



STATE OF NEBRASKA

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VIA EMAIL

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Re: Legal Sufficiency of Private Education Tax Credits Referendum

Dear Interested Parties:

The Private Education Tax Credits Referendum (the “Referendum”) has been submitted to this office for placement on the November 2024 general election ballot. The Referendum seeks to repeal LB 753 (2023), the Opportunity Scholarships Act. Per the Introducer’s Statement of Intent, LB 753 creates the Opportunity Scholarship Act, which allows individual and corporate taxpayers to qualify for non-refundable tax credits contributed to a scholarship-granting organization certified by the Nebraska Department of Revenue to provide education scholarships to assist eligible students to attend a qualified, nonprofit, private elementary or secondary school.

By letter dated January 8, 2024, and received by me on January 9, 2024, Senator Linehan along with counsel Brenna M. Grasz requested that I reconsider accepting the Referendum for filing and placement on the 2024 general election ballot (the “Request”). The Request asks that I decline to place the Referendum on the ballot.

In response to my request, on January 25, 2024, I received the letter of Mr. Norby and Daniel J. Gutman on behalf of the sponsors of the Referendum (the “Response”). The Response asks that I decline the Request and that I place the Referendum on the ballot.

Neb. Rev. Stat. § 32-1409(3) directs the Secretary of State to total the valid petition signatures and determine if constitutional and statutory requirements have been met for referendum petitions. In addition, the Secretary of State pursuant to Neb. Rev. Stat. §§ 32-201

and 32-202 has the duty to decide disputed points of election law and to supervise the conduct of primary and general elections in this state. The Nebraska Supreme Court has held that the Secretary of State has the duty to determine the legal sufficiency of ballot measures such as this, and to withhold such measures from the ballot if they are legally insufficient. *See State ex rel. Wieland v. Beer mann*, 246 Neb. 808, 816, 523 N. W. 2d 518, 525 (1994). *See also State ex rel. Lemon v. Gale*, 272 Neb. 295, 297, 721 N.W.2d 347, 351 (2006); *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 986-993, 853 N.W.2d 494, 505-508 (2014).

Neb. Rev. Stat. § 32-1407(3) provides that petitions invoking a referendum shall be filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to be referred was passed has adjourned sine die or has adjourned for more than ninety days. The Referendum petition was timely submitted to my office for filing on August 30, 2023. Via letter dated October 23, 2023, I determined that a sufficient number of signatures were gathered to qualify the Referendum for the 2024 general election ballot and provided notice of that determination to the sponsors.

Having now reviewed and considered all of the foregoing material, this letter sets forth my determination of the legal sufficiency of the Referendum.

Constitutional Question

The Request analyzes how two provisions of the Nebraska Constitution fit together.

Article III, Section 1, of the Nebraska Constitution provides:

The people...reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature, which power shall be called the power of referendum. (Emphasis added).

On the other hand, Article VIII, Section I, of the Nebraska Constitution, begins with “[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct.” The section concludes with “[e]xisting revenue laws shall continue in effect until changed by the Legislature.”

The constitutional issue posed requires the reconciliation of the broad power of referendum against the specific directive that revenue laws shall remain in effect until changed by the Legislature.

The Request argues that placing the Referendum on the ballot would frustrate the legislative power to tax set forth in Article VIII, Section 1, of the Nebraska Constitution. The Request also discusses LB 753’s role in fulfilling the Religious Freedom Clause found in Article I, Section 4, of the Nebraska Constitution.

These arguments are important and well articulated, but they are outside of the purview of my office to consider. The issues raised are substantive constitutional questions yet to be

determined. Such issues must be left for the courts to decide. The courts have distinguished between procedural challenges to the legal sufficiency of a petition that may be determined prior to the election and those that involve substantive constitutional challenges which do not become justiciable unless and until the proposal is approved by voters. *See Stewart v. Advanced Gaming Techs., Inc.*, 272 Neb. 471, 485, 723 N.W.2d 65, 76 (2006). The constitutional questions raised by the Request are substantive challenges that are not ripe for determination at this time and in any event are not within my purview to decide.

Statutory Question

The Request asserts a second ground for declining to place the Referendum on the ballot, based upon Neb. Rev. Stat. § 32-1408.

That statute directs the Secretary of State to not accept for filing

any initiative or referendum petition which interferes with the legislative prerogative contained in the Constitution of Nebraska that the necessary revenue of the state and its governmental subdivisions shall be raised by taxation in the manner as the Legislature may direct.

The Response asserts that § 32-1408 does not apply because the legislation in question doesn't concern raising taxation, but rather lowers taxation through a tax credit. My view is that this interpretation of the statute is too narrow.

The entire relevant clause in the statute reads: "the necessary revenue of the state and its governmental subdivisions shall be raised by taxation in the manner as the Legislature may direct."

This clause set forth in § 32-1408 is a direct quotation of the first sentence of Article VIII, Section 1, of the Nebraska Constitution. In this sentence of the Constitution, quoted in its entirety in the statute, the phrase "raised by taxation" does not empower the Legislature solely to increase taxes, and deprive the Legislature of the constitutional authority to lower taxes. It empowers the Legislature to establish the overall framework, and the particulars, for raising revenue.

The above-quoted clause from § 32-1408 means that the question under that statute is whether the referendum in question interferes with legislation affecting taxes. This reading gives the correct meaning to the clause, rather than entertaining a distinction between raising taxes or lowering them. All taxation measures are a part of the overall legislative framework for raising revenue by taxation.

Thus, under my reading of § 32-1408, the Referendum potentially interferes with the taxing authority of the Legislature, and therefore the Referendum may be prohibited by that statute. But there is more to consider concerning § 32-1408.

Opinions of the Attorney General

The word “interferes” in Neb. Rev. Stat. § 32-1408 has been interpreted to be a restatement of the constitutional limitation on the referendum process, thereby limiting its use to proposals that would destroy the state’s power to tax. See Neb. Op. Att’y Gen. No. 96005 (Jan. 18, 1996). This Opinion relies upon an earlier opinion (1969-70 Rep. Att’y Gen. 55 (Opinion No. 34, dated April 29, 1969) and the Nebraska Supreme Court’s decision in *Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1969). Essentially, the Attorney General’s view appears to be that the common meaning of “interferes” is too broad to be constitutional. To read the statute as constitutional requires that a stiffer meaning be ascribed to the word “interferes.” The word must be read to mean that the initiative or referendum in question completely destroys or emasculates the taxing authority of the Legislature.

In other words, mere interference, as commonly understood, renders the statute unconstitutional and therefore unenforceable.

The Election Act calls upon the Secretary of State to consider the views of the Attorney General when interpreting and enforcing the Act. See Neb. Rev. Stat. § 32-202(4). Further, the Nebraska Supreme Court has held that the power of referendum must be liberally construed to promote the democratic process, that the power is precious to the people and is one in which the courts are zealous to preserve to the fullest tenable measure. See *Hargesheimer v. Gale*, 294 Neb. 123, 134, 881 N.W.2d 589, 597 (2016).

I do not think that I should ignore these published opinions of the Attorney General.

Using the analysis of the Attorney General in the referenced opinions, and the Nebraska Supreme Court case cited therein, the Referendum does not completely destroy the taxing authority of the Legislature. For that reason, the Referendum cannot be withheld from the ballot under § 32-1408.

Conclusion

I have concluded that the Referendum is legally sufficient and should be placed on the 2024 general election ballot. I will place the Referendum on the ballot unless otherwise ordered by a court of competent jurisdiction.

Sincerely,



Robert B. Evnen
Nebraska Secretary of State