

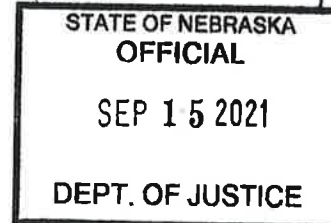


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ATTORNEY GENERAL

*No. 21-014*



**SUBJECT:** Whether LB 12 Is Within The Scope Of The Governor's Special Session Call.

**REQUESTED BY:** Senator Mark Kolterman  
Nebraska Legislature

**WRITTEN BY:** Douglas J. Peterson, Attorney General  
L. Jay Bartel, Assistant Attorney General

### INTRODUCTION

The One Hundred Seventh Legislature convened its First Special Session on September 13, 2021. The special session was convened pursuant to a Proclamation issued by the Governor on August 27, 2021. The Governor's Proclamation called the Legislature into special session "for the purpose of considering and enacting legislation on only" seven subjects. Among the subjects listed is "[e]nacting legislation to redistrict boundaries for members of the Legislature." You have introduced LB 12, which proposes to amend Neb. Rev. Stat. § 32-508 (2016) to increase the number of members of the Legislature by changing the number of legislative districts from forty-nine to fifty. Your question is whether LB 12 falls within the scope of the Governor's Proclamation calling the Legislature into special session. As explained below, we conclude the bill is outside the scope of the call.

### ANALYSIS

The Governor's authority to call the Legislature into special session is found in Neb. Const. art. IV, § 28, which provides:

The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the

Legislature shall enter upon no business except that for which they are called together.

We have discussed this constitutional provision in numerous previous opinions, and have noted that the final portion of art. IV, § 8 “places an express limitation on the power of the Legislature to act during a special session.” Op. Att’y Gen. No. 09010 at 2 (November 6, 2009); Op. Att’y Gen. No. 01034 at 2 (October 31, 2001); Op. Att’y Gen. No. 89069 at 1 (November 9, 1989). That limitation was described in *Arrow Club, Inc. v. Nebraska Liquor Control Commission*, 177 Neb. 686, 689, 131 N.W.2d 134, 137 (1964):

It is well established that the Legislature while in special session can transact no business except that for which it was called together. The proclamation may state the purpose for which the Legislature is convened in broad, general terms or it may limit the consideration to a specified phase of a general subject. The Legislature is free to determine in what manner the purpose shall be accomplished, but it must confine itself to the matters submitted to it by the proclamation. (Citations omitted).

While noting the express constitutional limitation on the power of the Legislature to act in a special session, the court in *Arrow Club* also recognized that,

“[w]hile the Legislature must confine itself to the matters submitted, it need not follow the views of the Governor or legislate in any particular way. Within the special business or designated subjects submitted, the Legislature cannot be restricted or dictated to by the Governor. It is a free agent, and the Governor, under the guise of definition, cannot direct or control its action.” (quoting *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35, 57, 161 A. 697, 703 (1932)).

*The Legislature while in special session may enact legislation relating to, germane to, and having a natural connection with the purpose for which it was convened.* The purpose or subject as stated in the proclamation is to be determined by an analysis and construction of the proclamation as in the case of any written instrument. The presumption is always in favor of the constitutionality of legislation, and an act should be held to be within the call if it can be done by any reasonable construction. *Arrow Club*, 177 Neb. at 690, 131 N.W.2d at 137 (emphasis added) (citations omitted).

Further, in *Jaksha v. State*, 222 Neb. 690, 696, 385 N.W.2d 922, 926 (1986), the Nebraska Supreme Court quoted favorably from *Stickler v. Higgins*, 269 Ky. 260, 265, 106 S.W.2d 1008, 1011 (1937), to the effect that a Kentucky constitutional provision very similar to Neb. Const. art. IV, § 8 confers upon the Governor “the power and authority to limit . . . the subjects that the Legislature might consider at [an] extraordinarily called session.” The *Jaksha* court then went on to state:

We conclude that Neb. Const. art. IV, § 8, as part of the power of the executive branch of government, permits the Governor to determine when an extraordinary

occasion exists, necessitating convention of a special session of the Nebraska Legislature. The subject matter restriction envisioned in Neb. Const. art. IV, § 8, empowers the Governor to set the boundaries of legislative action permissible at a special session of the Nebraska Legislature. 222 Neb. at 698, 385 N.W.2d at 927.

We have also recognized that, while the Legislature may enact legislation during a special session “relating to, germane to, and having a natural connection with the purpose for which it was convened,” *Arrow Club*, 177 Neb. at 690, 131 N.W.2d at 137, the Nebraska Supreme Court has “adopted a narrow view of germaneness, limiting it to ‘a specified phase of a general subject.’” Op. Att’y Gen. No. 01034 at 4 (Oct. 31, 2001) (quoting *Arrow Club*, 177 Neb. at 689, 131 N.W.2d at 137)). As stated in Opinion No. 01034: “In light of the *Arrow Club* decision, it appears the Nebraska Supreme Court would take a restrictive view of what legislation is considered germane to a Governor’s special session call.” *Id.*

The Governor’s call, in addition to authorizing legislation to appropriate funds for the necessary expenses of the special session, includes six subjects. Each is limited to “[e]nacting legislation to redistrict boundaries” for various offices. The subject of item five of the call is “[e]nacting legislation to redistrict boundaries for members of the Legislature.” LB 12 would amend Neb. Rev. Stat. § 32-508 (2016) to “divide the state into fifty legislative districts,” rather than the forty-nine legislative districts currently established by law.

The Nebraska Constitution provides “[t]he Legislature shall by law determine the number of members to be elected and divide the state into legislative districts.” Neb. Const. art. III, § 5. The Constitution further provides “[t]he Legislature shall consist of not more than fifty members and not less than thirty members.” Neb. Const. art. III, § 6. While the Constitution thus would permit legislation creating an additional legislative district to bring the total membership of the Legislature to fifty senators, the relevant specific subject in the call is restricted to enacting legislation “to redistrict boundaries” for members of the Legislature. The number of legislative districts and members of the Legislature is not sufficiently related to or naturally connected with this specific subject to fall within the limited scope of redistricting legislation permitted under the Governor’s Proclamation.

While LB 12 is not within the scope of the current call, “the Governor may, during the Legislature’s special session convened pursuant to a gubernatorial proclamation, submit by an appropriate amended proclamation any additional subjects for valid legislation to be enacted at such special session of the Legislature.” *Jaksha v. State*, 222 Neb. at 698, 385 N.W.2d at 927. You are, of course, free to ask the Governor to issue an amended proclamation to expand the subject matter of the call to include consideration of LB 12.

**CONCLUSION**

The Governor's Proclamation restricts the subject of legislative redistricting to "[e]nacting legislation to redistrict boundaries for members of the Legislature." The increase in the number of legislative districts and members of the Legislature proposed under LB 12 is not sufficiently related to, germane to, and naturally connected with the limited scope of redistricting legislation allowed under the call. Expanding the call to include consideration of the matters proposed in LB 12 would be permissible, however, if the Governor were to issue an amended proclamation adding this subject to the call.

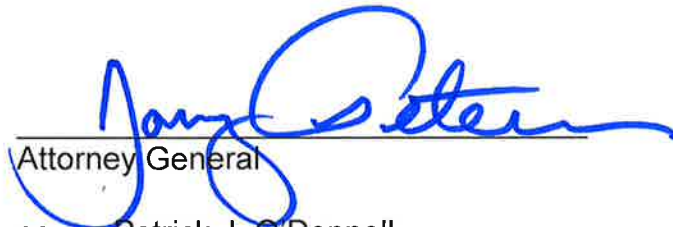
Very truly yours,

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Approved by:



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Clerk of the Nebraska Legislature