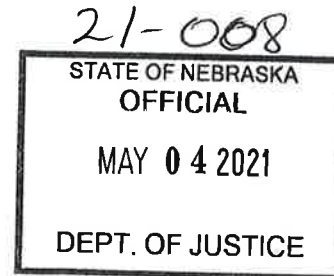




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SUBJECT: Whether LR11CA Violates the Separate-Vote Requirement in Neb. Const. art. XVI, § 1.

REQUESTED BY: Senator Steve Erdman
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
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INTRODUCTION

LR11CA proposes to amend the Nebraska Constitution to prohibit the State and its political subdivisions from imposing taxes on income, property, inheritances, estates, and the retail sale of goods, and requires the Legislature to enact a consumption tax on purchases of services and new goods, except for fuel. The amendment would allow the Legislature to authorize political subdivisions to enact their own consumption taxes.

You ask us to address whether LR11CA 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 LR11CA.

Amendments to the Nebraska Constitution proposed by the Legislature are instead 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 LR11CA violates the “separate-vote” requirement in Neb. Const. art. XVI, § 1.

ANALYSIS

A. The Natural and Necessary Connection Test Applies to the Separate-Vote Provision.

Loontjer involved a challenge to a legislative resolution to amend the Nebraska Constitution to “permit wagering on ‘replayed’ horseraces in addition to wagering on live horseraces.” 288 Neb. at 975, 853 N.W.2d at 496. The resolution also “specif[ie]d] how the Legislature must appropriate the proceeds from a tax placed on wagering for both live and replayed horseraces.” *Id.* Loontjer’s counsel asked the Secretary of State not to place the proposed amendment on the ballot, contending it was legally insufficient because it violated the separate-vote provision in article XVI, § 1. He argued the resolution “presented at least two amendments: one that authorizes a new type of gambling on replayed horseraces, and one that directs tax revenues from new and currently authorized wagering to be used for property tax relief and education funding.” *Id.* at 983, 853 N.W.2d at 503. He contended “that the Legislature was unconstitutionally presenting two separate and independent changes to the constitution for voters to approve or reject in a single vote.” *Id.* When the Secretary of State declined to remove the proposed amendment from the ballot, Loontjer petitioned the Supreme Court for a writ of mandamus directing the Secretary not to certify the proposed amendment for placement on the ballot.

After finding the challenge was justiciable prior to the election, the Court considered the meaning of the separate-vote requirement in art. XVI, § 1. The Court “agree[d] with the parties that the separate-vote provision in article XVI, § 1, imposes the same requirements as the single subject provision under article III, § 2.” *Id.* at 993, 853 N.W.2d at 509. “Like single subject rules [for constitutional amendments], a separate-vote provision is often said to be aimed at the practice of logrolling.” *Id.* at 995, 853 N.W.2d at 510. “[L]ogrolling 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.* “It is sometimes described as including favored but unrelated propositions in a proposed amendment to ensure passage of a provision that might otherwise fail.” *Id.* 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.” *Id.* at 998-99, 853 N.W.2d at 512.

Turning to the test to be applied, the Court adopted the “natural and necessary connection test” formulated in prior cases dealing with proposed amendments for city charters and municipal ballot measures. *Id.* at Neb. 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)).

Applying the natural and necessary connection test to the challenged legislative resolution, the Court cautioned that “whether a proposed amendment’s provisions deal with a single subject matter depends on how narrowly or broadly the subject matter is defined.” *Id.* at 1001, 853 N.W.2d at 514. “[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 v. Tusa*, 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 514.¹ “Without a unifying purpose, separate proposals in a ballot measure necessarily present independent and distinct proposals that require a separate vote.” *Id.* at 1003, 853 N.W.2d at 515. The primary purpose of the resolution was “to legalize a new form of wagering,” not “to create new funding for property tax relief and education by requiring that all tax revenues from parimutuel wagering be used for such purposes.” *Id.* Because there was no “natural and necessary connection” between “the proposal to use tax revenues from parimutuel wagering for property tax relief and education” and “legalizing a new form of wagering,” the Court found the proposed amendment violated the separate-vote requirement in art. XVI, § 1, and directed the Secretary of State not to certify the proposal for placement on the ballot. *Id.* at 1004, 1006, 853 N.W.2d at 515, 517.

B. Summary of LR11CA.

LR11CA proposes to amend article IV, § 28, of the Nebraska Constitution, and fourteen sections in article VIII of the Constitution. It would also create a new article VIII, § 14. The amendment to Neb. Const. art. VIII, § 28, would eliminate the Tax Equalization and Review Commission on January 1, 2025. All but one of the remaining changes would amend sections in article VIII by adding language providing that these sections would be “superseded” by new article VIII, § 14, and would “only apply with respect to taxes imposed prior to January 1, 2024.” Among the sections that would be “superseded” are: (1) Article VIII, § 1 (taxation of real and personal property, and taxes other than property taxes “authorized by law”); (2) Article VIII, § 1A (prohibition against property tax for state purposes); (3) Article VIII, § 1B (legislative authorization to adopt income tax); (4) Article VIII, § 2 (property tax exemptions); (5) Article VIII, § 2A (exemption of personal property in transit in licensed warehouses or storage areas); (6) Article VIII, § 3 (redemption from sales of real estate for taxes); (7) Article VIII, § 4 (prohibition against Legislature remitting or commuting taxes); (8) Article VIII, § 5 (limit on county taxes); (9) Article VIII, § 6 (special

¹ The Court most recently applied the “natural and necessary connection” test to decide single subject challenges to several initiative measures. *State ex rel. McNally v. Evnen*, 307 Neb. 103, 948 N.W.2d 463 (2020) [“*McNally*”]; *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 948 N.W.2d 244 (2020) [“*Wagner*”].

assessments or taxes for local improvements of cities, towns, and villages); (10) Article VIII, § 7 (no taxes on municipal corporations, inhabitants, or property for corporate purposes); (11) Article VIII, § 10 (alternative valuation for taxes upon grain and seed); (12) Article VIII, § 11 (payments in lieu of taxes by public corporations or political subdivisions providing electricity); and (13) Article VIII, § 13 (ratification and confirmation of existing revenue laws). The resolution would also amend Neb. Const. art. VIII, § 12, which allows cities or villages to incur indebtedness and to rehabilitate, acquire, or redevelop substandard and blighted property in a redevelopment project and pledge taxes on property in the project area. This section would be amended to provide that “[b]eginning January 1, 2024, cities and villages shall no longer have the power to incur indebtedness pursuant to subsection (1) of this section or to pledge taxes pursuant to subsection (2) of this section.” Finally, the resolution would create a new article VIII, § 14, providing:

(1) Notwithstanding any other provision of this Constitution to the contrary, effective January 1, 2024, the State of Nebraska and all political subdivisions of the state shall be prohibited from imposing a tax on personal income, a tax on corporate income, a tax on personal property, a tax on real property, a tax on an inheritance from a deceased person, a tax on the estate of a deceased person, and a tax on the retail sale of goods except as provided in subsection (2) of this section. Any taxes described in this subsection that are imposed prior to January 1, 2024, may be collected through the end of calendar year 2024.

(2) The Legislature shall enact a consumption tax which shall apply to purchases of services and new goods, except for fuel. Such consumption tax shall begin no later than January 1, 2024. The Legislature may authorize political subdivisions of the state to enact their own consumption taxes upon such terms and conditions as the Legislature may provide.

C. Application of the Natural and Necessary Connection Test to LR11CA.

The analysis under the separate-vote provision begins with identifying LR11CA’s general subject. “The general subject is defined by its primary purpose.” *McNally*, 307 Neb. at 119, 948 N.W.2d at 477. The general subject “must not be considered too broadly when considering an amendment to the constitution.” *Wagner*, 307 Neb. at 153, 948 N.W.2d at 254. “An overly broad general subject might allow any secondary purpose to arguably be naturally and necessarily connected to it.” *Id.* “Instead, a general subject must be characterized at a level of specificity that allows for meaningful review of the natural and necessary connection between it and the [measure’s] other purposes.” *Id.*

The Introducer’s Statement of Intent explains that the purpose of the resolution is “for a constitutional amendment for a consumption tax.” Committee Records on LR11CA, 107th Leg., 1st Sess. (Feb. 3, 2021). The statement also states: “LR11CA changes the way taxes are collected, and replaces the income tax, the sales tax, the property tax, and the inheritance tax with a consumption tax, and directs the Legislature to enact a consumption tax.” *Id.* The ballot language for the proposed amendment states:

A constitutional amendment to prohibit the state and all political subdivisions from imposing an income tax, a property tax, an inheritance tax, an estate tax, and a tax on retail sales of goods and services except for a consumption tax and to require the Legislature to enact a consumption tax. LR11CA, § 2.

At the broadest level, the general subject of LR11CA is to prohibit the imposition of income, property, inheritance, estates, and sales taxes and require the Legislature to enact a consumption tax. The primary purpose of the amendment is to replace the prohibited forms of taxation with the consumption tax. LR11CA accomplishes this purpose by amending several sections of Article VIII of the Constitution dealing with revenue by providing that those sections are superseded by new Article VIII, § 14, which prohibits imposing taxes on income, property, inheritance, estates, and sales and requires the Legislature to impose a consumption tax. The superseded provisions of Article VIII, which relate to some of the forms of taxation to be prohibited by the amendment, appear 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. The proposed amendment to Article IV, § 28, i.e., eliminating the Tax Equalization and Review Commission ["TERC"], also bears a natural and necessary connection to the amendment's primary purpose as eliminating the property tax would obviate the need for the TERC to perform the statewide equalization of assessments of property for taxation and other powers granted TERC by the Legislature related to property taxation.

We have some concern, however, that the proposed amendment to Neb. Const. art. VIII, § 11, which would eliminate payments in lieu of certain taxes by public corporations or political subdivisions providing electricity, and the amendment to Neb. Const. art. VIII, § 12, which would remove the power granted to cities and villages to incur indebtedness or pledge taxes to rehabilitate, acquire, or redevelop substandard and blighted property in a redevelopment project, are not naturally and necessarily connected to the amendment's primary purpose. "The term 'necessary' means something 'on which another thing is dependent or contingent.'" *Wagner*, 307 Neb. at 158-59, 948 N.W.2d at 257 (quoting Oxford English Dictionary Online). These portions of LR11CA do not seem dependent or contingent on the primary purpose of eliminating certain forms of taxation and replacing them with a consumption tax.

Another issue is whether it is proper to adopt such a broad view of the general subject or primary purpose of LR11CA. The separate-vote requirement "is intended to prevent the practice of logrolling in amending the State's fundamental law." *Loontjer*, 258 Neb. at 997, 853 N.W.2d at 511. Logrolling "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." *McNally*, 307 Neb. at 118-19, 948 N.W.2d at 476. The general subject or primary purpose of LR11CA could more narrowly be viewed as to require the enactment of a consumption tax to replace revenues lost by elimination of other taxes. But the amendment does not provide voters a choice as to whether to eliminate only some of the taxes to be replaced. For example, while some voters may approve of a consumption tax to replace the property tax and sales tax, they may not wish to prohibit

taxes on income, inheritances, and estates. But the amendment does not permit such a choice. Rather, those voters “would be presented with a take-it-or-leave-it proposition” to vote for the consumption tax and prohibit all these other forms of taxation. *Loontjer*, 288 Neb. at 1004, 853 N.W.2d at 515. “[T]his type of proposition is at the heart of the prohibition against logrolling.” *Id.* The prohibition of each of these other 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 may be held to constitute impermissible logrolling which violates art. XVI, § 1.

CONCLUSION

Construed broadly, the general subject of LR11CA is to prohibit income, property, inheritance, estate, and sales taxes and require the Legislature to enact a consumption tax. The primary purpose would be to replace these taxes with the consumption tax. Apart from the proposed amendments to Neb. Const. art. VIII, §§ 11 and 12, the remaining provisions of LR11CA appear to bear a natural and necessary connection to this broad general subject and satisfy the separate-vote requirement. There is a question, however, whether the general subject of LR11CA should be construed more narrowly with the primary purpose being to enact a consumption tax to replace other taxes. Under this general subject, a question may exist as to whether the “all-or-nothing” approach in LR11CA, forcing voters who may favor a consumption tax to also choose to eliminate all of the other identified forms of taxation prohibited by the amendment, as opposed to allowing them to separately vote on which taxes to eliminate, constitutes impermissible logrolling in violation of art. XVI, § 1.

Very truly yours,

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