

January 25, 2024

The Honorable Robert B. Evnen  
Nebraska Secretary of State  
State Capitol  
1445 K Street, Suite 2300  
Lincoln, NE 68508  
[robert.evnen@nebraska.gov](mailto:robert.evnen@nebraska.gov)

VIA EMAIL AND U.S. MAIL

Re: Private Education Tax Credits Referendum

Dear Secretary Evnen:

Senator Lou Ann Linehan has asked you to reconsider your decision to place the Private Education Tax Credits Referendum (“Referendum”) on the 2024 general election ballot. We write on behalf of Support Our Schools – Nebraska and the Referendum’s sponsors in opposition to Senator Linehan’s request.

Nebraska law directs the Secretary of State to determine the legal sufficiency of a referendum before placing it on the ballot. Consistent with this requirement, you have determined that “the constitutional requirements have been met to place the referendum on the November 2024 ballot.” Because neither the facts nor the law have changed since your initial determination, Senator Linehan’s request should be declined.

To the extent you entertain this unusual request, however, it should be rejected for at least two separate and independent reasons.

First, Senator Linehan’s objections exceed the scope of your pre-election review. As discussed below, a legal sufficiency determination is procedural in nature, limited only to the form of the petition and the technical requirements of the sponsors. Senator Linehan’s request is substantive in nature, raising substantive constitutional challenges that are not ripe for review. Because substantive ballot challenges cannot be decided before an election, Senator Linehan’s request should be denied.

Second, Senator Linehan’s arguments fail as a matter of law. Her attempt to limit the referendum right is foreclosed by the plain text of the Constitution, which reserves to the people the right to repeal “any act” of the Legislature. Further, the Senator’s reliance on revenue generating provisions is misplaced because LB 753 *reduces* the state’s revenue

through corporate and individual tax breaks. Senator Linehan's arguments are without merit, and you should reject them as a matter of law.

**1. Senator Linehan raises substantive issues not ripe for review.**

Nebraska law distinguishes between procedural and substantive challenges to the legal sufficiency of a ballot measure. Whereas procedural challenges are reviewable before an election, substantive issues are not. *Christensen v. Gale*, 301 Neb. 19, 35, 917 N.W.2d 145, 158 (2018). Because Senator Linehan raises substantive issues that are not ripe for review, her request for reconsideration should be denied.

A substantive ballot challenge is one that focuses on the merits and possible outcomes of the measure if approved by Nebraska voters. Courts lack subject matter jurisdiction over these challenges because they depend on the "contingent future event of the measure's passage." *Id.* Procedural challenges, on the other hand, attack the form of the petition "or the procedural requirements to its placement on the ballot[.]" *Id.* Unlike substantive challenges, procedural issues are reviewable before an election. *Id.*

Senator Linehan argues that the Referendum is legally insufficient because it "frustrates" the Legislature's ability to raise revenue for the State. She also argues that the Referendum improperly changes existing revenue laws in violation of Article VIII of the Constitution. And she contends that the ballot measure, if passed, would "arguably" violate the Legislature's duty to "encourage schools." (Linehan Memo, pg. 8, 11.)

Remarkably, Senator Linehan concedes the substantive nature of these objections, noting her legal challenges "do[] not deal with narrow procedural or timing requirement for referendum petitions." (Linehan Memo, pg. 5.) Instead, Senator Linehan requests an advisory opinion from your office regarding the legality of the Referendum, if passed, under substantive provisions of the Constitution. Because this inquiry exceeds the scope of your pre-election review, your initial determination controls.

This result is confirmed by the Nebraska Supreme Court's holding in *Stewart v. Advanced Gaming Techs., Inc.*, 272 Neb. 471, 723 N.W.2d 65 (2006). In that case, a voter challenged the legal sufficiency of statutory initiative authorizing the use of video keno. The voter argued that the initiative was facially invalid because it conflicted with a constitutional provision prohibiting gambling. In other words, the voter argued that the measure was procedurally deficient because it "sought by statutory amendment to effect change that was required to be made by constitutional amendment." *Id.* at 472.

The Supreme Court dismissed the pre-election challenge for lack of subject matter jurisdiction. Resolving the dispute, the Court noted, would require the Secretary of State to determine whether the proposed initiative was inconsistent with "substantive provisions of the constitution." *Id.* "Such an intricate and complex challenge is in reality

a substantive constitutional challenge to the initiative rather than a procedural challenge to the legal sufficiency of the initiative.” *Id.*

The same is true here. In order to resolve Senator Linehan’s objections, you would need to determine whether the Referendum conflicts with substantive constitutional provisions pertaining to taxes, revenue, and religion. As in *Stewart*, this level of analysis exceeds the scope of your pre-election review and thus cannot be determined before the election. *Id.*; see also *Christensen*, 301 Neb. at 35 (“substantive challenges to proposed initiatives are not justiciable before the measures are adopted by voters”). For these reasons, the request for reconsideration should be denied.

For completeness, we note Senator Linehan’s citation to Neb. Rev. Stat. § 32-1408, which 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.

But this statute does not apply, and thus cannot confer jurisdiction, because the Referendum does not “interfere” with the Legislature’s ability to raise taxes. By its terms, LB 753 *reduces* the state’s revenue through individual and corporate tax breaks.

Further, even if the statute did apply, it must be strictly construed to avoid an unconstitutional result. See *Dykes v. Scotts Bluff County Agr. Soc., Inc.*, 260 Neb. 375, 380, 617 N.W.2d 817, 821 (2000) (explaining the obligation to construe statutes in a way that preserves to avoid constitutional problems); see also *Klosterman v. Marsh*, 180 Neb. 506, 513, 143 N.W.2d 744, 749 (1966) (“Any legislation which would hamper or render ineffective the power reserved to the people would be unconstitutional”) (citation and quotation marks omitted). To that end, the Nebraska Attorney General’s Office interprets the provision as authorizing the Secretary of State to withhold a ballot measure if, and only if, the measure’s passage would be “patently unconstitutional or clearly invalid on its face” because it would “destroy or completely emasculate the state’s power to tax.” Neb. Op. Atty. Gen. No. 96005 (1996). The Referendum does not affect the state’s power to tax—much less “destroy” it altogether—so § 32-1408 does not apply. Senator Linehan’s request for reconsideration should be denied.

## **2. Senator Linehan’s arguments fail as a matter of law.**

On the merits, Senator Linehan argues that Article VIII Section 1 of the Nebraska Constitution implicitly limits the right of referendum by vesting plenary power in the Legislature to (a) raise necessary revenue for the state through taxation, and (b) change or alter existing revenue laws. To this end, the Senator argues that the people are powerless to initiate or repeal legislation pertaining to taxes and revenue, even though

this purported limitation appears nowhere in the constitution’s text. For several separate and independent reasons, Senator Linehan’s arguments fail.

**a. Senator Linehan ignores the plain text of Article III.**

Senator Linehan’s objections are foreclosed by the plain text of Article III. “The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning.” *State v. City Betterment Corp.*, 197 Neb. 575, 582–83, 250 N.W.2d 601, 605 (1977). In plain and obvious terms, Article III, Section 1 explicitly reserves to the people the “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.” Neb. Const. art. III, § 1 (emphasis added). The people’s right to repeal “**any**” act of the Legislature by referendum is reiterated in Article III, Section 3. *Id.* § 3 (emphasis added). It undeniable that the use of term “any” is meant to be “expansive and refers to all that fall within a particular category of whatever kind.” *State v. Taylor*, 310 Neb. 376, 386, 966 N.W.2d 510, 518 (2021) (citation and quotation marks omitted); *see also Gimple v. Student Transportation of Am.*, 300 Neb. 708, 715, 915 N.W.2d 606, 612 (2018) (“The plain and ordinary meaning of ‘any’ is ‘all’ or ‘every.’”); *Patel v. Garland*, 596 U.S. 328, 338 (2022) (“As this Court has repeatedly explained, the word ‘any’ has an expansive meaning.”) (citations and quotation marks omitted).

Article III provides only a single exception to the people’s referendum right to repeal “any” act of the Legislature—namely, they cannot repeal acts of the Legislature “making appropriations for the expense of the state government or a state institution existing the time of the passage of such act.” Neb. Const. art. III, § 3. As the Senator concedes, LB 753 does not fall within the narrow exception to the referendum right. *See* Linehan Memo, pg. 4 (acknowledging that the limited exception for appropriations “is not at issue here”). Moreover, because there is already an explicit exception to the people’s referendum power, it is impermissible to elaborate other, “unprovided-for exceptions to [the] text.” Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 87 (2012); *see also Pony Lake Sch. Dist. 30 v. State Comm. for Reorganization of Sch. Districts*, 271 Neb. 173, 185, 710 N.W.2d 609, 620 (2006) (“In ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed.”); *Bogue v. Gillis*, 311 Neb. 445, 459, 973 N.W.2d 338, 347 (2022) (explaining that when a provision’s text “specifically provides for exceptions, we will not recognize others judicially”); *Reed v. State Dep’t of Lab.*, 272 Neb. 8, 17, 717 N.W.2d 899, 905–06 (2006) (explaining the that when a provision already includes explicit exceptions, the “proper inference” is that the issue of exceptions was considered and, “in the end, limited . . . to the ones set forth”).

More to the point, Senator Linehan ignores decades of Supreme Court precedent construing the referendum power in a manner that “promotes the democratic process.” *State v. Jenkins*, 303 Neb. 676, 709, 931 N.W.2d 851, 878 (2019). As the Nebraska Supreme Court has repeatedly held, the reserved rights are “precious to the people” and ones which “the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.” *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589, 597 (2016). Senator Linehan’s arguments ignore these principles by diminishing—not effectuating—the legislative power reserved in the people, and you should therefore reject them as a matter of law. Senator Linehan’s request for reconsideration should be denied.

***b. Article VIII Section 1 does not apply.***

Further, Senator Linehan’s reliance on Article VIII Section 1 is misplaced. Specifically, the Senator cites the first and last sentences of Article VIII as vesting exclusive powers and authority in the Legislature which, by implication, limits the right referendum guaranteed in Article III. But for the reasons discussed below, Article VIII has no applicability to this dispute, so Senator Linehan’s constitutional arguments fail.

The first sentence of Article VIII provides, “The necessary revenue of the state and its governmental subdivision **shall be raised** by taxation in such manner as the Legislature may direct.” Neb. Const. art. VIII, § 1 (emphasis added.) By its terms, the provision applies only to revenue generating legislation—that is, legislation that raises necessary revenue for the state and its subdivisions.

The legislation subject to repeal, however, reduces the state’s revenue *by tens of millions of dollars* through individual and corporate tax cuts. This is reflected in the Fiscal Note accompanying the legislation, which “estimates the following reduction to General Fund revenues as a result of this bill:”

- FY 23-24: \$0
- FY 24-25: (\$25,000,000)
- FY 25-26: (\$25,000,000)
- FY 26-27: (\$25,000,000)
- FY 27-28: (\$31,250,000)

Legislative Fiscal Analyst Estimate, Fiscal Note, LB 753. Simply put, the first sentence of Article VIII has no applicability whatsoever to LB 753 or the Referendum.

Nor does the last sentence, which provides, “Existing revenue laws shall continue in effect until changed by the Legislature.” Neb. Const. art. VIII, § 1. This provision, as confirmed by the 1919 Constitutional debates leading to its enactment, is merely a savings clause. In other words, the term “existing laws” is a reference to the laws that existed at the time the Constitutional amendment was adopted. By including this language, the

drafters confirmed the prospective application of the newly enacted provision—that is, laws that existed at the time of its enactment would remain in effect, even if they conflicted with the newly enacted amendment, unless and until they were “changed by the Legislature.” See *Journal of the Nebraska Constitutional Convention: Convened in Lincoln, December 2, 1919*, at 845–46, 848–49 (debate regarding the last sentence of Article VIII).<sup>1</sup> The last sentence of Article VIII, like the first, does not apply.

Finally, Senator Linehan incorrectly presumes that the word “Legislature” in Article VIII is exclusive to the Nebraska Legislature. Proceeding on this assumption, the Senator argues that only the Nebraska Legislature—and not the people—can make or repeal laws involving taxation and revenue.

This interpretation is inconsistent with the text and structure of the Nebraska Constitution. As noted above, Article III of the Nebraska Constitution delegates legislative authority the Nebraska Legislature *and* reserves it for the people through initiative and referendum. Neb. Const. art. III, § 1. This ensures that “the Legislature and the electorate are concurrently equal in rank as sources of legislation.” *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 210, 602 N.W.2d 465, 474 (1999). Because the electorate shares lawmaking authority on equal footing with the Nebraska Legislature, the term “Legislature” encompasses the people’s reserved rights.<sup>2</sup>

The U.S. Supreme Court reached this same result in *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 819 (2015). In that case, the Court interpreted the word “Legislature” in the Elections Clause of the federal constitution as encompassing Arizona’s state-created initiative process. *Id.* at 824. “As to the ‘power that makes the laws’ in Arizona, initiatives adopted by the voters legislate for the State just as measures passed by the representative body.” *Id.* at 814. Because the same result applies here, Senator Linehan’s arguments should be rejected.

***c. The Senator’s arguments, if adopted, would disrupt settled law and expectations.***

Consistent with the arguments set forth above, the history of initiatives and referenda in Nebraska include numerous examples of the people deciding on issues pertaining to taxation and revenue. By the sponsors’ count, at least 15 ballot measures have addressed topics ranging from the repeal of gas and property taxes, to the funding

---

<sup>1</sup> Available at: <https://hdl.handle.net/2027/uiug.30112071755273>.

<sup>2</sup> To the extent Senator Linehan suggests that the Referendum conflicts with Article I, Section 4 (see Linehan Memo, pgs. 7–11), that claim should be rejected, as well. Even though the Constitution provides that “it shall be the duty of the Legislature to pass suitable laws . . . to encourage schools and the means of instruction,” Neb. Const. art. I, § 4, that in no way diminishes power of the people “at their own option to approve or reject at the polls **any** act, item, section, or part of any act passed by the Legislature.” *Id.* art. III, § 1 (emphasis added); *accord id.* § 3.

of public schools and government projects. Thus, contrary to Senator Linehan's arguments, the people have both imposed and repealed tax laws through the reserved powers set forth in Article III.<sup>3</sup>

Similarly, in *Lawrence v. Beerman*, the Nebraska Supreme Court expressly authorized a referendum that sought to repeal legislation allocating funding to public schools through increased taxation. 192 Neb. 507, 507, 222 N.W.2d 809, 810 (1974). Construing the right liberally, the Court held that the proposed referendum did not fall within the single narrow exception for appropriations, and thus qualified for the ballot under Article III. *Id.* For the many reasons discussed above, the same result applies here, and Senator Linehan's request for reconsideration should be denied.

### Conclusion

For the foregoing reasons, we respectfully ask you to reaffirm your initial determination certifying the Referendum for the general election ballot. Because neither the facts nor the law have changed since your initial determination, Senator Linehan's request for reconsideration should be denied.

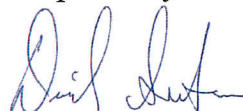
Should you have questions or concerns, please do not hesitate to contact us.

Respectfully submitted,



Scott J. Norby

Respectfully submitted,



Daniel J. Gutman

---

<sup>3</sup> Indeed, if Senator Linehan's reasoning were taken to its logical endpoint—and *any* reference in the Constitution to the authority of the "Legislature" with respect to a topic were deemed exclusive—the people's referendum power would become a complete nullity. *See* Neb. Const. art. III, §30 ("The Legislature shall pass all laws necessary to carry into effect the provisions of this constitution."); *see also, e.g., id.* art. III, § 24 (the "Legislature" may regulate the state lottery); *id.* art. IV, § 20 (the "Legislature" may provide for regulation of common carriers by the Public Service Commission); *id.* art. VII, § 1 (the "Legislature" may provide for education through the common schools); *id.* §§ 2 & 3 (the "Legislature" may regulate of the State Department of Education and State Board of Education).