing for the Office of
 Lancaster County Attorney

Dear Mr. Shively:

I represent the Nebraska Republican Party and the Lancaster County Republican Party (collectively the "Objectors"). Pursuant to Neb. Rev. Stat. § 32-624, the Objectors hereby object to the candidate filing form submitted January 11, 2022, by Adam S. Morfeld for the office of Lancaster County Attorney. Morfeld does not meet the statutory requirements and qualifications to serve as County Attorney, and therefore should not appear on the ballot for that office.

Nebraska's county attorney qualifications statute provides, in relevant part:

No person shall seek nomination or appointment for the office of county attorney in counties of Class 4, 5, 6, or 7,^[1] nor serve in that capacity, unless he or she has been admitted to the practice of law in this state for at least two years next preceding the date such person would take

¹ Lancaster County is a Class 7 county under Neb. Rev. Stat. § 23-1114.01 because it has a population of more than two hundred thousand inhabitants.

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office and has practiced law actively in this state during such two-year period.

Neb. Rev. Stat. § 23-1201.02(1) (emphasis added). The emphasized clause contains both a substantive prong (*i.e.*, “practiced law”) and a durational prong (*i.e.*, “actively during such two-year period”). Morfeld satisfies neither prong.

Regarding the substantive prong, there is no statutory definition for the phrase “practiced law.” But the attorney practice and bar admission rules promulgated by the Nebraska Supreme Court do provide a practice of law definition at Neb. Ct. R. § 3-101(P). That sub-section provides, in its entirety:

“Substantially engaged in the practice of law” means primarily engaged in legal work performing any combination of the following:

(1) The private practice of law as a sole practitioner or as an attorney employee of, or partner or shareholder in, a law firm, professional corporation, legal clinic, legal services office, or similar entity; or

(2) Employment as an attorney for a corporation, partnership, trust, individual, or other entity with the primary duties of:

(a) Furnishing legal counsel, drafting documents and pleadings, and interpreting and giving advice with respect to the law; or

(b) Preparing cases for presentation to or trying before courts, executive departments, or administrative bureaus or agencies;

(3) Employment as an attorney in the law offices of the executive, legislative, or judicial departments of the United States, including the independent agencies thereof, or of any state, political subdivision of a state, territory, special district, or municipality of the United States, with the primary duties of:

(a) Furnishing legal counsel, drafting documents and pleadings, and interpreting and giving advice with respect to the law; or

(b) Preparing cases for presentation to or trying cases before courts, executive departments, or administrative bureaus or agencies;

(4) Employment as a judge, magistrate, hearing examiner, administrative law judge, law clerk, or similar official of the United States, including the independent agencies thereof, or of any state, territory, or municipality of the United States, with the duties of hearing and deciding cases and controversies in judicial or administrative proceedings, provided such employment is available only

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to an attorney; or

(5) Employment as a teacher of law at a law school approved by the American Bar Association throughout the applicant's employment; or

(6) In the event that the applicant has not served for a full 3 of the last 5 years with any of the entities listed in subsections (1) through

(5) above, for purposes of this section, the applicant may use any combination of subsections (1) through (5) above.

Neb. Ct. R. § 3-101(P).

On information and belief, Morfeld has not engaged in one of these activities since his 2012 graduation from law school and admission to the Nebraska bar. Neither his employment as a nonprofit organization executive, nor his legislative service, nor his adjunct teaching at educational institutions which are not law schools, nor his work as a political consultant meet any of the definition's subcategories. Unless Morfeld can specify some activity that meets a cognizable law practice definition—and swear that he has engaged in such activity, pursuant to Neb. Rev. Stat. § 32-607—this requires that you deny Morfeld's candidate filing form and withhold his name from the ballot.

Regarding the durational prong of Neb. Rev. Stat. § 23-1201.02(1)—*i.e.*, that a county attorney candidate must have practiced law “actively during such two-year period”—even if Morfeld has engaged in some activity constituting the practice of law, he has not done so “actively” during the relevant period.²

Even if Morfeld could somehow identify an instance in which he has practiced law during the relevant period, such practice was not, on information and belief, “active” as the Supreme Court has defined that term. Construing the meaning of the term “actively engaged in the day-to-day labor and management of” a farm or ranch in Neb. Const. art. XII, § 8, the Nebraska Supreme Court found the “most natural and obvious meaning” of “actively” is “*constantly engaged*.” *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 414, 610 N.W.2d 420, 427-28 (2000) (emphasis added). In issuing an opinion on the interpretation of the phrase “actively engaged in the teaching profession,” the Attorney General applied *Progress Pig* and reached a similar

² The relevant period under the statute is the two years preceding the date on which Morfeld would assume the office of county attorney, if elected. Neb. Rev. Stat. § 23-1201.02(1). Assuming that date is approximately January 1, 2023, the relevant period is January 1, 2021, to January 1, 2023.

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conclusion. *See* Neb. Op. Att’y Gen. No. 21-016, 2021 WL 4849093, at *2 (Oct. 14, 2021).

Applying this principle here, Morfeld has not, according to *any* publicly available information, been “constantly engaged” since January 1, 2021, in any activity constituting law practice, if he has engaged in any such activity at all.

For these reasons, Morfeld is not qualified to serve as Lancaster County Attorney and cannot appear on the ballot for that office. The Objectors respectfully request that you exercise your authority under Neb. Rev. Stat. § 32-624, sustain these objections, reject Morfeld’s candidate filing form, and withhold his name from any 2022 ballot for the office of county attorney.

Time is of the essence. Your decision on these objections may be the subject of immediate litigation, which may involve appeal to the Nebraska Court of Appeals or Supreme Court. Under the Election Act, such litigation must be completed on or before the fifty-fifth day preceding the election. Neb. Rev. Stat. § 32-624. With the primary election on May 10, 2022, this statutory deadline is March 16, 2022. Thus, to allow for adequate time for potential judicial proceedings, the Objectors ask that you render a decision as soon as possible. We acknowledge that Morfeld should be afforded an opportunity to respond. We respectfully suggest that you set a 7-day deadline for his response. As required by statute, Morfeld has been served with a copy of this objections letter.

Please direct all communications to me at the address above. Thank you for your prompt consideration of this matter.

Sincerely,

HUSCH BLACKWELL LLP



Dave Lopez

*Counsel for the Nebraska Republican Party and
Lancaster County Republican Party*

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Signing for the Objectors:



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Chairman
Nebraska Republican Party
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Chairman
Lancaster County Republican Party
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Copy (by email and First-Class U.S. Mail):

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