KEATING | O'GARA

Gary J. Nedved
Paul J. Peter
Anne W. Winner
Jefferson Downing
Gary L. Young
Joel D. Nelson
Joel Bacon
Thomas P. McCarty
Tara L. Gardner-Williams
Milissa D. Johnson-Wiles
Brenna M. Grasz
Courtney R. Faller

OF COUNSEL:
Doug Peterson
EMERITUS:
Con M. Keating

January 3, 2024

Keep Kids First Nebraska
134 South 13th Street, Suite 1200
Lincoln, NE 68508

RE: Private Education Tax Credits Referendum

Dear Keep Kids First Nebraska:

You are aware that the ballot referendum titled the Private Education Tax Credits Referendum (hereinafter the "Referendum") to repeal Legislative Bill 753 creating the Opportunity Scholarships Act (hereinafter the "Act") has been filed with the Nebraska Secretary of State's Office. For the reasons stated below, I believe the Referendum raises constitutionality concerns that the Secretary should consider before allowing the Referendum to be placed on the 2024 general ballot this fall.

I. Nebraska Opportunity Scholarships Act

As you know, in 2023, the Nebraska Legislature passed the Act. See Neb. Rev. Stat. §§ 77-7101 *et seq*. Under the Act, individual taxpayers who make contributions to charitable scholarship-granting organizations as certified by the Department of Revenue are eligible for a credit against their state income tax due under the Nebraska Revenue Act. Most of the contributions made by these taxpayers are used for education scholarships to eligible students. The eligible students use these scholarships at qualified schools as defined by the Act, including privately operated elementary and secondary schools.

Scholarship priority is given to eligible students who, for example, live in low-income households, are in foster care, are children of military members, and are experiencing bullying, harassment and sexual offenses at school.

The Act caps the amount of annual tax credits that can be allowed each year under the Act against state income taxes due. The annual income tax credit limit through 2026 is $25 million and thereafter increases according to the terms of the Act. For reference, the same year the Act was passed, the Legislature passed another bill providing historic funding for the state's public education system, including an initial investment of one *billion* dollars, with an additional $250 million for the following years.

Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248 • Lincoln NE 68501-2248
phone: 402.475.8230 • toll free: 888.234.0621
fax: 402.475.8328 • www.keatinglaw.com

Under the Act, once the income tax credit limit has been reached, no further income tax credits are allowed. Further, the Act requires the scholarship-granting organizations to "limit scholarship amounts awarded to students in a manner that assures that the average of the scholarship amounts awarded per student does not exceed seventy-five percent of the statewide average general fund operating expenditures per formula student for the most recently available complete data year" as defined under another act—the Tax Equity and Educational Opportunities Support Act—which deals with the funding of state aid to public schools. Neb. Rev. Stat. § 77-7104(1)(g). The Department of Revenue is authorized to adopt and promulgate rules and regulations to carry out the Act.

II. Constitutionality Concerns About Permitting the Act to be Repealed by Referendum.

The Legislature's Power of Taxation.

First, it is critical to understand the clearly established breadth of the Legislature's taxation powers. The legislature has broad, plenary authority to tax. This principle is well established both in the Nebraska Constitution and Nebraska Supreme Court caselaw.

Article VIII Section 1 of the Nebraska Constitution states that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." Neb. Const. art. VIII, § 1. As the Nebraska Supreme Court has stated, "The legislature ha[s] exclusive and discretionary power to prescribe the means by which taxes shall be collected. Taxes are collectible in, and only in, the manner provided by statute". *Darnell v. City of Broken Bow*, 139 Neb. 844, 299 N.W. 274, 284 (1941) (citation and quotations omitted).

This plenary power of the Legislature over taxation is subject only to constitutional restrictions. As the Nebraska Supreme Court has articulated, "[i]t is the fundamental law of this state that the Legislature is vested with the taxing power without limit, subject only to restrictions contained in the Constitution." *State ex rel. Sch. Dist. of ScottsBluff, Scotts Bluff Cnty. v. Ellis*, 168 Neb. 166, 170, 95 N.W.2d 538, 541 (1959). See also, *State ex rel. Meyer v. McNeil*, 185 Neb. 586, 587–88, 177 N.W.2d 596, 598 (1970) (stating same); *U.S. Cold Storage Corp. v. Stolinski*, 168 Neb. 513, 513, 96 N.W.2d 408, 410 (1959) (stating same); *Sarpy Cnty. Farm Bureau v. Learning Cmty. of Douglas & Sarpy Ctys.*, 283 Neb. 212, 239, 808 N.W.2d 598, 618 (2012) ("The power to tax being a sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to the government, but are merely limitations on a power which would otherwise be unrestricted."); *Sch. Dist. of Seward Ed. Ass'n v. Sch. Dist. of Seward in Seward Cnty.*, 188 Neb. 772, 788, 199 N.W.2d 752, 761 (1972) (stating "[t]he fundamental principle that the powers of the Legislature on matters of taxation are plenary except where clearly

Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248 • Lincoln NE 68501-2248
phone: 402.475.8230 • toll free: 888.234.0621
fax: 402.475.8328 • www.keatinglaw.com

restricted by the Constitution . . . . The powers of the Legislature on matters of taxation cannot be limited by implication or interpretation, and the restriction upon the legislative power must be clear and unequivocal").

The Legislature's Power to Change Revenue Laws, the People's Power of Referendum, and Harmoniously Interpreting Both Provisions.

Not only is it a well-established principle that the Legislature possesses broad taxation powers, but the Nebraska Constitution also contains directives on who can raise and change state revenue laws.

Article VIII Section 1 of the Nebraska Constitution states that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the *Legislature* may direct." Neb. Const. art. VIII, § 1. Importantly, that Section goes on to state that *"[e]xisting revenue laws shall continue in effect until changed by the Legislature." Id.* (emphasis added). This provision was added in 1920 and has remained in Article VIII Section 1 through each amendment to this section. See *Int'l Harvester Co. v. Douglas Cnty.*, 146 Neb. 555, 562–63, 20 N.W.2d 620, 625 (1945) (providing history of the addition of the existing revenue law provision, including intent for intangible property would continue to be taxed "until legislation dealing therewith should be subsequently adopted", following new constitutional provisions distinguishing between tangible and intangible property).

I would argue the Referendum at issue here runs afoul to the plain language of this state constitutional directive that "existing revenue laws *shall continue in effect* until changed by the *Legislature*." Neb. Const. art. VIII, § 1 (emphasis added). The Referendum is an attempt to repeal an Act passed by the Legislature operating within the state's income tax revenue scheme and currently in effect. Allowing the Referendum to be placed on the 2024 general election ballot would thus conflict with the Nebraska Constitution's express directive that revenue laws may only be changed by the Legislature and shall continue in effect until that time.

Another reading of Article VIII Section 1's existing revenue provision is that it affirms the necessary revenue provision the *Legislature* may direct the raising by taxation this state's necessary revenue. Neb. Const. art. VIII, § 1. The Act here is an act of the Legislature directly pertaining to the states' existing revenue and taxation powers and changing existing revenue laws by authorizing tax credits as permitted by the Act. If the Act can be the subject of the Referendum, the Legislature's plenary authority to tax as reaffirmed in the necessary revenue provision would be frustrated.

Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248 · Lincoln NE 68501-2248
phone: 402.475.8230 · toll free: 888.234.0621
fax: 402.475.8328 · www.keatinglaw.com

The people's referendum power does not change this analysis. As further explained below, interpreting the Article VIII Section 1 revenue power provision to operate as an additional limitation on the Article III Section 3 referendum power provision harmonizes both constitutional provisions in a way that gives effect to each of them.

First, a review of constitutional interpretation principles is instructive. "The Nebraska Constitution, as amended, must be read as a whole." *Steven Banks v. Heineman*, 286 Neb. 390, 399, 837 N.W.2d 70, 78 (2013) (citation omitted). Importantly, "[a] constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument." *State ex rel. Johnson v. Gale*, 273 Neb. 889, 905, 734 N.W.2d 290, 304 (2007) (citation omitted).

In addition, "[i]t is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose." *State ex rel. Lemon v. Gale,* 272 Neb. 295, 304, 721 N.W.2d 347, 356 (2006) (citation omitted). "In ascertaining the intent of a constitutional provision from its language, a court may not supply any supposed omission, or add words to or take words from the provision as framed." *City of N. Platte v. Tilgner*, 282 Neb. 328, 345, 803 N.W.2d 469, 485 (2011) (citation omitted).

Further, "[i]f the meaning is clear, we give a constitutional provision the meaning that laypersons would obviously understand it to convey." *Id.* at 345–46, 803 N.W.2d at 485. See also *State ex rel. Peterson v. Shively*, 310 Neb. 1, 10, 963 N.W.2d 508, 516 (2021) ("The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense.") (citation omitted).

Specifically regarding taxation, "[i]n the proper construction of constitutional provisions, limitations or restrictions upon the power of taxation can never be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language. *Evans v. Metro. Utilities Dist. of Omaha*, 187 Neb. 261, 269, 188 N.W.2d 851, 856 (1971) (citation omitted). "Constitutional limitations on the power to tax must be strictly construed." *Sarpy Cnty. Farm Bureau v. Learning Cmty. of Douglas & Sarpy Ctys.*, 283 Neb. 212, 239 (2012).

Article III Section 3 of the Nebraska Constitution states that "[t]he second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature." Neb. Const. art. III, § 3. This provision contains an exception for "those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act." *Id.* This exception is not at issue here.

Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248 · Lincoln NE 68501-2248
phone: 402.475.8230 · toll free: 888.234.0621
fax: 402.475.8328 · www.keatinglaw.com

Regarding the Article III Section 3 power of referendum, courts have stated this power "must be liberally construed to promote the democratic process" and "courts are zealous to preserve [it] to the fullest tenable measure of spirit as well as letter. *State v. Jenkins*, 303 Neb. 676, 709, 931 N.W.2d 851, 878 (2019) (citations omitted). In other words, "the provisions authorizing the referendum should be construed in such a manner that the legislative power reserved in the people is effectual. *Id.* at 710, 931 N.W.2d at 879. See also *Lawrence v. Beermann*, 192 Neb. 507, 508, 222 N.W.2d 809, 810 (1974) ("Constitutional provisions with respect to the right of initiative and referendum reserved to the people should be construed to make effective the powers reserved.") (Citations omitted.).

I am unaware of any Nebraska case specifically addressing and deciding whether a referendum measure to repeal an existing revenue law is unconstitutional in light of Art VIII Section 1's necessary revenue and existing revenue law provisions. For example, this is not a situation where an initiative would enact a statute that imposes a tax. See *State ex rel. McNally v. Evnen*, 307 Neb. 103, 948 N.W.2d 463 (2020) (one ballot initiative at issue would enact statutes imposing a tax on games of chance revenues and specifying the distribution of the tax). Rather, it is an attempt to repeal by referendum a revenue law enacted by the Legislature pursuant to its broad taxation powers.

Neither is this a situation about the applicability of the referendum exception in Article III Section 3 regarding appropriations. See *Lawrence v. Beermann*, 192 Neb. 507, 222 N.W.2d 809 (1974) (holding law *not yet in effect* establishing state treasury fund and public school district taxation and financing scheme did not fall under Article III Section 3's appropriation exception; because law was not yet in effect, "existing revenue laws shall continue in effect" provision of Article VIII Section 1 arguably would not apply). *Cf. Id.* at 510, 222 N.W.2d at 811 (clarifying that "local school districts are not part of state government nor are they state institutions within the meaning of the language of Article III, section 3, of the Constitution of Nebraska") (Newton, J., concurring). Instead, the focus here is on the interplay between Article III Section 3's referendum power provision and Article VIII Section 1's affirmation of the Legislature's plenary taxation powers as well as the applicability of existing revenue laws provision.

In addition, the question presented here does not deal with narrow procedural or timing requirements for referendum petitions. See *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744 (1966) (addressing referendum petition to repeal state income tax where signatures were obtained both before and after law was amended; deciding whether factual circumstances caused a procedural issue; and holding procedural and timing requirements were met). See also *Pony Lake Sch. Dist. 30 v. State Comm. for Reorganization of Sch. Districts*, 271 Neb. 173, 183–84, 710 N.W.2d 609, 619–20 (2006) (stating *Klosterman* was limited to and "*simply has no application* outside of regulating

Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248 · Lincoln NE 68501-2248
phone: 402.475.8230 · toll free: 888.234.0621
fax: 402.475.8328 · www.keatinglaw.com

legislation intended to facilitate the initiative or referendum procedures") (emphasis added).

Allowing the Referendum at issue to be placed on the 2024 general election ballot would give effect to one provision (Article III Section 3) while frustrating the other (Article VIII Section 1). As already established, Article VIII Section 1 generally provides that the Legislature has broad authority to tax and raise revenue. See, e.g., *International Harvester Co.*, 146 Neb. at 562 ("'The purpose of the amendment is to *enable the Legislature* to make ample provision for reaching a large amount of property that now escapes taxation and provide for raising revenue by other methods in addition to property taxes, thereby more equitably distributing the burdens of taxation.'") (quoting the 1919–1920 Constitutional Convention to ascertain the meaning of Article VIII Section 1, and rejecting an argument that certain intangible property held by corporations was constitutionally exempt from taxation). And the Legislature not only holds the power of taxation, as previously explained and provided for in Article VIII Section 1; our state's Constitution also clearly provides for the means by which existing revenue laws must continue in effect and can be changed. Article VIII Section 1 expressly states that "[e]xisting revenue laws *shall* continue in effect until changed *by the Legislature*." (emphasis added). By its plain language, the Article VIII Section 1 revenue powers provision arguably operates as an additional limitation on the power of referendum. The existing revenue laws provision also reaffirms the necessary revenue provision stating that taxation shall be raised as the *Legislature* may direct.

To treat it otherwise—i.e., to read Article III Section 3's referendum power provision to include the power to change existing revenue laws or to frustrate the Legislature's taxation powers—would fail to give effect here to the last sentence in Article VIII Section 1. Every clause of the Constitution must be given effect, and no words may be omitted. See *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967) ("Each and every clause in a constitution has been inserted for some useful purpose.").

The plain language of Article VIII Section 1 I believe can be interpreted as a limitation on Article III Section 3's referendum power provision, just as Article III Section 3 itself provides an exception to this power. This interpretation harmonizes both provisions in a way that gives effect to each without frustrating the other.

III. The Act and the Necessary Revenue of the State

As discussed above, in addition to stating that "existing revenue laws shall remain in effect until changed by the Legislature" Article VIII Section 1 also states that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." Neb. Const. art. VIII, § 1.

Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248 · Lincoln NE 68501-2248
phone: 402.475.8230 · toll free: 888.234.0621
fax: 402.475.8328 · www.keatinglaw.com

The Nebraska Supreme Court has previously addressed what the word "necessary" means in this constitutional provision. In *Banks v. Bd. of Ed. of Chase Cnty. High Sch. Dist. No. 15*, the Nebraska Supreme Court first observed that "the word 'necessary' is found in the constitutional provision which is a general grant to the Legislature of the taxing power." *Banks v. Bd. of Ed. of Chase Cnty. High Sch. Dist. No. 15*, 202 Neb. 717, 720, 277 N.W.2d 76, 79 (1979). Following this, the Court stated that "[t]he determination of what is necessary revenue under that section can only be made with reference to the duties imposed in the other sections of the Constitution." *Id.* Thus, we look to other constitutional provisions to determine whether the Act falls under this "necessary revenue" provision.

Income Taxation.

As previously discussed, the Legislature holds the taxation power of this State and has the "exclusive and discretionary power to prescribe the means by which taxes shall be collected, and taxes are collectible in, and only in, the manner so provided." *Darnell v. City of Broken Bow*, 139 Neb. 844 (1941) (syllabus of the Court). As one Nebraska Supreme Court Justice has noted, taxation in general is important to a republican form of government. See *State ex rel. Morris v. Marsh*, 183 Neb. 521, 537, 162 N.W.2d 262, 272 (1968) ("It is obvious that a republican form of government, as we understand it, cannot be maintained without adequate taxation.") (Spencer, J., dissenting).

One of the primary forms of raising revenue of this state is through the state's current system of income taxation, which is both allowed under and anticipated in the Nebraska Constitution. See, e.g., Neb. Const. art. VIII, §. IB ("When an income tax is adopted by the Legislature, the Legislature may adopt an income tax law based upon the laws of the United States."). Here, the Act is directly linked to the state's revenue-raising income tax system permitted under the Nebraska Constitution. See *id.* The Act pertains to income tax credits, which operate within the state's revenue-raising structure of income taxation. Revenue of the state is being raised by income taxation and the Act, within that constitutionally permitted tax structure, directs how the state will choose to forego a capped amount of revenue the state is entitled to under its income tax laws.

The Religious Freedom Clause.

Second, it is important to draw specific attention to Article I Section 4 of Nebraska's State Constitution, which I will refer to as the Religious Freedom Clause. The Religious Freedom Clause, in addition to containing robust freedom of conscience

Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248 · Lincoln NE 68501-2248
phone: 402.475.8230 · toll free: 888.234.0621
fax: 402.475.8328 · www.keatinglaw.com

language and protection for citizens of this State, contains an exceptional provision regarding the State's mandatory duties to encourage schools. The relevant portion of the Religious Freedom Clause states:

> Religion, morality, and knowledge, however, being essential to good government, *it shall be the duty of the Legislature* to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and *to encourage schools and the means of instruction.*

Art. I, §. 4 (emphasis added). As the Nebraska Supreme Court has stated, "The plain language of the religious freedom clause [ ] textually commits to the Legislature the *duty* to encourage schools." *Nebraska Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman*, 273 Neb. 531, 549, 731 N.W.2d 164, 178 (2007) (quoting Neb. Const. Art. I, § 4) (emphasis added).

The Nebraska Constitution states that "[t]he Legislature shall pass all laws necessary to carry into effect the provisions of this constitution." Neb. Const. art. III, § 30. The Act here uses the state's income tax revenue-raising system to provide tax credits for donations made to charitable scholarship-granting organizations to provide educational scholarships for children whose education will greatly benefit from those scholarships. By encouraging and incentivizing donations for these educational scholarships through the state's revenue-raising income tax structure—a structure which includes various deductions and tax credits—the Act fulfills the Legislature's duty to encourage schools as mandated in the Religious Freedom Clause.

The fact this unique provision regarding encouraging schools falls squarely within the Religious Freedom Clause—not elsewhere—is something that should not be ignored. One interpretation of the provision has been to confine its meaning to "imposing an affirmative duty on the Legislature to encourage schools beyond the establishment of school districts with authority to raise taxes." *Nebraska Coal. for Educ. Equity & Adequacy (Coal.)*, 273 Neb. at 552, 731 N.W.2d at 180. The Nebraska Supreme Court in *Nebraska Coal. for Educ. Equity & Adequacy* cited to an earlier case, *Banks v. Bd. of Ed. of Chase Cnty. High Sch. Dist. No. 15,* in reaching this conclusion. In *Banks*, the statute at issue allowed boards of education of school districts to establish a fund for matters such as acquiring and building school buildings by using the proceeds of a levy determined by the respective board of education. The plaintiffs argued the statutory scheme was an unlawful delegation of legislative authority. The Court disagreed and stated, "A school district is a creation of the Legislature. Its purpose is to fulfill the constitutional duty

placed upon the Legislature 'to encourage schools and the means of instruction' and it is a governmental subdivision to which authority to levy taxes may properly be delegated under the Constitution." *Banks v. Bd. of Ed. of Chase Cnty. High Sch. Dist. No. 15*, 202 Neb. 717, 719–20, 277 N.W.2d 76, 79 (1979).

But properly understood, the Court's decision in *Banks* did not narrow or limit the meaning of the Religious Freedom Clause's provision regarding encouraging schools; it is simply one application of it. Further, it would be odd for a provision with the Religious Freedom Clause to apply only to public schools, especially when the Constitution provides for funding of public schools elsewhere. See Neb. Const. art. VII, § 1 ("The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."). See also *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 144, 219 N.W.2d 726, 737 (1974) ("This section of our Constitution [Article I Section 4] cannot refer to the common schools of the state, the mandatory establishment of which is required by the specific provisions of Article VII, section 1".) (Clinton and McCown, Justices, dissenting).

Further, nothing in the history of the drafting of the Religious Freedom Clause seems to confine the Legislature's duty to encourage schools only to the context of establishing school districts with authority to raise taxes. In fact, the history of the Religious Freedom Clause in general supports a reading of the Clause that is much broader in the religious freedom context.

The Religious Freedom Clause's encouraging schools provision—"[r]eligion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction "—first appeared in the 1866 Nebraska Constitution which was proposed during Nebraska's pursuit to attaining statehood. While there are no records of the framers' deliberations at this Convention, the language of the 1866 religious freedom clause guaranteed broad religious freedom; and further, as one commentator notes, the encouraging schools provision is "[p]erhaps the most interesting innovation" of the provision. See Jeremy Patrick, *The Religion Provisions of the Nebraska Constitution: An Analysis and Litigation History*, 19 J.L. & Religion 331, 355 (2004).

In 1871, another constitutional convention was held to draft a binding state constitution. The religious freedom clause was completely rewritten and excluded the

Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248 · Lincoln NE 68501-2248
phone: 402.475.8230 · toll free: 888.234.0621
fax: 402.475.8328 · www.keatinglaw.com

encouraging schools provision. However, this 1871 version was defeated at the polls, along with the entire proposed constitution.

Then in 1875, today's Religious Freedom Clause was drafted and subsequently adopted. The Religious Freedom Clause is nearly identical to the proposed 1866 provision. As a whole, the Religious Freedom Clause provides a much more positive recognition of religion than did the 1871 clause, arguably reflecting "a more active religious sentiment of that time". Nebraska Constitutions of 1866, 1871 & 1875 and Proposed Amendments Submitted to the People September 21, 1920, at 9 (Addison E. Sheldon ed. 1920). And most notably here, the Religious Freedom Clause includes a provision identical to the 1866 proposed constitution, imposing a duty on the Legislature to encourage schools and the means of instruction.

While the history of the Religious Freedom Clause may not provide direct answers to the meaning of the encouraging schools provision, it does provide critical context surrounding the historical embedding of strong religious freedom language into our state's Constitution. And given the uniqueness of the final phrase in the Clause imposing a duty on the Legislature to encourage schools in light of the recognition of "[r]eligion, morality, and knowledge [are] essential to good government," it is difficult to see how this affirmative duty uniquely placed in the Religious Freedom Clause should be interpreted in a narrow, limited manner as applying only to establishing public school districts, as if it were located somewhere other than the Religious Freedom Clause.

I believe it is fair to read the "plain language of the religious freedom clause", which "textually commits to the Legislature the duty to encourage schools", as a provision that extends to the Act at issue. *Nebraska Coal. for Educ. Equity & Adequacy (Coal.)*, 273 Neb. at 549, 731 N.W.2d at 178 (quoting Neb. Const. art. I, § 4). The Act here recognizes that the State's "[p]rivately operated elementary and secondary schools . . . provide quality educational opportunities for children". Neb. Rev. Stat. § 77-7102(2). Through the use of income tax credits under the state's tax revenue scheme, the Act expressly "encourage[s] individuals and businesses to support organizations that financially assist parents and legal guardians who want to enroll their children in privately operated elementary and secondary schools". § 77-7102(5). The result is that "[p]arents and legal guardians of limited means [who] are less able to choose among quality educational opportunities for their children" are able to do so because of the Act. § 77-7102(3).

"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Bd. of Ed. of Topeka,*

Shawnee Cnty., Kan., 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954), *supplemented sub nom. in subsequent case.* See also *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 144, 219 N.W.2d 726, 737 (1974) ("The words in [Article I Section 4] of the Constitution directing the passage of suitable laws to encourage schools certainly mean more than a mere statutory exhortation of encouragement. The term 'pass suitable laws' can only mean laws which have an effect and which require implementation.") (Clinton and McCown, Justices, dissenting). The Act here provides tax credits for donations to scholarship-granting organizations who in turn provide scholarships to children in need of quality educational instruction and opportunity at qualified schools. Its operation can reasonably be said to be a fulfillment of the plain language of the Religious Freedom Clause's mandate for the Legislature to "encourage schools and the means of instruction." Neb. Const. art. 1, § 4. See, e.g., *Banks v. Bd. of Ed. of Chase Cnty. High Sch. Dist. No. 15*, 202 Neb. 717, 720–21, 277 N.W.2d 76, 79 (1979) ("If the tax authorized under [the relevant Nebraska statute] has as its purpose the raising of revenue which could reasonably be said to be necessary for the maintenance of the public schools, then it must be upheld as constitutional.").

IV. Secretary of State's Mandatory Duty, and Referendums Interfering with Legislature's Constitutional Prerogative.

Given all this, I believe the Secretary should reconsider accepting for filing the Referendum at issue. The key statute at issue is Neb. Rev. Stat. § 32-1408, which states in full:

> The Secretary of State shall 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.*

See also Neb. Rev. Stat. § 32-201 (stating it is the Secretary's statutory duty "to decide disputed points of election law . . . until changed by the courts").

As discussed above, the Act arguably falls within this legislative prerogative. The Referendum, if allowed to be placed on the 2024 general election ballot, would interfere with the Legislature's ability to carry out its prerogative by repealing an existing revenue law that operates under the State's income tax scheme and arguably within the Religious

Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248 • Lincoln NE 68501-2248
phone: 402.475.8230 • toll free: 888.234.0621
fax: 402.475.8328 • www.keatinglaw.com

Freedom Clause's mandate for the Legislature to "encourage schools and the means of instruction" as discussed above. Neb. Const. art. 1, § 4.

A previous Attorney General's Opinion has interpreted the word "interfere" specifically and Section 32-1408 generally in a manner that seems to be broader than the plain language of the statute requires. See Neb. Op. Att'y Gen. No. 96005 (Jan. 17, 1996) ("Attorney General's Opinion"). In the Attorney General's Opinion, two constitutional amendments brought via initiative efforts were at issue. The Attorney General concluded that the guideline the Secretary should use when determining whether the Secretary could refuse to place an initiative or referendum on the ballot and whether it interferes with the legislative prerogative to tax as stated in Section 32-1408 is whether the respective "measure would destroy or completely emasculate the state's power to tax." *Id.* at 13.

This language in this Attorney General's Opinion is derived from the Nebraska Supreme Court's decision of *State ex rel Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968). However, the issue addressed in *Morris* was whether the procedural requirements for filing an initiative petition were met. The Court in *Morris* ultimately held that substantial compliance with statutory requirements was enough. *Id.* at 536, 162 N.W.2d at 271. The case did not address the Secretary's authority specifically under § 32-1408 as applied to the constitutionality concerns raised here.

Further, the portion of the *Morris* opinion the Attorney General's Opinion focuses on comes at the end of the Court's decision, where the Court stated, seemingly in dicta,

> We hold that a substantial compliance with section 32—704, R.R.S.1943, in filing the itemized verified statement of contributions and expenditures is all that is required.
>
> *The power to tax is essential to the continued existence of a state. A constitutional amendment which would destroy or completely emasculate that power might well be itself unconstitutional. That issue is not presently here.*

Id. at 536, 162 N.W.2d at 271. Presumably, this line of the opinion was included to address the dissent's belief "that the initiative process may [not] be used to limit the power of the legislative branch of government to provide for the proper financing of the state government." *Id.* at 536, 162 N.W.2d at 272 (Spencer, J., dissenting). *See also id.* ("It is obvious that a republican form of government, as we understand it, cannot be maintained without adequate taxation. I therefore maintain . . . that to use the initiative procedure

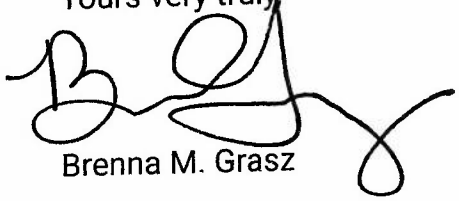
herein is violative of the restriction imposed upon us by the Enabling Act, and consequently is unconstitutional."). The relied-upon language in *Morris* was not the Court's holding as to the meaning or invoking of § 32-1408.

I do not disagree with the Attorney General's Opinion that § 32-1408 is a declaration of the authority the Secretary already possesses to reject unconstitutional ballot measures. Neither do I disagree that "an attempt to totally emasculate the state's power to tax" could be a basis for the Secretary to refuse to place an initiative or referendum on the ballot. However, I do not believe this is the bar that *must* be cleared under the plain language of § 32-1408. To "interfere" with does not require destroying or completely emasculating. Rather, it suggests something that hinders or impedes the Legislature's prerogative of broad taxation powers in Article VIII Section 1. Simply because the extreme posited in *Morris* is not at issue here does not mean the Referendum does not interfere with the Legislature's constitutional prerogative or that the Secretary cannot invoke § 32-1408 in this circumstance.

V. Conclusion

For the reasons set forth above, I believe the Referendum raises constitutionality concerns and the Secretary should reconsider accepting it for filing and placement on the 2024 general election ballot. If you have any questions concerning these matters, please do not hesitate to reach out.

Yours very truly,



Brenna M. Grasz

Keating, O'Gara, Nedved & Peter, PC, LLO
P.O. Box 82248 • Lincoln NE 68501-2248
phone: 402.475.8230 • toll free: 888.234.0621
fax: 402.475.8328 • www.keatinglaw.com