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No. 22-004
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DEPT. OF JUSTICE

SUBJECT: Whether LR264CA Violates the Separate-Vote Requirement in Neb. Const. art. XVI, § 1.

REQUESTED BY: Senator Steve Erdman
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
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INTRODUCTION

LR264CA proposes to amend the Nebraska Constitution to provide that, after January 1, 2024, “no taxes other than retail consumption taxes and excise taxes shall be imposed upon the people of Nebraska.” You ask us to address whether LR264CA violates the provision in Neb. Const. art. III, § 2, requiring that “[i]nitiative measures shall contain only one subject.” Article III, § 2, reserves power to the people to adopt laws and constitutional amendments by initiative petition “independently of the Legislature.” Neb. Const. art. III, § 2. As this constitutional provision applies only to exercise of the initiative power by the people, it has no application to a resolution of the Legislature proposing to amend the Constitution. Thus, the “single subject” requirement in art. III, § 2, has no application to LR264CA.

Amendments to the Nebraska Constitution proposed by the Legislature are governed by Neb. Const. art. XVI, § 1. This provision requires that, “[w]hen two or more amendments are submitted at the same election, they shall so be submitted as to enable the electors to vote on each amendment separately.” Neb. Const. art XVI, § 1. The

Nebraska Supreme Court has held that this “separate-vote” provision “imposes the same requirements as the single subject provision under article III, § 2.” *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 993, 853 N.W.2d 494, 509 (2014) [*Loontjer*]. Thus, the proper question presented is whether LR264CA violates the “separate-vote” requirement in Neb. Const. art. XVI, § 1.

ANALYSIS

In *Loontjer*, the Court concluded “that the single subject rule for voter initiatives and the separate-vote provision for the Legislature’s proposed amendments should be construed as imposing the same ballot requirements: A voter initiative or a legislatively proposed constitutional amendment may not contain two or more distinct subjects for voter approval in a single vote.” 288 Neb. at 998-99, 853 N.W.2d at 512. “Like single subject rules [for constitutional amendments], a separate-vote provision is often said to be aimed at the practice of logrolling. . .,” which “is the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately.” *Id.* at 995, 853 N.W.2d at 510. The test applied to determine if a voter-initiated proposal or a legislatively proposed constitutional amendment contains a single subject is the “natural and necessary connection test.” *Id.* at 1001, 853 N.W.2d at 513-14. Under that test, “[w]here the limits of a proposed law, having natural and necessary connection with each other, and, together, are part of one general subject, the proposal is a single and not a dual proposition.” *Id.* at 999, 853 N.W.2d at 513 (quoting *Munch v. Tusa*, 140 Neb. 457, 463, 300 N.W. 385, 389 (1941)). “[T]he controlling consideration in determining the singleness of an amendment is its singleness of purpose and the relationship of the details to the general subject.” *Id.* (quoting *Munch*, 140 Neb. at 463, 300 N.W. at 389)). “[T]he general subject of a proposed measure is defined by its primary purpose[.]” *Id.* at 1002, 853 N.W.2d at 514.

In Op. Att’y Gen. No. 21-008 (May 4, 2021), we addressed whether a previous proposal to amend the Constitution on related topics violated the separate-vote requirement in art. XVI, § 1. That proposal (LR11CA) prohibited the State and its political subdivisions from imposing taxes on income, property, inheritances, estates, and the retail sale of goods, and required the Legislature to enact a consumption tax on purchases of services and new goods (except fuel). It sought to accomplish the goal by amending several constitutional provisions relating to revenue in Article VIII. It also created a new section providing that: (1) those sections were superseded; (2) the imposition of specific taxes were prohibited; and (3) the Legislature was required to impose a consumption tax. We found that, “[a]t the broadest level, the general subject of LR11CA [was] to prohibit the imposition of income, property, inheritance, estates, and sales taxes and require the Legislature to enact a consumption tax. . .,” and that “[t]he primary purpose of the amendment [was] to replace the prohibited forms of taxation with the consumption tax.” *Id.* at 5. We concluded that “[t]he superseded provisions of Article VIII, which relate to some of the forms of taxation to be prohibited by the amendment, appear[ed] for the most part to have a natural and necessary connection to the resolution’s primary purpose of

replacing those taxes with the consumption tax.” *Id.* We expressed concern that amendments to two constitutional provisions included in the resolution were “not naturally and necessarily connected to the amendment’s primary purpose. . .,” as they did “not seem dependent or contingent on the primary purpose of eliminating certain forms of taxation and replacing them with a consumption tax.” *Id.* Finally, we noted a potential logrolling concern because, while the amendment proposed prohibiting several specific types of taxes and replacing them with a consumption tax, “the amendment [did] not provide voters a choice as to whether to eliminate only some of the taxes to be replaced.” *Id.* Thus, we pointed out that the prohibition of these specific taxes “could be viewed as distinct subjects which should be separately presented to voters, and the inability of voters to select which taxes would be replaced by the consumption tax [could] be held to constitute impermissible logrolling which violates art. XVI, § 1.” *Id.* at 6.

The ballot language for LR264CA states: “A constitutional amendment to provide that, beginning January 1, 2024, no taxes other than retail consumption and excise taxes shall be imposed upon the people of Nebraska.” The general subject of LR264CA is the prohibition of all taxes other than retail consumption and excise taxes beginning January 1, 2024. The primary purpose of the amendment is to eliminate all forms of taxation other than retail consumption and excise taxes. The resolution contains a single subject as there is a natural and necessary connection between the authorization of consumption and excise taxes and elimination of all other taxes. Moreover, because “the parts have a natural and necessary connection, there is no logrolling.” *State ex rel. McNally v. Evnen*, 307 Neb. 103, 124, 948 N.W.2d 463, 480 (2020). Accordingly, the resolution does not violate the separate-vote requirement in art. XVI, § 1.

We point out, however, that the proposed amendment provides “no taxes other than retail consumption taxes and excise taxes shall be imposed upon the people of Nebraska.” (emphasis added). “An excise tax is a tax imposed on the manufacture, sale, or use of goods or on an occupation or activity, and is measured by the extent to which a privilege is exercised.” *Banks v. Heineman*, 286 Neb. 390, 396, 837 N.W.2d 70, 76 (2013). In other words, “[a]n excise tax is imposed upon the performance of an act.” *Id.* Technically, a retail consumption tax (which we assume refers to a tax on the retail purchase of goods or services) would, like the sales tax, be a form of excise tax. *Woodmen of the World Life Ins. Soc. v. Nebraska Dept. of Revenue*, 299 Neb. 43, 57, 907 N.W.2d 1, 11 (2018) (Sales tax is an excise tax that “is not imposed on the article sold, but, rather, upon the transaction called the sale.”). Thus, retail consumption taxes and other excise taxes are not technically “imposed” on people, but on activities. Also, by referring solely to such taxes “imposed upon the people of Nebraska,” the amendment might be read to suggest other taxes may be imposed on non-Nebraskans. We suggest striking this language or clarifying its intent. As one option, this could be done through language stating that no governmental entity in the State of Nebraska may impose taxes other than retail consumption taxes or excise taxes.

CONCLUSION

The general subject of LR264CA is the prohibition of all taxes other than retail consumption and excise taxes beginning January 1, 2024. The primary purpose of the amendment is to eliminate all forms of taxation other than retail consumption and excise taxes. The resolution contains a single subject as there is a natural and necessary connection between the authorization of consumption and excise taxes and elimination of all other taxes. Accordingly, we conclude the resolution does not violate the separate-vote requirement in art. XVI, § 1.

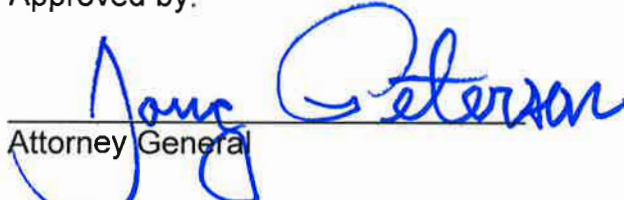
Very truly yours,

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