

**SEVENTY-NINTH DAY - MAY 14, 2003**

**LEGISLATIVE JOURNAL**

**NINETY-EIGHTH LEGISLATURE  
FIRST SESSION**

**SEVENTY-NINTH DAY**

Legislative Chamber, Lincoln, Nebraska  
Wednesday, May 14, 2003

**PRAYER**

The prayer was offered by Pastor Seth Leypoldt, Bradshaw and Aurora United Methodist Churches, Aurora, Nebraska.

**ROLL CALL**

Pursuant to adjournment, the Legislature met at 9:00 a.m., Senator Cudaback presiding.

The roll was called and all members were present.

**CORRECTIONS FOR THE JOURNAL**

The Journal for the seventy-eighth day was approved.

**MESSAGE FROM THE GOVERNOR**

May 9, 2003

President, Speaker Bromm  
and Members of the Legislature  
State Capitol Building  
Lincoln, NE 68509

Dear Mr. President, Speaker Bromm and Senators:

Contingent upon your approval, the following individual has been reappointed to the Power Review Board.

**APPOINTEE:**

Mark Hunzeker, 4645 Union Hill Rd, Lincoln, NE 68516

The aforementioned name is respectfully submitted for your consideration.

Sincerely,  
(Signed) Mike Johanns

Governor

say/

**SELECT FILE**

**LEGISLATIVE BILL 407.** Senator Wehrbein asked unanimous consent to withdraw his pending amendment, AM1874, found on page 1763, and replace it with the Bromm et al. substitute pending amendment, AM1881, found on page 1767. No objections. So ordered.

Senator Raikes offered the following amendment to the Bromm et al. pending amendment:

FA1359

Amend AM1881

On page 1, strike line 3 and insert "General Fund 805,142,705 794,827,138"; strike line 5 and insert "Program Total 1,013,639,625 1,003,745,821"; in line 6 strike "\$794,280,716" and insert "\$796,280,716"; in line 8 strike "\$783,749,767" and insert "\$785,749,767"; in line 9 strike "\$624,468,344" and insert "\$626,468,344"; in line 10 strike "\$606,263,742" and insert "\$608,263,742".

Senator Hartnett moved the previous question. The question is, "Shall the debate now close?" The motion prevailed with 26 ayes, 0 nays, and 23 not voting.

The Raikes amendment was adopted with 32 ayes, 7 nays, and 10 present and not voting.

Pending.

**REFERENCE COMMITTEE REPORT**

The Legislative Council Executive Board submits the following report:

Hunzeker, Mark - Power Review Board - Natural Resources

(Signed) Pat Engel, Chairperson  
Legislative Council  
Executive Board

**RESOLUTIONS**

**LEGISLATIVE RESOLUTION 116.** Introduced by Schrock, 38.

**PURPOSE:** To review state common carrier laws and rules and regulations, including, but not limited to, an examination of allowable truck sizes, lengths, axles, weights, and fees, in comparison with neighboring states, for the purpose of increasing common carrier efficiency and commerce.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Transportation and Telecommunications Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 117.** Introduced by Schrock, 38.

PURPOSE: The purpose of this interim study is to study the state's speed limits as well as the fine schedule and enforcement of such speed limits.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Transportation and Telecommunications Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 118.** Introduced by Baker, 44.

PURPOSE: To study issues relating to unsolicited electronic mail, including, but not limited to, the possibility of an opt-out system similar to that used by other types of direct marketing and related activities in other states and on the federal level.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Transportation and Telecommunications Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 119.** Introduced by Baker, 44.

PURPOSE: To study the issues that come under the jurisdiction of the Transportation and Telecommunications Committee of the Legislature.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE

## NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Transportation and Telecommunications Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 120.** Introduced by Baker, 44.

**PURPOSE:** To review state and federal common carrier laws and rules and regulations, including, but not limited to, an examination of allowable truck sizes, lengths, axles, weights, and fees, in comparison with neighboring states, for the purpose of increasing common carrier efficiency and commerce.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Transportation and Telecommunications Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 121.** Introduced by Schrock, 38.

**PURPOSE:** The Livestock Waste Management Act, passed in 1998, established fees to be collected by the Department of Environmental Quality for inspection requests of livestock operations and review of permit applications for livestock waste control facilities. Since the act's implementation, the annual fees received have been significantly less than expected. This interim study will evaluate the act's statutory fee structure to determine if changes are necessary to provide the department with adequate funding for the administration of the act.

In addition, this study will review the new federal Environmental Protection Agency Concentrated Animal Feeding Operation rules and examine what impact those rules may have on the federal agency's livestock waste management activities and resources.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Natural Resources Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report

of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

### **SELECT FILE**

**LEGISLATIVE BILL 407.** The Bromm et al. pending amendment, AM1881, found on page 1767 and considered in this day's Journal, as amended, was renewed.

### **SENATOR VRTISKA PRESIDING**

### **SENATOR CUDABACK PRESIDING**

Senator Beutler moved the previous question. The question is, "Shall the debate now close?" The motion prevailed with 25 ayes, 4 nays, and 20 not voting.

Senator Bromm moved for a call of the house. The motion prevailed with 24 ayes, 0 nays, and 25 not voting.

The Bromm et al. amendment, as amended, was adopted with 33 ayes, 13 nays, and 3 present and not voting.

The Chair declared the call raised.

Senator Jensen withdrew his pending amendment, AM1872, found on page 1765.

Senator Smith renewed his pending amendment, AM1884, found on page 1766.

Pending.

### **RESOLUTIONS**

**LEGISLATIVE RESOLUTION 122.** Introduced by Janssen, 15.

**PURPOSE:** To review existing law and the need for legislation regarding the predatory pricing of motor fuel. Unfair competition in the marketing of motor fuel occurs whenever costs associated with the marketing of motor fuel are recovered from other than operations, thus allowing the refined motor fuel to be sold at subsidized prices. Such subsidies most commonly occur in one of three ways: (1) When refiners use profits from refining crude oil to cover below-normal or negative returns earned from motor fuel marketing operations, (2) when a motor fuel retailer with more than one location uses profits from one location to cover losses from predatory

pricing practices of motor fuel at another location, and (3) when a business uses profits from nonmotor fuel sales to cover losses from the predatory pricing being lost on motor fuel sales. The study shall include a review of the long-term effects on the competitive market of the pricing of motor fuel at predatory pricing levels, ways to encourage fair and honest competition, and options to safeguard the public against the creation of monopolies or unfair methods of competition in transactions involving the sale of, offer to sell, or inducement to sell motor fuel in the wholesale or retail trades in this state. In addition, the study shall include the feasibility of prohibiting the pricing of motor fuel, an infinite resource, to be used as a loss-leader product.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Revenue Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 123.** Introduced by Janssen, 15.

PURPOSE: The purpose of this study is to determine the feasibility of implementing the provisions of the Master Settlement Agreement Protection Act, as introduced in LB 783 in the 2003 Legislative Session.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Revenue Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

### **AMENDMENTS - Print in Journal**

Senator Quandahl filed the following amendment to LB 73:  
AM1744

(Amendments to Standing Committee amendments, AM0304)

1 1. Insert the following new sections:

2 "Sec. 10. Section 44-704, Reissue Revised Statutes of  
3 Nebraska, is amended to read:

4 44-704. (1) Except as provided in subsection (2) of this

5 section, no policy of insurance shall be issued upon the person of

6 any individual except upon the application of the individual

7 insured or with the written consent of the individual insured.

8 Nothing in this section shall be deemed to prohibit the immediate

9 transfer or assignment of a life insurance policy or annuity  
10 contract so issued.

11 (2) Notwithstanding the provisions of subsection (1) of  
12 this section, (a) a husband or wife may effectuate a policy of  
13 insurance upon the person of the other and (b) any person may  
14 effectuate a policy of insurance upon the person of a child.

15 (3) The term policy of insurance as used in this section  
16 shall include any life insurance policy, annuity contract, and  
17 contract of sickness and accident insurance but shall not include a  
18 contract of group life insurance or a contract of blanket or group  
19 sickness and accident insurance.

20 (4) Nothing in Chapter 44 shall prohibit an organization  
21 or entity described in section 501(c)(3) of the Internal Revenue  
22 Code or to whom a charitable contribution could be made under  
23 section 170(c) of the code or a trust all of whose beneficiaries  
1 are organizations or entities described in section 501(c)(3) of the  
2 code or to whom a charitable contribution could be made under  
3 section 170(c) of the code from procuring, effectuating, or causing  
4 to be procured or effectuated the ownership of any life insurance  
5 policy or annuity contract upon the life of an individual if such  
6 individual gives written consent to the issuance of such policy or  
7 contract when such organization, entity, or trust is the ~~original~~  
8 owner of such policy or contract. Nothing in Chapter 44 shall  
9 require such organization, entity, or trust to have an insurable  
10 interest as defined in section 44-103 in the life of such  
11 individual in order for a policy or contract to be procured or  
12 effectuated pursuant to this subsection. This subsection shall  
13 apply to all policies and contracts in force on or after April 16,  
14 1992. The changes made to this subsection by this legislative bill  
15 shall apply to all policies and contracts in force on or after the  
16 effective date of this act.

17 (5) Except as provided in subsection (4) of this section,  
18 nothing in this section shall be construed to permit a person to  
19 procure, effectuate, or cause to be procured or effectuated,  
20 directly or by assignment or otherwise, any policy of insurance  
21 upon the person of a child or other individual unless the benefits  
22 under such policy are payable to the child or other individual  
23 insured, to his or her personal representative, or to a person  
24 having, at the time such policy is issued, an insurable interest in  
25 the child or other individual insured.

26 Sec. 11. Original section 44-704, Reissue Revised  
27 Statutes of Nebraska, is repealed."

1 2. Insert underscoring in the original sections.

Senator Quandahl filed the following amendment to LB 125:  
AM1743

1 1. Insert the following new section:

2 "Sec. 2. Section 44-704, Reissue Revised Statutes of  
3 Nebraska, is amended to read:

4 44-704. (1) Except as provided in subsection (2) of this  
 5 section, no policy of insurance shall be issued upon the person of  
 6 any individual except upon the application of the individual  
 7 insured or with the written consent of the individual insured.  
 8 Nothing in this section shall be deemed to prohibit the immediate  
 9 transfer or assignment of a life insurance policy or annuity  
 10 contract so issued.

11 (2) Notwithstanding the provisions of subsection (1) of  
 12 this section, (a) a husband or wife may effectuate a policy of  
 13 insurance upon the person of the other and (b) any person may  
 14 effectuate a policy of insurance upon the person of a child.

15 (3) The term policy of insurance as used in this section  
 16 shall include any life insurance policy, annuity contract, and  
 17 contract of sickness and accident insurance but shall not include a  
 18 contract of group life insurance or a contract of blanket or group  
 19 sickness and accident insurance.

20 (4) Nothing in Chapter 44 shall prohibit an organization  
 21 or entity described in section 501(c)(3) of the Internal Revenue  
 22 Code or to whom a charitable contribution could be made under  
 23 section 170(c) of the code or a trust all of whose beneficiaries  
 24 are organizations or entities described in section 501(c)(3) of the  
 1 code or to whom a charitable contribution could be made under  
 2 section 170(c) of the code from procuring, effectuating, or causing  
 3 to be procured or effectuated the ownership of any life insurance  
 4 policy or annuity contract upon the life of an individual if such  
 5 individual gives written consent to the issuance of such policy or  
 6 contract when such organization, entity, or trust is the ~~original~~  
 7 owner of such policy or contract. Nothing in Chapter 44 shall  
 8 require such organization, entity, or trust to have an insurable  
 9 interest as defined in section 44-103 in the life of such  
 10 individual in order for a policy or contract to be procured or  
 11 effectuated pursuant to this subsection. This subsection shall  
 12 apply to all policies and contracts in force on or after April 16,  
 13 1992. The changes made to this subsection by this legislative bill  
 14 shall apply to all policies and contracts in force on or after the  
 15 effective date of this act.

16 (5) Except as provided in subsection (4) of this section,  
 17 nothing in this section shall be construed to permit a person to  
 18 procure, effectuate, or cause to be procured or effectuated,  
 19 directly or by assignment or otherwise, any policy of insurance  
 20 upon the person of a child or other individual unless the benefits  
 21 under such policy are payable to the child or other individual  
 22 insured, to his or her personal representative, or to a person  
 23 having, at the time such policy is issued, an insurable interest in  
 24 the child or other individual insured."

25 2. On page 12, line 3, after "Original" insert "section  
 26 44-704, Reissue Revised Statutes of Nebraska, and"; and in line 4  
 27 strike "is" and insert "are".

1 3. Renumber the remaining sections accordingly.

### VISITORS

Visitors to the Chamber were Nola Moog and Lloyd Synovec from North Platte; 35 fourth-grade students and teachers from Gates Elementary School, Grand Island; Senator Beutler's mother, Dorothy Beutler, and his aunt, Betty Braun, from Omaha; 80 fourth-grade students and teachers from Spring Ridge Elementary School, Omaha; and 33 senior citizens from Polk, Seward, and York.

### RECESS

At 11:58 a.m., on a motion by Senator Price, the Legislature recessed until 1:30 p.m.

### AFTER RECESS

The Legislature reconvened at 1:30 p.m., Senator Cudaback presiding.

### ROLL CALL

The roll was called and all members were present except Senator Landis who was excused until he arrives.

### RESOLUTIONS

**LEGISLATIVE RESOLUTION 124.** Introduced by Smith, 48.

**PURPOSE:** The purpose of this interim study is to determine what would be the administrative costs to the state of taking over the administration of the federal Head Start program.

**NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:**

1. That the Appropriations Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 125.** Introduced by Smith, 48.

**PURPOSE:** The purpose of this interim study is to determine what is the state's involvement in crime victims' reparations.

**NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:**

1. That the Judiciary Committee of the Legislature shall be designated to

conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 126.** Introduced by Burling, 33.

WHEREAS, Dane Jacobi of Troop 125, Hastings, Nebraska, has completed the requirements for and been awarded the highest honor and rank in the Boy Scouts of Eagle Scout; and

WHEREAS, Dane Jacobi was recognized by the Boy Scouts for his years of hard work, commitment to his scouting duties, and service to his community which included his Eagle Scout project. His project consisted of constructing and finishing four wooden benches for the Hastings Family YMCA, each of which displays lettering outlining one of the four character development pillars of the YMCA: Respect; responsibility; caring; and honesty; and

WHEREAS, fewer than two percent of all boys who join Boy Scouts attain the rank of Eagle Scout; and

WHEREAS, Dane Jacobi has achieved great success as an exemplary member of the scouting program; thereby, through his hard work and perseverance, joining other high achievers who are Eagle Scouts such as astronauts, political and industry leaders, artists, scientists, and athletes, and has represented his troop and community with excellence.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Legislature congratulates Dane Jacobi on his achievement of the elite rank of Eagle Scout in the Boy Scouts and recognizes his outstanding community service efforts in Hastings.

2. That a copy of this resolution be sent to Dane Jacobi and his family.

Laid over.

**SELECT FILE**

**LEGISLATIVE BILL 407.** The Smith pending amendment, AM1884, found on page 1766 and considered in this day's Journal, was renewed.

Senator Smith offered the following amendment to his pending amendment:

FA1360

Amend AM1884

On page 1, line 5, strike "General" and insert "Cash"

Senator Smith moved for a call of the house. The motion prevailed with 29 ayes, 1 nay, and 19 not voting.

Senator Smith requested a roll call vote on his amendment.

Voting in the affirmative, 20:

|         |            |         |        |         |
|---------|------------|---------|--------|---------|
| Aguilar | Cudaback   | Foley   | Kremer | Raikes  |
| Baker   | Cunningham | Friend  | Kruse  | Schrock |
| Bromm   | Engel      | Janssen | Louden | Stuhr   |
| Combs   | Erdman     | Jones   | Mossey | Vrtiska |

Voting in the negative, 16:

|          |         |               |            |
|----------|---------|---------------|------------|
| Beutler  | Burling | Mines         | Redfield   |
| Bourne   | Hudkins | Pedersen, Dw. | Stuthman   |
| Brashear | Jensen  | Preister      | Synowiecki |
| Brown    | Johnson | Quandahl      | Tyson      |

Present and not voting, 12:

|          |          |              |          |
|----------|----------|--------------|----------|
| Byars    | Hartnett | Pederson, D. | Smith    |
| Chambers | Maxwell  | Price        | Thompson |
| Connealy | McDonald | Schimek      | Wehrbein |

Excused and not voting, 1:

Landis

The Smith amendment lost with 20 ayes, 16 nays, 12 present and not voting, and 1 excused and not voting.

The Chair declared the call raised.

Senator Smith offered the following motion:  
Reconsider the vote on FA1360.

Senator Janssen asked unanimous consent to be excused until he returns. No objections. So ordered.

Senator Mines moved the previous question. The question is, "Shall the debate now close?" The motion prevailed with 26 ayes, 0 nays, and 23 not voting.

The Smith motion to reconsider prevailed with 30 ayes, 2 nays, 15 present and not voting, and 2 excused and not voting.

The Smith amendment, FA1360, found in this day's Journal, was reconsidered.

The Smith amendment was adopted with 33 ayes, 0 nays, 14 present and not voting, and 2 excused and not voting.

Senator Smith moved for a call of the house. The motion prevailed with 36 ayes, 0 nays, and 13 not voting.

The Smith pending amendment, AM1884, as amended, was renewed.

Senator Smith requested a roll call vote, in reverse order, on his amendment.

Voting in the affirmative, 14:

|          |            |        |        |          |
|----------|------------|--------|--------|----------|
| Aguilar  | Cunningham | Jones  | Landis | Quandahl |
| Baker    | Erdman     | Kremer | Louden | Stuhr    |
| Cudaback | Foley      | Kruse  | Mossey |          |

Voting in the negative, 21:

|         |          |               |            |          |
|---------|----------|---------------|------------|----------|
| Beutler | Combs    | Johnson       | Raikes     | Wehrbein |
| Bourne  | Connealy | Mines         | Redfield   |          |
| Brown   | Engel    | Pedersen, Dw. | Stuthman   |          |
| Burling | Hudkins  | Pederson, D.  | Synowiecki |          |
| Byars   | Jensen   | Preister      | Tyson      |          |

Present and not voting, 13:

|          |          |          |          |         |
|----------|----------|----------|----------|---------|
| Brashear | Friend   | McDonald | Schrock  | Vrtiska |
| Bromm    | Hartnett | Price    | Smith    |         |
| Chambers | Maxwell  | Schimek  | Thompson |         |

Excused and not voting, 1:

Janssen

The Smith amendment, as amended, lost with 14 ayes, 21 nays, 13 present and not voting, and 1 excused and not voting.

The Chair declared the call raised.

Pending.

## RESOLUTIONS

**LEGISLATIVE RESOLUTION 127.** Introduced by Schimek, 27.

**PURPOSE:** The purpose of this study is to examine matters and issues within the jurisdiction of the Government, Military and Veterans Affairs Committee of the Legislature.

**NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:**

1. That the Government, Military and Veterans Affairs Committee of the

Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 128.** Introduced by Stuhr, 24.

**PURPOSE:** The purpose of this study is to examine the transfer of state service annuities from the School Retirement System of the State of Nebraska to the retirement system created pursuant to the Class V School Employees Retirement Act. The Nebraska Public Employees Retirement System currently transfers an actuarially determined single sum to the system created pursuant to the Class V School Employees Retirement Act upon the retirement of an eligible member of such system. The study will examine such transfers, the manner in which such transfers are to be calculated, how such transfers shall be made, and changes to statutes which may be necessary to effectuate the process.

**NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:**

1. That the Nebraska Retirement Systems Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 129.** Introduced by Stuhr, 24.

**PURPOSE:** The purpose of this study is to examine issues raised in LR 21CA (2003) concerning retirement benefits for certain retired school employees. Issues to be considered shall include adopting a medical cost-of-living adjustment, an adjustment in the purchasing power percentage, a minimum monthly benefit, or other such benefit improvements or adjustments to ensure that benefits are adequate and appropriate to meet retirement needs.

**NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:**

1. That the Nebraska Retirement Systems Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 130.** Introduced by Dw. Pedersen, 39.

**PURPOSE:** The purpose of this resolution is to authorize an interim study of the correctional system in the State of Nebraska to include:

(1) Review of the policies and practices of the Department of Correctional Services relating to inmate population management and its fiscal impact. The review shall include, but not be limited to, an examination of classification systems, disciplinary systems, facility management, staffing, and rates of parole;

(2) Review of current inmate programming and treatment services provided by the Department of Correctional Services to determine whether there are more economical and effective means for the delivery of rehabilitative services to convicted offenders; and

(3) Review of Department of Correctional Services contracts with private providers for telephone services, medical care, and food service, to determine whether they are the most cost-effective methods for delivering such services to the inmate population.

This interim study will be performed by a subcommittee composed of legislative staff and shall be completed by December 31, 2003. The interim study will result in a final report to be presented to the Judiciary Committee of the Legislature prior to the convening of the Ninety-eighth Legislature, Second Session.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Judiciary Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 131.** Introduced by Erdman, 47.

WHEREAS, Tami Whited and Amber Tritt of Sidney earned the Girl Scouts' highest award, the Girl Scout Gold Award; and

WHEREAS, Tami and Amber have served diligently in Troop 138 in Sidney, and for their Gold Award projects they promoted public awareness for the Domestic Violence Program (DOVES) and helped to paint the shelter and collect clothing for the shelter that will be located in Sidney; and

WHEREAS, few Girl Scouts achieve this honor; and

WHEREAS, Tami Whited and Amber Tritt have both achieved great success as exemplary members of the Girl Scout program and have represented their community and troop with excellence.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Legislature congratulates Tami Whited and Amber Tritt on

their achievement of the elite Gold Award and recognizes their outstanding community service efforts in Sidney.

2. That a copy of this resolution be sent to Tami Whited and Amber Tritt as well as their families.

Laid over.

**LEGISLATIVE RESOLUTION 132.** Introduced by Schimek, 27.

**PURPOSE:** The purpose of this study is to examine information available on county assessors' websites including what information is available and how the public can search for such information. The study shall also examine the possibility of allowing persons who work in certain professions, who may be at risk by having personal information available to the public, to request a waiver from the placement of this information on the website. The Nebraska Association of County Officials, as well as other parties interested in public records, shall be asked to participate in the study.

**NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:**

1. That the Government, Military and Veterans Affairs Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

### **SELECT FILE**

**LEGISLATIVE BILL 407.** Senator Brashear asked unanimous consent to withdraw his pending amendment, AM1885, found on page 1766, and replace it with his substitute amendment, AM1898. No objections. So ordered.

AM1898

(Amendments to Standing Committee amendments, AM1111)

- 1 1. On page 16, after line 4 insert the following new
- 2 paragraph:
- 3 "AM1899 to LB 440 does not reduce the appropriation for
- 4 state aid to municipalities, but it will result in approximately
- 5 \$14,100,000 in additional revenue in the General Fund as a result
- 6 of the rebate to the General Fund of additional revenue raised by
- 7 municipalities pursuant to the Local Option Revenue Act."

**SPEAKER BROMM PRESIDING**

**SENATOR BAKER PRESIDING**

Senator Stuthman moved the previous question. The question is, "Shall the debate now close?"

Senator Mines moved for a call of the house. The motion prevailed with 29 ayes, 0 nays, and 20 not voting.

The motion to cease debate prevailed with 26 ayes, 7 nays, and 16 not voting.

Senator Brashear withdrew his amendment.

The Chair declared the call raised.

Pending.

## RESOLUTIONS

**LEGISLATIVE RESOLUTION 133.** Introduced by Quandahl, 31.

**PURPOSE:** During the past two years the State of Nebraska has experienced unprecedented fiscal problems. The Legislature is currently in its fourth budget cutting session in that two-year period.

There are many programs and services that are critical to the future of Nebraska. There are many programs and services critical to the health, safety, and welfare of individual Nebraskans. But the current state of the economy makes it impossible to provide the funds necessary to maintain the current level of programs and services.

It is important for the future prosperity of our state that we have clear spending priorities and that our revenue system be as current as possible. The Legislature should convene an Economic Summit to discuss state priorities and to recommend changes to our revenue system. Attending the Economic Summit would be representatives of the Legislature, the administration, and public and private interests in the state who have a need for a strong state economy. These interested Nebraskans need to study, discuss, and prioritize programs and services offered by the state.

Such a prioritization should serve as a basis for future funding decisions, rather than the current approach of across the board cuts. In addition, a revised state revenue system reflective of the current economy and sustainable into the foreseeable future needs to be developed to fund the priorities.

**NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:**

1. That the Executive Board of the Legislative Council shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the executive board shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 134.** Introduced by Schimek, 27.

PURPOSE: The purpose of this study is to examine information available on county assessors', registers of deeds', and county clerks' websites including what information is available and how the public and professionals requiring access can search for such information. The study shall also examine concerns of privacy and the possibility of allowing persons who work in certain professions, who may be at risk by having personal information available to the public, to request a waiver from the placement of this information on the website. The Nebraska Association of County Officials, as well as other parties interested in public records, shall be asked to participate in the study.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Government, Military and Veterans Affairs Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**ATTORNEY GENERAL'S OPINIONS**Opinion # 03014

DATE: May 14, 2003

SUBJECT: Application of Neb. Rev. Stat. § 60-6,301(5) (Supp. 2002) to vehicles hauling grass sod.

REQUESTED BY: Senator Tom Baker  
Nebraska State Legislature

WRITTEN BY: Jon Bruning, Attorney General  
Jeffery T. Schroeder, Assistant Attorney General

You have requested our opinion as to whether a motor vehicle, semitrailer or trailer hauling grass sod on the highways of this state is allowed, pursuant to Neb. Rev. Stat. § 60-6,301 (Supp. 2002), to exceed by up to 15 percent the maximum weight limits set out in Neb. Rev. Stat. § 60-6,294. As discussed below, we believe that a vehicle hauling grass sod does not qualify for the 15 percent overweight exception of Neb. Rev. Stat. § 60-6,301 because grass sod is not a "seasonally harvested product" under this statute.

In your letter, you have provided some information concerning the grass

sod industry. You have informed us that sod growers are considered to be farmers by the Internal Revenue Service. You tell us that grass sod takes about 1½ to 2 years to grow and that when it is mature, it can be cut and removed from the field generally at any time from March to November. You have also informed us that once the sod has been cut, the cut sod needs to be installed within 24 hours of cutting. We understand your question to be whether the weight limit exception of Neb. Rev. Stat. § 60-6,301 (5) would apply to the vehicles hauling grass sod.

It is not apparent from the statute whether grass sod is a seasonally harvested product. We are aware of no statutory definition of the phrase "seasonally harvested product." The Nebraska Supreme Court has stated that:

In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the legislature as ascertained from the entire language of the statute considered in its plain, ordinary and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Curry v. State, ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible. *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992).

*Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 33, 541 N.W.2d 36, 40 (1995).

Based upon this standard, we have reviewed the statutes on this subject in order to understand the intent and purpose of the legislature when it used the phrase "seasonally harvest products." As you know, Nebraska law protects the highways of this State from damage and destruction caused by overweight vehicles by making it illegal to operate vehicles on the public highways that exceed certain maximum weight limits. Neb. Rev. Stat. § 60-6,294 (Supp. 2002). There are, however, various statutory exceptions to the maximum weight limits, including two separate exceptions that involve vehicles carrying "grain or other seasonally harvested products." One of these exceptions is set out in Neb. Rev. Stat. § 60-6,301 (Supp. 2002). Section 60-6,301 states in part as follows:

When any motor vehicle, semitrailer, or trailer is operated upon the highways of this state carrying a load in excess of the maximum weight permitted by section 60-6,294, the load shall be reduced or shifted to within such maximum tolerance before being permitted to operate on any public highway of this state, except that:

. . . (5) Any motor vehicle, semitrailer, or trailer carrying grain or other seasonally harvested products may operate from the field where such grain or products are harvested to storage, market, or stockpile in

the field or from stockpile to market or factory up to seventy miles with a load that exceeds the maximum load permitted by section 60-6,294 by fifteen percent on any tandem axle, group of axles, and gross weight. The owner or a representative of the owner of the agricultural product shall furnish the driver of the loaded vehicle a signed statement of origin and destination.

This exception became effective in 2000. This exception was based, however, on language from Neb. Rev. Stat. § 60-6,298 (1)(b) (1998). Subsection (1)(b) of 60-6,298 was repealed in 2000. The phrase "grain or other seasonally harvested products" used in section 60-6,301 (5) was the identical phrase used in the repealed subsection (1)(b) of section 60-6,298. We understand that the purpose for moving this statutory exception from section 60-6,298 to 60-6,301 was to eliminate the permit required under 60-6,298.

There is another exception for vehicles carrying "grain or other seasonally harvested products" contained in Neb. Rev. Stat. § 60-6,298 (1)(a) (Supp. 2002). Section 60-6,298 (1)(a)(ii) authorizes the Department of Roads, the Nebraska State Patrol or local authorities to issue permits for certain vehicles when carrying "grain or other seasonally harvested products." It is important to read these two exceptions together since they both apply to the hauling of overweight loads of "grain or other seasonally harvested products on the public highways. Section 60-6,298 provides the following insights into the problem the legislature was addressing when it enacted exceptions to the maximum weight limits for vehicles carrying grain or other seasonally harvested products:

(1) Although "seasonally harvested" is not defined, the legislature included the following three examples of products that the legislature deemed to be "seasonally harvested"--grains, dry beans, and sugar beets. These examples are all typical farm crops.

(2) Section 60-6,298 (1)(a)(ii) states that a permit should be granted:

. . . when failure to move such grain or products in abundant quantities would cause an economic loss to the person or persons whose grain or products are being transported or when failure to move such grain or products in as large quantities as possible would not be in the best interests of the national defense or general welfare.

(3) Section 60-6,298 (7)(b) specifies that permits issued pursuant to (1)(a)(ii) shall be "valid for thirty days or sixty days and shall be renewable for a total number of days not to exceed one hundred and twenty days per year." This language shows that the legislature contemplated that overweight loads of "seasonally harvested products" should only be allowed to travel on the public highways for a limited period of time.

(4) The legislature identified a specific problem with the harvesting of

sugar beets. The legislature made specific provision to allow vehicles hauling "sugar beets" to exceed the weight limits by 25 percent. We understand that this special exception for sugar beets was based on the fact that there is an unusually short period of time from when sugar beets mature to when they must be moved out of the field. This special "sugar beet" exception highlights the fact that the legislature was concerned about the specific problem of how to get a mature crop out of the field quickly and efficiently during a relatively short period of time. This suggests that the legislature was considering only a short term use of the highways by overloaded vehicles carrying seasonally harvested products.

(5) The legislature was mindful that it had a compelling need to protect the public highways from undue damage caused by overweight loads as evidenced by the narrow language it used to grant the exceptions in this statute and in the authority it gave the Department to specify the conditions for the permitted uses of the highways by overweight vehicles. See section 60-6,298 (3).

Reading sections 60-6,298 and 60-6,301 together, it appears that the problem the legislature was addressing when it first used the phrase "grain or other seasonally harvested products" related to the problem of getting a crop out of the field quickly and efficiently after the crop becomes mature. Failure to remove the crop quickly from the field when it is ready for harvest could cause the loss of the crop if bad weather or other causes destroy the crop or make it difficult or impossible to remove it from the field. This conclusion is reinforced by the special consideration in this statute for sugar beets. The statute specifically allows vehicles hauling sugar beets to obtain a permit to exceed maximum weight limits by 25 percent. The legislature sought a balance between the need to protect public highways from damage caused by overweight vehicles with the need to quickly remove mature crops from the field at harvest time in order to avoid the risk of the loss of the mature.

In addition to this review of the statutes, we have discussed this matter with officials of the Carrier Enforcement Division of the State Patrol and officials of the Nebraska Department of Roads. We have been informed that the issue you have raised has been considered before and that the longstanding interpretation of this language by the officials charged with enforcing these statutes has been that grass sod does not qualify as "grain or other seasonally harvested products." Further, we have reviewed the legislative history of LB 1361 and have found no substantive discussion of the legislative intent when this phrase was used in the statutes.

It is the opinion of this office that grass sod is not "grain or other seasonally harvested products" based upon the plain and ordinary meaning of the words used and upon the intent and purpose of the legislature as discerned from the statutes discussed above. The key to this conclusion is the legislatures use of the word "seasonally" in this phrase. The Nebraska Supreme Court has stated that: "The word 'seasonal' pertains, of course, to

the four seasons of the year--spring, summer, autumn and winter--but is popularly used in a somewhat wider sense." *Hogsett v. Cinek Coal & Feed Co.*, 127 Neb. 393, 255 N.W. 546 (1934). In *Hogsett*, the court concluded that: "seasonal employment," as used in the compensation law, has reference to an employment which must have been completed during some rather definite period of the year. *Id.* The court explained further that:

A seasonal occupation is an employment pertaining to a season or a specific part of a year; hence it may be said that a seasonal occupation is an employment pertaining to or of that kind of labor exclusively performed at specific seasons or periods of the year. The word is different in meaning from the words "casual" and "intermittent."

Seasonal occupations are those vocations which cannot, from their very nature, be continuous or carried on throughout the year, but only during fixed portions of it. On the other hand, labor or occupation possible of performance and being carried on at any time of the year, or through the entire twelve months, is not seasonal.

*Id.*

Based upon the meaning of the word "seasonal" and the language of sections 60-6,298 and 60-6,301, we are led to the conclusion that a "seasonally" harvested product is a product that is harvested during a certain season of the year. A seasonally harvested product has a certain planting season, growing season and must be harvested during a relatively short period of time in a specific season. A "seasonally" harvested product is not a product that can be gathered or harvested at any time throughout 8 months of the year. There is a compelling need to quickly remove a mature seasonally harvested crop from the field because the failure to get the crop out of the field could mean the loss of the crop. There is not the same risk of loss for a product that can be removed from the field at any time over an eight month period.

There is simply no suggestion in the legislative history or the language used in the exception statutes that the legislature intended to allow overloaded vehicles to use and potentially damage the public highways of the state during eight months of the year. The statutes clearly contemplate a short term, 30 to 60 day "seasonal" use of the highways by overloaded vehicles. This short term risk of damage to the highways is justified only because there is a significant risk of loss to "seasonal" crops if they are not quickly removed from the field when the crop reaches the optimal condition for harvest. Our interpretation conforms to the long standing interpretation of this language by the officials who have enforced these laws and is consistent with the decision of the legislature to not overrule this long standing interpretation when it revisited this issue in 2000. The Nebraska Supreme Court has stated that: "Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the legislature has not

taken any action to change such interpretation." *Cox Cable v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998). (Headnote number 2). Finally, this exception cannot be interpreted to allow the hauling of a product that can be removed from the field during 8 months of the year because such an interpretation would read the word "seasonally" out of the statute.

Additionally, there is a minor question as to whether grass sod is actually "harvested." The common understanding of the word harvested would tend to be limited to the typical harvesting of farm crops such as corn or wheat. The common understanding of "harvested" would seem to exclude the activity of cutting sod, which seems to actually involve merely transplanting the living grass plants from one place to another. Again, there is no indication from the words used in the statutes that the legislature intended that the term "harvested" would extend to the hauling of plants to be transplanted in another location.

For these reasons, we do not believe that grass sod is a "seasonally harvested product" as that phrase is used in Neb. Rev. Stat. § 60-6,301(5) (Supp. 2002).

Sincerely,  
JON BRUNING  
Attorney General  
(Signed) Jeffery T. Schroeder  
Assistant Attorney General

cc: Patrick O'Donnell  
Clerk of the Legislature

Opinion # 03015

DATE: May 14, 2003

SUBJECT: Whether The Sales Tax on Gross Income Received for Casino Advertising Proposed Under LB 759, as Amended, Violates the Guarantee of Freedom of Speech in the First Amendment to the United States Constitution.

REQUESTED BY: Senator Ray Janssen  
Nebraska State Legislature

WRITTEN BY: Jon Bruning, Attorney General  
L. Jay Bartel, Assistant Attorney General

You have requested our opinion concerning the constitutionality of an amendment to LB 759, AM 1376. The amendment extends Nebraska's sales tax to "[t]he gross income received for casino advertising" when "the seller

of the advertising is located" in Nebraska and the advertising is "broadcast, circulated, or displayed" in Nebraska. "Casino" is defined as "any establishment conducting games of chance which are illegal in the State of Nebraska." "Casino advertising" is defined as "purchasing air time on television or radio, purchasing advertising space in newspapers, magazines, or billboards, purchasing or circulating pamphlets or fliers, purchasing or displaying store signs or window displays, or purchasing any product or media time or space to sell or promote the activities of a casino." "Casino advertising does not include consulting, designing artwork or advertising campaigns, or performing any other creative processes that may result in the purchase of casino advertising." Your question is whether the imposition of sales tax on casino advertising under AM 1376 violates the guarantee of freedom of speech in the First Amendment to the United States Constitution.

For the reasons set forth below, we conclude that the proposed tax on casino advertising likely inhibits free speech rights in violation of the First Amendment. First, the proposed tax on casino advertising does not appear to be the type of "generally applicable" tax which impacts speech that has been approved by the United States Supreme Court. While it is part of the general sales tax, which includes taxation of a variety of tangible personal property and services, it applies only to casino advertising. By singling out a specific form of advertising for taxation, while exempting other advertising and services, the tax likely cannot be viewed as one of "general application." It also appears to target a relatively small group of speakers. Second, because of the limited and special nature of the tax, it probably cannot withstand scrutiny under the four-part test for assessing the constitutionality of laws regulating commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). This four-part analysis requires determining: (1) Whether the commercial speech concerns lawful activity and is not misleading; (2) Whether the law involves a substantial governmental interest; (3) Whether the law directly advances the governmental interest asserted; and (4) Whether the law is not more extensive than is necessary to serve the governmental interest. As to part 1, the casino advertising would concern lawful activity relating to casinos located in states where such activity is legal, and, presumably, the advertising would not be misleading. With respect to part 2, the tax would raise revenue, which can be considered a substantial government interest. If raising revenue is deemed a substantial interest, then the requirement of part 3 that the tax directly advance that government interest is also met. Part 4, however, likely is not satisfied. Because the tax is not general, but narrowly targets a specific message and limited group of speakers, it is more extensive than necessary to achieve the governmental interest, as more narrowly tailored alternatives which avoid the selective taxation proposed could be enacted to further the state's need to raise revenue.

## I. ANALYSIS

### A. The Protection of Commercial Speech Under the First Amendment.

The First Amendment provides that "Congress shall make no law. . . abridging the freedom of speech, or of the press. . . ." U. S. Const., amend. 1.<sup>1</sup> At one time, the United States Supreme Court did not view commercial speech as worthy of First Amendment protection. *Valentine v. Chrestensen*, 316 U.S. 53, 54 (1942) ("[T]he Constitution imposes no. . . restraint on government as respects purely commercial advertising."). The Court has since altered this view, and, in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), explicitly held that commercial speech is protected by the First Amendment. Explaining its rationale for extending First Amendment protection to commercial speech, the Court in *Virginia Bd. of Pharmacy* stated:

Generally, society. . . may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely 'commercial', may be of general public interest.

\* \* \*

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless the dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve the predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

425 U.S. at 764-65. Expanding on this theme in its later decision in *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), the Court stated:

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

Since advertising is commercial speech protected by the First Amendment, the proposed tax on casino advertising raises a question as to whether the tax impermissibly restricts advertisers' First Amendment right to free speech. Resolution of this issue entails considering the Court's decisions involving the validity of taxes challenged as violative of the First Amendment, as well as the Court's First Amendment analysis of the validity of regulations or restrictions affecting commercial speech.

#### B. Taxation and the First Amendment.

On several occasions, the Court has addressed claims that taxes affecting the press violated the First Amendment. In *Grossjean v. American Press*

Co., 297 U.S. 233 (1936), the Court struck down a state tax on the gross receipts of advertising imposed only on newspapers with a circulation of more than 20,000 copies per week. While noting that its decision invalidating the tax should not be read "to suggest that owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. . .," the Court held the tax was "not an ordinary form of tax, but one single in kind \* \* \* with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." *Id.* at 250-51.

In *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the Court held a use tax imposed on the cost of paper and ink products exceeding \$100,000 a year consumed in the production of periodic publications violated the First Amendment guarantee of freedom of the press. The Court noted that "[b]y creating this special use tax, . . . , Minnesota ha[d] singled out the press for special treatment." *Id.* at 582. In striking down this special tax, the Court found the danger posed by subjecting the press to special taxation, rather than taxes of "general applicability," was crucial:

A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. . . . When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.

*Id.* at 585.

Minnesota's asserted interest justifying the tax was "the raising of revenue." *Id.* at 586. While recognizing "that interest is critical to any government. . .," the Court held it could not "justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment [was] clearly available: the State could raise the revenue by taxing businesses generally." *Id.* The Minnesota tax was found unconstitutional not only because "it single[d] out the press," but also because "it target[ed] a small group of newspapers. . . ." *Id.* at 591. By exempting the first \$100,000 in paper and ink costs from taxation, the tax targeted only a few large publishers. *Id.* at 592. Singling out only a select group of publishers for special taxation created a "potential for abuse" which "resemble[d] more of a penalty for a few of the largest newspapers. . . ." *Id.* Even absent any indication of an "[i]llicit legislative intent" to target the press or selected members of the press, the Court found

the Minnesota tax violated the First Amendment. *Id.*

In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), on remand 293 Ark. 395, 738 S.W.2d 402 (1987), the Court invalidated a state sales tax scheme that taxed general interest magazines, but exempted newspapers and religious, professional, trade, and sports journals, as violating the First Amendment guarantee of freedom of the press. Arkansas asserted the differential taxation was permissible because "the Arkansas sales tax [was] a generally applicable economic regulation." *Id.* at 228-29. The Arkansas tax was invalidated, however, because it singled out a small group of magazines for taxation, while exempting most other magazines, and did so based on content. *Id.* at 229-30. While recognizing the state's interest in raising revenue was "an important one," the Court found "it [did] not explain selective imposition of the sales tax on some magazines and not others, based solely on their content." *Id.* at 231.

A few years after its decision in *Arkansas Writers' Project*, the Court upheld the constitutionality of Arkansas' sales tax on cable television services, even though newspapers and other print media were exempt, against a First Amendment challenge. *Leathers v. Medlock*, 499 U.S. 439 (1991). In *Leathers*, the Court explained the principles set forth in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers' Project* as follows:

These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. . . . The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion. A tax is also suspect if it targets a small group of speakers. . . . Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.

499 U.S. at 447 (citations omitted).

The Court in *Leathers* found the Arkansas sales tax on cable television "present[ed] none of these types of discrimination." *Id.* "The Arkansas sales tax [was] a tax of general applicability. . ." which "applie[d] to receipts from the sale of all tangible personal property and a broad range of services, unless within a group of specific exemptions." *Id.* The tax did "not single out the press. . .," and did not "target[ ] a small number of speakers. . .," as it applied to approximately 100 cable systems in the State of Arkansas. *Id.* at 447-48. Finally, the tax "[was] not content based. . . ." *Id.* at 449.

Since the Arkansas tax "present[ed] none the First Amendment difficulties that. . . led the [Court] to strike down differential taxation in the past," the Arkansas tax would be invalidated "only if the Arkansas tax

scheme present[ed] 'an additional basis' for concluding the tax violated the First Amendment. *Id.* at 449 (quoting Arkansas Writers' Project, 481 U.S. at 233). The cable operators argued the discrimination between different media (i.e., taxing cable television but exempting print media) constituted an "additional basis" requiring invalidation of the Arkansas sales tax on cable television services. Rejecting this claim, the Court noted its decisions in *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) and *Cammarano v. United States*, 358 U.S. 498 (1959), established "that a legislature is not required to subsidize First Amendment rights through a tax exemption or a tax deduction." 499 U.S. at 450-51. Citing to *Regan*, as well as *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946) and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), the Court stated:

Taken together, *Regan*, *Mabee*, and *Oklahoma Press* establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presented the danger of suppressing, particular ideas. That was the case in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers'*, but it is not the case here. The Arkansas Legislature simply chose to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas' broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite systems, while exempting the print media, does not violate the First Amendment.

*Id.* at 453.

The United States Supreme Court's decisions concerning First Amendment taxation have involved only taxes on noncommercial speech. While the Court has not considered the validity of taxes imposed on commercial speech, such as advertising, at least two state courts have addressed First Amendment challenges to advertising taxes. In *City of Baltimore v. A. S. Abell Co.*, 218 Md. 273, 145 A.2d 111 (1958), the Court of Appeals of Maryland held that municipal ordinances taxing advertising violated the First Amendment. One ordinance imposed on purchasers a tax of four percent of the gross sales price of the space for printed advertising or the time for any broadcast advertising in Baltimore. *Id.* at 277-78, 145 A.2d at 112-13. A second ordinance levied on the sellers of such advertising a tax of two percent on gross receipts. *Id.* Although the tax ordinances were repealed after only one year, newspaper publishers, radio and television broadcasters, billboard operators, and advertising purchasers sued to recover taxes paid under the ordinances, asserting the taxes violated the First Amendment. *Id.* at 113, 145 A.2d at 278. Finding the effect of the two taxes was essentially the same for purposes of considering the First Amendment issue, the court applied a single analysis in assessing the claim that the taxes

abridged the freedoms of speech and of the press guaranteed by the Constitution. Id. at 283, 145 A.2d at 116.

The City of Baltimore defended the validity of the taxes by asserting that, while not reaching all advertising, the taxes were "broad enough in their nature and character so as to escape the designation of being 'single in kind' and therefore [did] not violate the immunities of freedom of speech or of the press." Id. at 283, 145 A.2d at 116. Discussing this contention, the court noted "this argument is predicated upon, and assumes, the fact that the taxes involved herein are ordinary or general in nature and operation, as distinguished from special or 'single in kind' taxes." Id. at 287, 145 A.2d at 118 (emphasis in original). This was significant because, the court noted, "when [a] tax is imposed upon a business that enjoys one of the constitutional immunities of the First Amendment, it must be general in its nature and character and affect this business only incidentally as it affects other businesses in their combined duty to support the government." Id. The court found the taxes were not general, but "singled out" entities entitled to First Amendment protection "to pay a special tax that [was] not required of business in general or some broad portion thereof." Id. at 288, 145 A.2d at 118-19. Because the taxes were "so single in their nature and the range of their impact [was] so narrow - 90% to 95% thereof falling upon the newspapers and the [radio and television] stations-[ ] their effect ma[de] them constitute a restraint on the freedoms of speech and of the press guaranteed" by the Constitution. Id. at 288-89, 145 A.2d at 119.

In an advisory opinion issued at the request of the Governor, the Supreme Court of Florida concluded that legislation extending Florida's sales tax to previously untaxed services, including advertising, did not facially violate the freedom of speech and press guarantees in the First Amendment. In re Advisory Opinion to the Governor, 509 So. 2d 292 (Sup. Ct. Fla. 1987). Citing the U. S. Supreme Court's decision in *Arkansas Writers' Project*, *Minneapolis Star*, and *Grosjean*, the court stated "[i]t was beyond question that advertisers and the press are not immune from ordinary, nondiscriminatory taxes of general application." 509 So.2d at 306. The court found the "tax on the sale of services [was] one of general application and [did] not single out advertisers or the press for special taxation." Id. In finding the advertising tax did not violate the First Amendment, the court noted did the tax did "not impact only a select few advertisers or publications. . .," and did not "unconstitutionally discriminate between publications based on content." Id. at 308.

*City of Baltimore v. A. S. Abell Co.* and *In re Advisory Opinion to the Governor* indicate that the question of whether a tax impermissibly impacts commercial speech such as advertising may, to some degree, appropriately be analyzed by resort to the standards used by the Supreme Court in cases such as *Grosjean*, *Minneapolis Star*, *Arkansas Writers'*, and *Leathers*, to evaluate the constitutionality of taxes on noncommercial speech. Basically, the relevant considerations are whether the tax is "generally applicable," and does not "single out" particular speakers or "target only a small number" of

speakers. *Leathers*, 499 U.S. at 447-48.

Judged by these standards, the casino advertising tax is constitutionally suspect. The tax is part of Nebraska's sales and use tax scheme, which imposes a tax on the sale or use of tangible personal property and certain services, subject to specific exemptions. In that respect, it could be argued that the tax, although limited to "casino" advertising, is "generally applicable." While this argument has facial appeal, it fails to properly recognize the extremely narrow and limited application of the tax. The tax is not imposed on advertising generally, but applies only to the extraordinarily limited subject of "casino advertising." By "singling out" commercial speech relating only to casino advertising for taxation, while all other advertising remains exempt from taxation, the tax does not appear to truly be one of "general application." Also, while the bill does apply to advertising by all media, limiting the tax to casino advertising appears to target the tax towards a small number of speakers. Since, as noted in the legislation, casino gambling in Nebraska is illegal, the casino advertising to be taxed likely relates to advertising by casinos in surrounding states which permit casino gambling. While we obviously have no empirical data concerning the scope and nature of advertising activity in Nebraska by out-of-state casinos, it is logical to conclude that the bulk of such advertising involves marketing by the three casinos located in Council Bluffs, Iowa, and directed towards the large metropolitan population in Omaha, Nebraska, as well as eastern Nebraska as a whole. If the primary impact of the tax would, as we surmise, fall almost exclusively on these three casinos in Iowa, it may well violate the First Amendment because it is directed at too small a group of speakers. A tax which singles out a specific advertiser or advertisers for disproportionate taxation may be found to impermissibly inhibit First Amendment rights. The casino advertising tax appears to be just such a tax.

### C. Commercial Speech and the Central Hudson Test.

In addition to the line of authority in which the United States Supreme Court has considered the validity of taxes imposed on activities protected by the First Amendment, the Court has, in a long series of cases, addressed First Amendment challenges to restrictions on commercial speech in a variety of areas. As noted in part I.A., *infra*, the Court first explicitly held that commercial speech was protected by the First Amendment in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In its later decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Court clarified the standards to be employed in assessing the constitutionality of restrictions or regulations of commercial speech.

In *Central Hudson*, the Court invalidated regulations prohibiting advertising and other promotional activities by electric utilities. Confirming prior precedents recognizing that "[t]he Constitution. . . accords a lesser degree of protection to commercial speech than to other constitutionally guaranteed expression. . .," the Court adopted the following four-part

analysis for evaluating the constitutionality of commercial speech regulations:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The Court has applied the Central Hudson analysis in a variety of contexts. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), five members of the Court joined in an opinion which upheld the constitutionality of a Puerto Rican statute that restricted advertising of casino gambling aimed at residents of Puerto Rico, while allowing local advertising targeted at tourists. Applying Central Hudson, the majority found this was commercial speech which involved a lawful activity (casino gambling was legal in Puerto Rico) and was not misleading. *Id.* at 340-41. The government interest asserted in support of the restriction, reducing the demand for casino gambling by residents of Puerto Rico, was found to be "substantial," in view of the potential harm to the "health, safety, and welfare" of Puerto Rico's citizens posed by casino gambling. *Id.* at 341. The majority found the challenged restrictions "directly advance[d]" the government's interest, finding the "legislature's belief" that the restrictions would reduce casino gambling by residents was "a reasonable one." *Id.* at 342. The Court reached this conclusion in spite of the fact that the restrictions applied only to casino gambling, and did not apply to advertisements concerning horse racing, cockfighting, and the lottery. *Id.* Finally, the majority concluded the restrictions were no more extensive than necessary to serve the government's interest, as the restrictions were limited to advertising to Puerto Rico residents. *Id.* at 343-44. The majority distinguished the advertising restrictions on casino gambling at issue in *Posadas* from advertising bans struck down in prior cases (*Carey v. Population Services International*, 431 U.S. 678 (1977) (ban on advertising or displaying contraceptives) and *Bigelow v. Virginia*, 421 U.S. 809 (1975) (ban on advertisements encouraging abortion)) by noting the advertising in those cases related to conduct that was "constitutionally protected and could not have been prohibited by the State." *Id.* at 345. "Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling. . . ." *Id.* at 345-46.

In *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the Court upheld the constitutionality of federal statutes (18 U.S.C. §§ 1304 and 1307) that prohibited the broadcasting of lottery advertising by a broadcaster

licensed in a state that did not allow lotteries (North Carolina), while allowing such broadcasting by a broadcaster licensed in Virginia, a state that sponsored a lottery, even though the Virginia broadcaster's signal extended into North Carolina. Applying *Central Hudson*, the Court recognized that the advertising involved a legal activity, since it concerned a legal lottery in Virginia, and assumed the advertising would not be misleading. *Id.* at 426. The statutes were found to "directly advance" the federal government's substantial interest in supporting the policies of nonlottery states while at the same time not interfering with the policies of lottery states. *Id.* at 428. The majority also concluded that the statutory restriction was "no more extensive than necessary" because, as was the case in *Posadas*, the "fit" between the restriction and the governmental interest, while "not necessarily perfect," was "reasonable." *Id.* at 429.

In subsequent decisions, the Court has retreated from the deferential standard of review taken in *Posadas* and *Edge* relating to the requirements of *Central Hudson* that restrictions on commercial speech must "directly advance" the government's interest and must not be more extensive than necessary to serve that interest. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court, without dissent, held unconstitutional a federal statute prohibiting beer labels from displaying alcohol content. There was no question that the statute related to commercial speech about a lawful activity which was not misleading. *Id.* at 483. In support of the ban, the government argued it directly advanced Congress' substantial interest in curbing "strength wars" by beer brewers competing for customers based on alcohol content. *Id.* The Court determined the ban did not "directly and materially advance its asserted interest because of the overall irrationality of the regulatory scheme." *Id.* at 488. The statute allowed disclosure of alcohol content on labels of wine and hard liquor, and permitted identification on labels of higher alcohol content by inclusion of the term "malt liquor." *Id.* at 488-89. The exceptions and internal contradictions in the statute thus did not materially advance the asserted goal. Further, the Court found the advertising ban was "not sufficiently tailored to its goal." *Id.* at 490. Other alternatives, including directly limiting alcohol content of beer, were available to achieve the government's interest. *Id.* at 490-91. Significantly, the Court unanimously rejected the government's contention that, under *Posadas* and *Edge*, "legislatures' have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech." *Id.* at 482n.2. The Court noted that neither *Posadas* nor *Edge* compelled crafting such an exception to *Central Hudson*, and specifically retreated from the statement in *Posadas* that the "greater power" to prohibit casino gambling included the "lesser power" to ban promotional advertising of casino gambling, noting this passage was dictum reached after the Court had already held the statute valid under *Central Hudson*. *Id.*

In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Court considered a First Amendment challenge to a state law banning advertising of retail prices of alcohol except at the point of sale. Justice Stevens, writing

for the plurality, noted that because the "price advertising ban constitute[d] a blanket prohibition against lawful, nonmisleading speech about a lawful product. . .," the Court "review[ed] the price advertising ban with 'special care,' . . ." stating that "speech prohibitions of this type rarely survive constitutional scrutiny." *Id.* at 504 (citation omitted). The blanket prohibition on price advertising failed to survive scrutiny under *Central Hudson*, as there was no evidence it would "significantly advance the State's interest of temperance." *Id.* at 505. The ban also failed to "satisfy the requirement that the restriction on speech be no more extensive than necessary. . .," as "obvious" other forms of regulation which did not restrict speech were available to achieve the state's temperance goals, including higher prices through direct regulation or increased taxation. *Id.* at 507. The plurality also rejected the "greater-includes-the-lessor" reasoning in *Posadas*, as well as the contention that the Court should recognize a "vice" exception in commercial speech matters based on language in *Edge* characterizing gambling as a "vice," an exception which was "effectively rejected" in *Rubin*. *Id.* at 508-14.

The Court again applied *Central Hudson* in the context of considering a restriction on gambling advertising in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999). *Greater New Orleans* involved a First Amendment challenge to a federal statute (18 U.S.C. § 1304) asserting the statute could not be applied to prohibit advertisements regarding casino gambling broadcast in a state where the gambling was legal. *Id.* at 176. There was no question that the speech involved lawful activity, and was not misleading. *Id.* at 184. The asserted governmental interest behind the restriction was "reducing the social costs associated with 'casino gambling,'" as well as "assisting States that 'restrict gambling' or 'prohibit casino gambling' within their own borders." *Id.* at 185. The Court "accept[ed] the characterization of these two interests as 'substantial,'" but noted "that conclusion [was] by no means self-evident." *Id.* at 186. The restriction did not, however, "directly and materially advance[ ] the asserted governmental interest[s]. . .," and was "more extensive than necessary" to achieve such interests. *Id.* at 188. The Court found the statute was "so pierced by exemptions and inconsistencies" that it could not survive First Amendment scrutiny. *Id.* at 190.

In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the Court considered, in part, First Amendment challenges to Massachusetts regulations restricting the promotion of tobacco products. Expanding on the scope of the third and fourth parts of the *Central Hudson* test, the Court noted "[t]he third step of *Central Hudson* concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest." *Id.* at 555. "It requires that 'the speech restriction directly and materially advance[ ] the asserted government interest. . .'" *Id.* (quoting *Greater New Orleans*, 527 U.S. at 188). The fourth step of *Central Hudson* " 'complements' " the third step, " 'asking whether the speech restriction is not more extensive than necessary to serve the interests that support it.'" *Id.* at 556 (quoting *Greater New Orleans*, 527

U.S. at 527). " '[T]he least restrictive means' " is not the standard; instead, the case law requires a reasonable " fit between the legislature's ends and the means chosen to accomplish those ends,. . . a means narrowly tailored to achieve the desired objective.' " Id. at 556 (quoting *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995) (quoting *Board of Trustees v. State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989))).

Applying these aspects of *Central Hudson*, the *Lorillard* Court struck down regulations prohibiting outdoor advertising for smokeless tobacco and cigars within a certain distance of schools or playgrounds, finding the regulations were "more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use." Id. at 565. In addition, regulations which restricted indoor, point-of-sale advertising for cigars and smokeless tobacco by placing a height requirement on such advertising in retail establishments a certain distance from schools or playgrounds were held invalid because they did not satisfy the third and fourth prongs of *Central Hudson*. Id. at 566-67. The height requirement did not directly advance the state's goals of preventing minors from using tobacco products or curbing demand by limiting youth exposure to advertising, nor did it "constitute a reasonable fit" to achieve those goals. Id.

Evaluating the proposed casino advertising tax under the four part test set forth in *Central Hudson* and its progeny, there is no question that part 1 is satisfied. While the term "casino," as defined in the amendment, refers to an establishment which conducts games of chance which would be illegal if conducted in Nebraska, the advertising to be taxed obviously pertains to advertising in Nebraska by casinos located in states in which such gambling activity is lawful. Presumably, this advertising would be truthful and not misleading. As to part 2 of *Central Hudson*, the tax would raise revenue, which can be considered a "substantial" governmental interest.<sup>2</sup> Accepting raising revenue as a substantial governmental interest, then the requirement of part 3 that the commercial speech restriction "directly advance" the government's interest is necessarily met. Part 4 of the *Central Hudson* test, however, likely is not satisfied. In considering application of this aspect of *Central Hudson*, the Court's evaluation of the validity of taxes on noncommercial speech is instructive. Because the casino advertising tax is not truly general, but narrowly targets a specific category of advertising and a limited group of speakers, it is more extensive than necessary to achieve the governmental interest, as more narrowly tailored alternatives which avoid the selective taxation proposed could be enacted to further the state's need to raise revenue. For example, the tax could be imposed on all advertising, thus avoiding the disproportionate impact on specific commercial speech implicated by the narrow "casino advertising" tax. As a result, we do not believe that the casino advertising tax proposed under AM 1376 would be likely to survive scrutiny if challenged as violating the First Amendment.<sup>3</sup>

## II. CONCLUSION

Based on the foregoing, we conclude that the casino advertising tax proposed under AM 1376 to LB 759 is constitutionally suspect. Extending the sales tax to only casino advertising, as opposed to advertising generally, singles out a distinct form of advertising for taxation, and appears to target a few selected speakers. As such, the tax does not seem to be the type of "generally applicable" tax impacting speech which the United States Supreme Court has held is permissible under the First Amendment. For the same reason, the casino advertising tax probably does not satisfy the requirement of the last portion of the Court's Central Hudson test for assessing the constitutionality of restrictions on commercial speech. Because the casino advertising tax is not truly general, but narrowly targets a specific category of advertising and a limited group of speakers, it is more extensive than necessary to achieve the governmental interest of raising revenue, as more narrowly tailored alternatives which avoid the selective taxation proposed could be enacted to further the state's revenue raising needs.

<sup>1</sup> The First Amendment, including the rights to freedom of speech and freedom of the press, are applicable to the states by virtue of the due process clause of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>2</sup> The casino advertising tax has reportedly been justified as a means to raise revenue to fund programs which deal with the social costs imposed on Nebraska resulting from the harm its citizens suffer because of legalized casino gambling in other states. Nothing in the proposed legislation indicates any revenue raised by the casino advertising tax is dedicated for such a purpose, and, as such, it must be evaluated as a general revenue raising measure.

<sup>3</sup> Because the tax at issue is directed only to "casino advertising," it has been suggested that the tax is a "content-based" restriction on free speech subject to strict or heightened scrutiny. The Court has declined to adopt a strict scrutiny approach to content specific commercial speech regulations, and has consistently applied "the somewhat less rigorous standards of Central Hudson." *Anderson v. Treadwell*, 294 F.3d 453, 460 (2d Cir. 2002) (citing *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002)). Since we believe the proposed tax fails to satisfy the traditional Central Hudson standard, it is not necessary to consider if a heightened "content-based" scrutiny would be appropriate.

Very truly yours,  
JON BRUNING  
Attorney General  
(Signed) L. Jay Bartel  
Assistant Attorney General

**SELECT FILE**

**LEGISLATIVE BILL 407.** Senator Schimek offered the following motion:  
Reconsider the vote on AM1778.

Senators McDonald and Wehrbein asked unanimous consent to be excused until they return. No objections. So ordered.

**SPEAKER BROMM PRESIDING**

Senator Smith moved the previous question. The question is, "Shall the debate now close?" The motion prevailed with 25 ayes, 1 nay, and 23 not voting.

Senator Brashear asked unanimous consent to be excused until he returns. No objections. So ordered.

Senator Schimek moved for a call of the house. The motion prevailed with 27 ayes, 0 nays, and 22 not voting.

Senator Schimek requested a record vote on her motion to reconsider.

Voting in the affirmative, 17:

|         |         |          |          |       |
|---------|---------|----------|----------|-------|
| Beutler | Hudkins | Maxwell  | Schimek  | Tyson |
| Erdman  | Jensen  | Mossey   | Schrock  |       |
| Foley   | Landis  | Quandahl | Smith    |       |
| Friend  | Louden  | Raikes   | Thompson |       |

Voting in the negative, 28:

|         |            |          |               |            |
|---------|------------|----------|---------------|------------|
| Aguilar | Byars      | Engel    | Kruse         | Price      |
| Baker   | Chambers   | Hartnett | McDonald      | Redfield   |
| Bourne  | Combs      | Janssen  | Mines         | Stuhr      |
| Bromm   | Connealy   | Johnson  | Pedersen, Dw. | Synowiecki |
| Brown   | Cudaback   | Jones    | Pederson, D.  |            |
| Burling | Cunningham | Kremer   | Preister      |            |

Present and not voting, 2:

Stuthman      Vrtiska

Excused and not voting, 2:

Brashear      Wehrbein

The Schimek motion to reconsider failed with 17 ayes, 28 nays, 2 present and not voting, and 2 excused and not voting.

The Chair declared the call raised.

Pending.

**STANDING COMMITTEE REPORTS**  
**Government, Military and Veterans Affairs**

**LEGISLATIVE RESOLUTION 52.** Reported to the Legislature for further consideration.

The Government, Military and Veterans Affairs Committee desires to report favorably upon the appointment(s) listed below. The Committee suggests the appointment(s) be confirmed by the Legislature and suggests a record vote.

State Personnel Board  
Mary C. Colacurci

VOTE: Aye: Senators Aguilar, Brown, Burling, Combs, McDonald, Schimek, Smith, and Vrtiska. Nay: None. Absent: None.

(Signed) DiAnna R. Schimek, Chairperson

**RESOLUTION**

**LEGISLATIVE RESOLUTION 135.** Introduced by Brown, 6; Stuhr, 24.

**PURPOSE:** The purpose of this study is to examine alternatives to provide a program for early retirement for long-term state employees who are fifty-five years of age and older.

**NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:**

1. That the Nebraska Retirement Systems Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**SELECT FILE**

**LEGISLATIVE BILL 407.** Senator D. Pederson withdrew the Wehrbein pending amendment, AM1870, found on page 1764.

Senator Dw. Pedersen reoffered his amendment, AM1563, found on page 1761.

Senator Dw. Pedersen asked unanimous consent to withdraw his pending amendment, AM1563, found on page 1761, and replace it with his substitute amendment, AM1647. No objections. So ordered.

AM1647

(Amendments to Standing Committee amendments, AM1111)

- 1 1. On page 80, line 21, strike "136,821,679" and insert
- 2 "130,114,384"; and in line 25 strike "159,362,092" and insert
- 3 "152,654,797".
- 4 2. On page 82, after line 1 insert:
- 5 "There is included in the appropriation to this program
- 6 for FY2003-04 \$3,211,234 General Funds to be used for the operation
- 7 of the McCook Incarceration Work Camp. There is included in the
- 8 appropriation to this program for FY2004-05 \$-0- General Funds to
- 9 be used to operate the McCook Incarceration Work Camp as a work
- 10 camp.
- 11 There is included in the appropriation to this program
- 12 for FY2003-04 \$3,496,061 General Funds to be used for the operation
- 13 of the Nebraska Correctional Youth Facility. There is included in
- 14 the appropriation to this program for FY2004-05 \$-0- General Funds
- 15 to be used to operate the Nebraska Correctional Youth Facility as a
- 16 youth facility."

## SENATOR CUDABACK PRESIDING

Senator Dw. Pedersen withdrew his amendment.

Senators Bromm, Schimek, Wehrbein, Raikes, and Hartnett offered the following amendment:

AM1896

- 1 1. Insert the following new section:
- 2 "Sec. 275. (1) The Executive Board of the Legislative
- 3 Council shall create a task force to examine Nebraska's overall tax
- 4 structure, both revenue and spending, and overall government and
- 5 education structure.
- 6 (2) The executive board shall appoint the chairpersons of
- 7 the standing committees of the legislature, the chairperson of the
- 8 executive board, and the Speaker of the Legislature to serve on the
- 9 Task Force to Review Government Structure and Taxation.
- 10 (3) The task force shall examine all of the major tax
- 11 programs used in Nebraska, the exemptions, credits, and other
- 12 preferences granted within those tax programs, the relative
- 13 reliance on each, and the combined burden they place on Nebraska
- 14 taxpayers in a variety of situations. In addition, the task force
- 15 shall examine the various political subdivisions and educational
- 16 facilities statutorily and constitutionally authorized in Nebraska
- 17 and their purpose, role, function, and necessity.
- 18 (4) The task force may include other lay, professional,
- 19 organizational, and governmental representatives in analyzing and
- 20 developing a report summarizing any recommendations for (a) the

21 restructure of government and education and (b) the revision of the  
22 tax structure.

23 (5) The Legislative Fiscal Analyst and appropriate  
24 committee staff shall serve as the staff for the task force.

1 (6) The task force shall present a report to the

2 Legislature no later than January 1, 2004."

3 2. Renumber the remaining sections accordingly.

The Bromm et al. amendment was adopted with 28 ayes, 0 nays, 20 present and not voting, and 1 excused and not voting.

Senator Preister asked unanimous consent to be excused. No objections. So ordered.

Senator Jensen offered the following amendment:

AM1854

(Amendments to Standing Committee amendments, AM1111)

1 1. On page 3, line 27, after "Funds" insert "from the  
2 Nebraska Health Care Cash Fund".

3 2. On page 33, line 27, after "licensing" insert "from  
4 the Nebraska Health Care Cash Fund".

5 3. On page 34, line 3, after "licensing" insert "from  
6 the Nebraska Health Care Cash Fund".

7 4. On page 58, line 15, strike "statewide"; and strike  
8 lines 18 through 27 and insert:

9 "There is included in the appropriation to this program  
10 for FY2003-04 \$1,400,000 Cash Funds from the Nebraska Health Care  
11 Cash Fund for state aid to be distributed equally among federally  
12 qualified health centers in a congressional district with a  
13 minority population of greater than seventy-five thousand  
14 inhabitants. There is included in the appropriation to this  
15 program for FY2004-05 \$1,400,000 Cash Funds from the Nebraska  
16 Health Care Cash Fund for state aid to be distributed equally among  
17 federally qualified health centers in a congressional district with  
18 a minority population of greater than seventy-five thousand  
19 inhabitants.

20 Such funds shall be used for the purpose of implementing  
21 a minority health initiative which may target, but shall not be  
22 limited to, infant mortality, cardiovascular disease, obesity,  
23 diabetes, and asthma."

1 5. On page 59, strike line 1.

The Jensen amendment was adopted with 28 ayes, 0 nays, 20 present and not voting, and 1 excused and not voting.

Senator Schimek withdrew the Schimek-Raikes pending amendment, AM1834, found on page 1767.

Senators Schrock, Beutler, Schimek, Bourne, Kruse, Johnson, and Foley

offered the following amendment:

AM1912

(Amendments to AM1881)

- 1 1. On page 2, line 3, strike "393,119,402" and insert
- 2 "396,369,402"; and in line 4 strike "402,233,114" and insert
- 3 "405,483,114".

The Schrock et al. amendment lost with 10 ayes, 15 nays, 23 present and not voting, and 1 excused and not voting.

Senator Wehrbein moved for a call of the house. The motion prevailed with 32 ayes, 0 nays, and 17 not voting.

Senator Wehrbein requested a roll call vote on the advancement of the bill.

Voting in the affirmative, 38:

|          |            |         |               |            |
|----------|------------|---------|---------------|------------|
| Aguilar  | Byars      | Hudkins | Louden        | Stuhr      |
| Baker    | Chambers   | Janssen | McDonald      | Stuthman   |
| Beutler  | Combs      | Jensen  | Mines         | Synowiecki |
| Bourne   | Connealy   | Johnson | Pedersen, Dw. | Thompson   |
| Brashear | Cudaback   | Jones   | Pederson, D.  | Vrtiska    |
| Bromm    | Cunningham | Kremer  | Price         | Wehrbein   |
| Brown    | Engel      | Kruse   | Raikes        |            |
| Burling  | Hartnett   | Landis  | Schrock       |            |

Voting in the negative, 9:

|        |         |          |          |       |
|--------|---------|----------|----------|-------|
| Erdman | Friend  | Mossey   | Redfield | Tyson |
| Foley  | Maxwell | Quandahl | Smith    |       |

Present and not voting, 1:

Schimek

Excused and not voting, 1:

Preister

Advanced to E & R for engrossment with 38 ayes, 9 nays, 1 present and not voting, and 1 excused and not voting.

The Chair declared the call raised.

## RESOLUTIONS

**LEGISLATIVE RESOLUTION 136.** Introduced by Bourne, 8.

**PURPOSE:** To examine the impact of manual strangulation, the resulting

injury potential to a victim of manual strangulation, and the charges filed under Nebraska law when such manual strangulation does not result in immediate death. The study should include, but not be limited to, a consideration of the injuries or potential injuries sustained by a victim of manual strangulation, including such permanent disabilities as brain damage and the exacerbation of preexisting conditions. The study should also include an examination of other states' laws with respect to aggravated assaults and statutes that classify manual strangulation assaults as felony crimes rather than misdemeanor crimes.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Judiciary Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 137.** Introduced by Preister, 5.

PURPOSE: The purpose of the study is to examine the financial assurance requirements in all of the programs in the Department of Environmental Quality and the Department of Agriculture and compare them to other states' financial assurance requirements to determine if the state is adequately protecting itself and its political subdivisions from potential costs by imposing adequate financial assurance requirements on licensees and permitholders.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Natural Resources and the Agriculture Committees of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committees shall upon the conclusion of the study make a report of their findings, together with their recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 138.** Introduced by Cunningham, 40.

PURPOSE: The purpose of this resolution is to study the collective-bargaining process used by teachers' unions and school boards when determining the negotiated agreement for teachers. With the present teacher shortage that is occurring in Nebraska as well as other states, it is becoming increasingly difficult to hire teachers, particularly in certain fields. This study shall focus on whether school boards should be given statutory authority to deviate above the standard contract when necessary to attract quality teachers.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Business and Labor Committee and the Education Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committees shall upon the conclusion of the study make a report of their findings, together with their recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

**LEGISLATIVE RESOLUTION 139.** Introduced by Dw. Pedersen, 39; Brashear, 4.

PURPOSE: The purpose of this interim study is to study the effect of closing the Lincoln Correctional Center as authorized by AM1778 to Legislative Bill 407, Ninety-eighth Legislature, First Session, 2003.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Judiciary Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

### AMENDMENTS - Print in Journal

Senator Brashear filed the following amendment to LB 759:  
AM1875

(Amendments to AM1831)

1 1. Strike amendment 1 and insert the following new  
2 amendments:  
3 "1. Insert the following new section:  
4 'Sec. 22. Sales and use taxes imposed on the gross  
5 income received for labor for repair services performed with regard  
6 to motor vehicles shall not be imposed on the gross income received  
7 for labor for repair services performed on passenger cars not  
8 registered as commercial vehicles or repair services performed on  
9 farm trucks. Terms used in this section have the meanings defined  
10 in section 60-301.'

11 2. In AM1745, on page 5, line 10, and page 9, line 15,  
12 before the semicolon insert 'or section 22 of this act'.

13 3. In AM7114, on page 8, lines 15 and 20, after 'act'  
14 insert 'and section 22 of this act'.

Senator Raikes filed the following amendment to LB 379:

AM1889

- 1 1. Insert the following new section:  
2 "Sec. 2. Section 77-2715.07, Revised Statutes  
3 Supplement, 2002, is amended to read:  
4 77-2715.07. (1) There shall be allowed to qualified  
5 resident individuals as a nonrefundable credit against the income  
6 tax imposed by the Nebraska Revenue Act of 1967:  
7 (a) A credit equal to the federal credit allowed under  
8 section 22 of the Internal Revenue Code; and  
9 (b) A credit for taxes paid to another state as provided  
10 in section 77-2730.  
11 (2) There shall be allowed to qualified resident  
12 individuals against the income tax imposed by the Nebraska Revenue  
13 Act of 1967:  
14 (a) For returns filed reporting federal adjusted gross  
15 incomes of greater than twenty-nine thousand dollars, a  
16 nonrefundable credit equal to twenty-five percent of the federal  
17 credit allowed under section 21 of the Internal Revenue Code of  
18 1986, as amended;  
19 (b) For returns filed reporting federal adjusted gross  
20 income of twenty-nine thousand dollars or less, a refundable credit  
21 equal to a percentage of the federal credit allowable under section  
22 21 of the Internal Revenue Code of 1986, as amended, whether or not  
23 the federal credit was limited by the federal tax liability. The  
24 percentage of the federal credit shall be one hundred percent for  
1 incomes not greater than twenty-two thousand dollars, and the  
2 percentage shall be reduced by ten percent for each one thousand  
3 dollars, or fraction thereof, by which the reported federal  
4 adjusted gross income exceeds twenty-two thousand dollars; and  
5 (c) A refundable credit for individuals who qualify for  
6 an income tax credit under the Beginning Farmer Tax Credit Act for  
7 all taxable years beginning or deemed to begin on or after January  
8 1, 2001, under the Internal Revenue Code of 1986, as amended.  
9 (3) There shall be allowed to all individuals as a  
10 nonrefundable credit against the income tax imposed by the Nebraska  
11 Revenue Act of 1967:  
12 (a) A credit for personal exemptions allowed under  
13 section 77-2716.01; and  
14 (b) A credit for contributions to certified community  
15 betterment programs as provided in the Community Development  
16 Assistance Act. Each partner, each shareholder of an electing  
17 subchapter S corporation, each beneficiary of an estate or trust,  
18 or each member of a limited liability company shall report his or  
19 her share of the credit in the same manner and proportion as he or  
20 she reports the partnership, subchapter S corporation, estate,  
21 trust, or limited liability company income.  
22 (4) There shall be allowed as a credit against the income  
23 tax imposed by the Nebraska Revenue Act of 1967:  
24 (a) A credit to all resident estates and trusts for taxes

25 paid to another state as provided in section 77-2730; and  
 26 (b) A credit to all estates and trusts for contributions  
 27 to certified community betterment programs as provided in the  
 1 Community Development Assistance Act.  
 2 (5) There shall be allowed to all business firms as a  
 3 credit against the income tax imposed by the Nebraska Revenue Act  
 4 of 1967 a credit as provided in section 77-27,222.

5 (6) For all taxable years beginning or deemed to begin on  
 6 or after January 1, 2003, there shall be allowed to resident  
 7 individual taxpayers a credit against the income tax imposed by the  
 8 Nebraska Revenue Act of 1967 in an amount equal to twenty-five  
 9 percent of the premium costs paid during the taxable year for one  
 10 or more long-term care insurance policies issued pursuant to the  
 11 Long-Term Care Insurance Act that offer coverage to the individual,  
 12 the individual's spouse, parent, or immediate family member, or a  
 13 dependent for whom the individual was allowed to deduct a personal  
 14 exemption credit for the taxable year. No taxpayer shall be  
 15 entitled to such credit with respect to the same expended amounts  
 16 for long-term care insurance which are claimed by another taxpayer  
 17 in any state. The credit allowed by this subsection shall not  
 18 exceed five hundred dollars and it shall not be refundable. Any  
 19 unused credit shall not be allowed to be carried forward to apply  
 20 to future taxable years. The Tax Commissioner shall annually  
 21 report to the Legislature the total dollar amount of credits  
 22 claimed under this subsection with the information reported under  
 23 subsection (7) of section 77-2715.02."

24 2. On page 4, after line 7 insert the following new  
 25 subsection:

26 "(7) The Tax Commissioner shall annually estimate the  
 27 increased revenue resulting from the changes made to this section  
 1 by this legislative bill and report such amount to the Legislature  
 2 with the information reported under subsection (6) of section  
 3 77-2715.07."; in line 8 strike "section 77-2715.02" and insert  
 4 "sections 77-2715.02 and 77-2715.07"; and in line 9 strike "is" and  
 5 insert "are".

6 3. Renumber the remaining section accordingly.

Senator Raikes filed the following amendment to LB 574:  
 AM1816

(Amendments to E & R amendments, AM7131)

1 1. Strike section 21 and insert the following new  
 2 section:  
 3 "Sec. 21. Section 9-812, Revised Statutes Supplement,  
 4 2002, as amended by section 1, Legislative Bill 367, Ninety-eighth  
 5 Legislature, First Session, 2003, is amended to read:  
 6 9-812. (1) All money received from the operation of  
 7 lottery games conducted pursuant to the State Lottery Act in  
 8 Nebraska shall be credited to the State Lottery Operation Trust  
 9 Fund, which fund is hereby created. All payments of expenses of

10 the operation of the lottery games shall be made from the State  
 11 Lottery Operation Cash Fund. In accordance with legislative  
 12 appropriations, money for payments for expenses of the division  
 13 shall be transferred from the State Lottery Operation Trust Fund to  
 14 the State Lottery Operation Cash Fund, which fund is hereby  
 15 created. All money necessary for the payment of lottery prizes  
 16 shall be transferred from the State Lottery Operation Trust Fund to  
 17 the State Lottery Prize Trust Fund, which fund is hereby created.  
 18 The amount used for the payment of lottery prizes shall not be less  
 19 than forty percent of the dollar amount of the lottery tickets  
 20 which have been sold. Until October 1, 2003, at least twenty-five  
 21 percent and beginning ~~Beginning~~ October 1, 2003, and until January  
 22 1, 2008, a portion of the dollar amount of the lottery tickets  
 23 which have been sold on an annualized basis shall be transferred  
 24 1 from the State Lottery Operation Trust Fund to the Education  
 25 2 Innovation Fund, the Nebraska Scholarship Fund, the Nebraska  
 26 3 Environmental Trust Fund, and the Compulsive Gamblers Assistance  
 27 4 Fund, except that the dollar amount transferred shall not be less  
 28 5 than the dollar amount transferred to the funds in fiscal year  
 29 6 2002-03. On and after January 1, 2008, at least twenty-five  
 30 7 percent of the dollar amount of the lottery tickets which have been  
 31 8 sold on an annualized basis shall be transferred from the State  
 32 9 Lottery Operation Trust Fund to the Education Innovation Fund, the  
 33 10 Nebraska Scholarship Fund, the Nebraska Environmental Trust Fund,  
 34 11 and the Compulsive Gamblers Assistance Fund. Of the money  
 35 12 available to be transferred to the Education Innovation Fund, the  
 36 13 Nebraska Scholarship Fund, the Nebraska Environmental Trust Fund,  
 37 14 and the Compulsive Gamblers Assistance Fund, the first five hundred  
 38 15 thousand dollars shall be transferred to the Compulsive Gamblers  
 39 16 Assistance Fund to be used as provided in sections 83-162.01 to  
 40 17 83-162.04. ~~Thereafter, forty-nine and one-half~~ Twenty-four and  
 41 18 three-fourths percent of the money remaining after the payment of  
 42 19 prizes and operating expenses and the initial transfer to the  
 43 20 Compulsive Gamblers Assistance Fund shall be transferred to the  
 44 21 Education Innovation Fund. Twenty-four and three-fourths percent  
 45 22 of the money remaining after the payment of prizes and operating  
 46 23 expenses and the initial transfer to the Compulsive Gamblers  
 47 24 Assistance Fund shall be transferred to the Nebraska Scholarship  
 48 25 Fund. Forty-nine and one-half percent of the money remaining after  
 49 26 the payment of prizes and operating expenses and the initial  
 50 27 transfer to the Compulsive Gamblers Assistance Fund shall be  
 51 1 transferred to the Nebraska Environmental Trust Fund to be used as  
 52 2 provided in the Nebraska Environmental Trust Act. One percent of  
 53 3 the money remaining after the payment of prizes and operating  
 54 4 expenses and the initial transfer to the Compulsive Gamblers  
 55 5 Assistance Fund shall be transferred to the Compulsive Gamblers  
 56 6 Assistance Fund to be used as provided in sections 83-162.01 to  
 57 7 83-162.04.

8 (2) The Education Innovation Fund is hereby created. At

9 least seventy-five percent of the lottery proceeds allocated to the  
10 Education Innovation Fund shall be available for disbursement. For  
11 each fiscal year except fiscal years 2003-04 and 2004-05, the  
12 Education Innovation Fund shall be allocated in the following  
13 manner: Up to ~~ten~~ twenty percent to fund the mentor teacher  
14 program pursuant to the Quality Education Accountability Act; ~~up to~~  
15 ~~sixty percent as quality education incentives pursuant to the act;~~  
16 up to ~~twenty~~ forty percent to the Attracting Excellence to Teaching  
17 Program Cash Fund to fund the Attracting Excellence to Teaching  
18 Program Act; and up to ~~ten~~ forty percent of the fund shall be  
19 allocated by the Governor. For fiscal years 2003-04 and 2004-05,  
20 the Education Innovation Fund shall be allocated to the General  
21 Fund after operating expenses for the Excellence in Education  
22 Council are deducted.

23 Allocations by the Governor shall be through incentive  
24 grants to encourage the development of strategic school improvement  
25 plans by school districts for accomplishing high performance  
26 learning and to encourage schools to establish innovations in  
27 programs or practices that result in restructuring of school  
1 organization, school management, and instructional programs which  
2 bring about improvement in the quality of education. Such  
3 incentive grants allocated by the Governor are intended to provide  
4 selected school districts, teachers or groups of teachers,  
5 nonprofit educational organizations, educational service units, or  
6 cooperatives funding for the allowable costs of implementing pilot  
7 projects and model programs.

8 From the funds allocated by the Governor, minigrants  
9 shall be available to school districts to support the development  
10 of strategic school improvement plans which shall include  
11 statements of purposes and goals for the districts. The plans  
12 shall also include the specific statements of improvement or  
13 strategic initiatives designed to improve quality learning for  
14 every student.

15 In addition to the minigrants granted for the development  
16 of strategic school improvement plans, school districts with annual  
17 budget expenditures of three hundred fifty thousand dollars or less  
18 are eligible for minigrants from the funds allocated by the  
19 Governor for the purposes allowed in subdivisions (2)(a) through  
20 (q) of this section. The amount of this type of minigrant shall  
21 not exceed five thousand dollars. The school district shall  
22 present a curriculum support plan with its application for the  
23 grant. The curriculum support plan must show how the district is  
24 working to achieve one or more of the allowed purposes and how the  
25 grant will be used to directly advance the plan to achieve one or  
26 more of these purposes. The plan must be signed by the school  
27 administrator and a school board representative. The application  
1 for the grant shall be brief. The Excellence in Education Council  
2 shall select the recipients of this type of minigrant and shall  
3 administer such minigrants.

4 From the funds allocated by the Governor, major  
5 competitive grants shall be available to support innovative  
6 programs which are directly related to the strategic school  
7 improvement plans. The development of a strategic school  
8 improvement plan by a school district shall be required before a  
9 grant is awarded. Annual reports shall be made by program  
10 recipients documenting the effectiveness of the program in  
11 improving the quality of education as designed in the strategic  
12 school improvement plans. Special consideration shall be given to  
13 plans which contain public or private matching funds and  
14 cooperative agreements, including agreements for in-kind services.  
15 Purposes for which such major competitive grants would be offered  
16 shall include:

- 17 (a) Professional staff development programs to provide  
18 funds for teacher and administrator training and continuing  
19 education to upgrade teaching and administrative skills;
- 20 (b) The development of strategic school improvement plans  
21 by school districts;
- 22 (c) Educational technology assistance to public schools  
23 for the purchase and operation of computers, telecommunications  
24 equipment and services, and other forms of technological innovation  
25 which may enhance classroom teaching, instructional management, and  
26 districtwide administration. Telecommunications equipment,  
27 services, and forms of technical innovation shall be approved only  
1 after review by the technical panel created in section 86-521;
- 2 (d) An educational accountability program to develop an  
3 educational indicators system to measure the performance and  
4 outcomes of public schools and to ensure efficiency in operations;
- 5 (e) Alternative programs for students, including  
6 underrepresented groups, at-risk students, and dropouts;
- 7 (f) Programs that demonstrate improvement of student  
8 performance against valid national and international achievement  
9 standards;
- 10 (g) Early childhood and parent education which emphasizes  
11 child development;
- 12 (h) Programs using decisionmaking models that increase  
13 involvement of parents, teachers, and students in school  
14 management;
- 15 (i) Increased involvement of the community in order to  
16 achieve increased confidence in and satisfaction with its schools;
- 17 (j) Development of magnet or model programs designed to  
18 facilitate desegregation;
- 19 (k) Programs that address family and social issues  
20 impairing the learning productivity of students;
- 21 (l) Programs enhancing critical and higher-order thinking  
22 capabilities;
- 23 (m) Programs which produce the quality of education  
24 necessary to guarantee a competitive work force;
- 25 (n) Programs designed to increase productivity of staff

26 and students through innovative use of time;

27 (o) Training programs designed to benefit teachers at all  
1 levels of education by increasing their ability to work with  
2 educational technology in the classroom;

3 (p) Approved accelerated or differentiated curriculum  
4 programs under sections 79-1106 to 79-1108.03; and

5 (q) Programs for children from birth to age twenty-one  
6 years with disabilities receiving special education under the  
7 Special Education Act and children from birth to age twenty-one  
8 years needing support services as defined in section 79-1125.01,  
9 which programs demonstrate improved outcomes for children from  
10 birth to age twenty-one years through emphasis on prevention and  
11 collaborative planning.

12 The Governor shall establish the Excellence in Education  
13 Council. The Governor shall appoint eleven members to the council  
14 including representatives of educational organizations,  
15 postsecondary educational institutions, the business community, and  
16 the general public, members of school boards and parent education  
17 associations, school administrators, and at least four teachers who  
18 are engaged in classroom teaching. The State Department of  
19 Education shall provide staff support for the council to administer  
20 the Education Innovation Fund, including the Quality Education  
21 Accountability Act. The council shall have the following powers  
22 and duties:

23 (i) In consultation with the department, develop and  
24 publish criteria for the awarding of incentive grants allocated by  
25 the Governor for programs pursuant to this subsection, including  
26 minigrants;

27 (ii) Provide recommendations to the Governor regarding  
1 the selection of projects to be funded and the distribution and  
2 duration of project funding;

3 (iii) Establish standards, formats, procedures, and  
4 timelines for the successful implementation of approved programs  
5 funded by incentive grants allocated by the Governor from the  
6 Education Innovation Fund;

7 (iv) Assist school districts in determining the  
8 effectiveness of the innovations in programs and practices and  
9 measure the subsequent degree of improvement in the quality of  
10 education;

11 (v) Consider the reasonable distribution of funds across  
12 the state and all classes of school districts;

13 (vi) Carry out its duties pursuant to the Quality  
14 Education Accountability Act; and

15 (vii) Provide annual reports to the Governor concerning  
16 programs funded by the fund. Each report shall include the number  
17 of applicants and approved applicants, an overview of the various  
18 programs, objectives, and anticipated outcomes, and detailed  
19 reports of the cost of each program.

20 To assist the council in carrying out its duties, the

21 State Board of Education shall, in consultation with the council,  
 22 adopt and promulgate rules and regulations establishing criteria,  
 23 standards, and procedures regarding the selection and  
 24 administration of programs funded from the Education Innovation  
 25 Fund, including the Quality Education Accountability Act.  
 26 (3) Recipients of incentive grants allocated by the  
 27 Governor from the Education Innovation Fund shall be required to  
 1 provide, upon request, such data relating to the funded programs  
 2 and initiatives as the Governor deems necessary.  
 3 (4) Any money in the State Lottery Operation Trust Fund,  
 4 the State Lottery Operation Cash Fund, the State Lottery Prize  
 5 Trust Fund, or the Education Innovation Fund available for  
 6 investment shall be invested by the state investment officer  
 7 pursuant to the Nebraska Capital Expansion Act and the Nebraska  
 8 State Funds Investment Act.  
 9 (5) Unclaimed prize money on a winning lottery ticket  
 10 shall be retained for a period of time prescribed by rules and  
 11 regulations. If no claim is made within such period, the prize  
 12 money shall be used at the discretion of the Tax Commissioner for  
 13 any of the purposes prescribed in this section."  
 14 2. On page 26, line 12, after "systems" insert "or the  
 15 Nebraska educational savings plan trust".  
 16 3. On page 28, line 7, after the stricken matter insert  
 17 "Community Scholarship Foundation Program Act and the".  
 18 4. On page 42, line 7, strike "and sections 9-812," and  
 19 insert "sections"; and in line 9 after the last comma insert "and  
 20 section 9-812, Revised Statutes Supplement, 2002, as amended by  
 21 section 1, Legislative Bill 367, Ninety-eighth Legislature, First  
 22 Session, 2003,".

Senator Chambers filed the following amendment to LB 283:  
 AM1891

(Amendments to Standing Committee amendments, AM0702)

- 1 1. On page 1, line 2, strike "twenty-nine" and insert
- 2 "thirty-one".

Senator Chambers filed the following amendment to LB 759:  
 AM1892

(Amendments to E & R amendments, AM7114)

- 1 1. On page 1, line 7, strike "twenty-nine" and insert
- 2 "thirty-one".

### SELECT FILE

**LEGISLATIVE BILL 403.** E & R amendment, AM7124, found on page 1603, was adopted.

Advanced to E & R for engrossment.

**LEGISLATIVE BILL 403A.** Senator Wehrbein renewed his pending amendment, AM1840, found on page 1756.

The Wehrbein amendment was adopted with 33 ayes, 0 nays, 15 present and not voting, and 1 excused and not voting.

Advanced to E & R for engrossment.

**LEGISLATIVE BILL 408.** E & R amendment, AM7125, printed separately and referred to on page 1603, was adopted.

Senator Wehrbein renewed his pending amendment, AM1669, found on page 1655.

The Wehrbein amendment was adopted with 38 ayes, 0 nays, 10 present and not voting, and 1 excused and not voting.

Senator Thompson renewed her pending amendment, AM1849, found on page 1754.

Senator Hartnett asked unanimous consent to be excused. No objections. So ordered.

Senator Thompson offered the following amendment to her pending amendment:

FA1361

Amend AM1849

On page three, lines 3, 4, and 7 strike "thirty-three million eight" and insert "sixteen million nine"

Senator Brashear asked unanimous consent to be excused. No objections. So ordered.

Senator Mines moved the previous question. The question is, "Shall the debate now close?" The motion prevailed with 33 ayes, 0 nays, and 16 not voting.

Senator Thompson moved for a call of the house. The motion prevailed with 36 ayes, 0 nays, and 13 not voting.

Senator Thompson requested a roll call vote on her amendment.

Voting in the affirmative, 5:

Chambers      Kruse              Price              Schimek              Thompson

Voting in the negative, 35:

|         |            |          |               |            |
|---------|------------|----------|---------------|------------|
| Aguilar | Connealy   | Jensen   | Mines         | Smith      |
| Baker   | Cunningham | Johnson  | Mossey        | Stuhr      |
| Bourne  | Engel      | Jones    | Pedersen, Dw. | Stuthman   |
| Bromm   | Erdman     | Kremer   | Pederson, D.  | Synowiecki |
| Brown   | Friend     | Landis   | Quandahl      | Tyson      |
| Byars   | Hudkins    | Louden   | Raikes        | Vrtiska    |
| Combs   | Janssen    | McDonald | Redfield      | Wehrbein   |

Present and not voting, 6:

|         |          |         |
|---------|----------|---------|
| Beutler | Cudaback | Maxwell |
| Burling | Foley    | Schrock |

Excused and not voting, 3:

|          |          |          |
|----------|----------|----------|
| Brashear | Hartnett | Preister |
|----------|----------|----------|

The Thompson amendment lost with 5 ayes, 35 nays, 6 present and not voting, and 3 excused and not voting.

The Chair declared the call raised.

The Thompson pending amendment, AM1849, was renewed.

Senator Dw. Pedersen moved the previous question. The question is, "Shall the debate now close?" The motion prevailed with 35 ayes, 1 nay, and 13 not voting.

Senator Thompson moved for a call of the house. The motion prevailed with 43 ayes, 0 nays, and 6 not voting.

Senator Thompson requested a roll call vote on her amendment.

Voting in the affirmative, 4:

|          |       |         |          |
|----------|-------|---------|----------|
| Chambers | Price | Schimek | Thompson |
|----------|-------|---------|----------|

Voting in the negative, 38:

|         |            |          |               |            |
|---------|------------|----------|---------------|------------|
| Aguilar | Connealy   | Jensen   | Mossey        | Stuhr      |
| Baker   | Cudaback   | Johnson  | Pedersen, Dw. | Stuthman   |
| Bourne  | Cunningham | Jones    | Pederson, D.  | Synowiecki |
| Bromm   | Engel      | Kremer   | Quandahl      | Tyson      |
| Brown   | Erdman     | Landis   | Raikes        | Vrtiska    |
| Burling | Friend     | Louden   | Redfield      | Wehrbein   |
| Byars   | Hudkins    | McDonald | Schrock       |            |
| Combs   | Janssen    | Mines    | Smith         |            |

Present and not voting, 4:

Beutler            Foley            Kruse            Maxwell

Excused and not voting, 3:

Brashear        Hartnett        Preister

The Thompson amendment lost with 4 ayes, 38 nays, 4 present and not voting, and 3 excused and not voting.

The Chair declared the call raised.

Senator Bourne withdrew his pending amendments, AM1825 and AM1826, found on pages 1756 and 1757.

Advanced to E & R for engrossment.

## RESOLUTION

**LEGISLATIVE RESOLUTION 140.** Introduced by Beutler, 28.

**PURPOSE:** To study Nebraska's corporate registration tax. The study should include, but not be limited to, an examination of any constitutional issues surrounding the tax, a comparison of Nebraska's tax scheme to surrounding states, the available alternatives for changing the method of assessing the tax, and the implications any potential changes might have on the revenue generated by the tax.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NINETY-EIGHTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That Revenue Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.

2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

Referred to the Executive Board.

## AMENDMENTS - Print in Journal

Senator Raikes filed the following amendment to LB 540:  
AM1926

(Amendments to Final Reading copy)

- 1 1. On page 4, line 22, strike "four" and insert "five".

Senator Brashear filed the following amendment to LB 440:  
AM1899

- 1 1. Insert the following new section:  
2 "Sec. 3. Section 77-27,137.01, Reissue Revised Statutes

3 of Nebraska, is amended to read:

4 77-27,137.01. (1) The appropriation provided for in  
 5 section 77-27,136 for aid to incorporated municipalities shall be  
 6 allocated by the Tax Commissioner to the various incorporated  
 7 municipalities. The Tax Commissioner shall determine the amount to  
 8 be distributed to the incorporated municipalities and certify such  
 9 amounts by voucher to the Director of Administrative Services.  
 10 Each amount shall be distributed in seven as nearly as possible  
 11 equal monthly payments on the last business day of each month  
 12 beginning in December. The State Treasurer shall, on the business  
 13 day preceding the last business day of each month, notify the  
 14 Director of Administrative Services of the amount of funds  
 15 available in the General Fund for payment purposes. The Director  
 16 of Administrative Services shall, on the last business day of each  
 17 month, draw warrants against funds appropriated. The Tax  
 18 Commissioner shall compute the amount due the incorporated  
 19 municipalities on the ratio of the population of the particular  
 20 incorporated municipality to the total population of all  
 21 incorporated municipalities in the state as determined by the most  
 22 recent federal census figures certified by the Tax Commissioner as  
 23 provided in section 77-3,119, which amounts shall be placed in the  
 24 general fund of such municipalities.

1 (2) Each fiscal year, the Tax Commissioner shall  
 2 determine the best estimate of the amount of additional sales and  
 3 use tax revenue raised by each municipality under the Local Option  
 4 Revenue Act as a result of changes in section 77-2702.07 made by  
 5 Legislative Bill 759, Ninety-eighth Legislature, First Session,  
 6 2003. On June 30 of each year, each municipality shall rebate to  
 7 the Tax Commissioner an amount equal to the lesser of the amount of  
 8 additional sales and use tax revenue so raised or the amount of aid  
 9 distributed pursuant to this section. Any such rebates shall be  
 10 credited to the General Fund."

11 2. Renumber the remaining sections accordingly.

### UNANIMOUS CONSENT - Add Cointroducers

Senator Connealy asked unanimous consent to have his name added as cointroducer to LB 760. No objections. So ordered.

Senator McDonald asked unanimous consent to have her name added as cointroducer to LR 104. No objections. So ordered.

### VISITORS

Visitors to the Chamber were 53 fourth-grade students and teachers from Engleman Elementary School, Grand Island; Senator Johnson's brother, David, from Rockford, Illinois; 30 seventh- and eighth-grade students and teachers from Trinity Lutheran School, Fremont; and 20 fourth-grade students and teacher from Ponca Elementary School, Omaha.

**ADJOURNMENT**

At 8:13 p.m., on a motion by Speaker Bromm, the Legislature adjourned until 9:00 a.m., Thursday, May 15, 2003.

Patrick J. O'Donnell  
Clerk of the Legislature

