

**SIXTY-SIXTH DAY - APRIL 18, 2017**  
**LEGISLATIVE JOURNAL**  
**ONE HUNDRED FIFTH LEGISLATURE**  
**FIRST SESSION**

**SIXTY-SIXTH DAY**

Legislative Chamber, Lincoln, Nebraska  
Tuesday, April 18, 2017

**PRAYER**

The prayer was offered by Senator Walz.

**ROLL CALL**

Pursuant to adjournment, the Legislature met at 9:00 a.m., President Foley presiding.

The roll was called and all members were present except Senator Krist who was excused; and Senators Craighead, Geist, Kuehn, Morfeld, Murante, Pansing Brooks, Watermeier, and Wayne who were excused until they arrive.

**CORRECTIONS FOR THE JOURNAL**

Page 1033, line 23, strike "2012" and insert "2008".  
Page 1034, line 24, strike "passed away" and insert "entered a care facility"  
and line 27, strike "each" and insert "eat".  
The Journal for the sixty-fifth day was approved as corrected.

**COMMITTEE REPORT(S)**  
Enrollment and Review

**LEGISLATIVE BILL 91A.** Placed on Select File.  
**LEGISLATIVE BILL 263A.** Placed on Select File.

(Signed) Anna Wishart, Chairperson

**RESOLUTION(S)**

Pursuant to Rule 4, Sec. 5(b), LRs 93, 94, 96, and 97 were adopted.

**PRESIDENT SIGNED**

While the Legislature was in session and capable of transacting business, the President signed the following: LRs 93, 94, 96, and 97.

**GENERAL FILE**

**LEGISLATIVE BILL 640.** Title read. Considered.

Committee AM752, found on page 971, was offered.

Senator Groene offered his amendment, AM992, found on page 1021, to the committee amendment.

Pending.

**COMMITTEE REPORT(S)**

Enrollment and Review

**LEGISLATIVE BILL 217.** Placed on Final Reading.

ST17

The following changes, required to be reported for publication in the Journal, have been made:

1. In the E and R amendments, ER48:
  - a. On page 16, line 26, "14" has been struck and "15" inserted;
  - b. On page 51, the matter beginning with "9" in line 14 through line 15 has been struck and "6, 10, 11, 12, 13, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, and 40 of" inserted; in line 17 "20 and 37" has been struck and "21 and 38" inserted; and in line 22 "77-1359," has been inserted after "69-2710.01,"; and
  - c. On page 52, line 8, "77-1359," has been inserted after the last comma; and in line 15 "assessment of agricultural land and horticultural land," has been inserted after the first comma.

**LEGISLATIVE BILL 263.** Placed on Final Reading.

ST16

The following changes, required to be reported for publication in the Journal, have been made:

1. In the Friesen amendment, AM867, section 49 has been renumbered as section 53.
2. In the Bolz amendment, AM670:
  - a. On page 1, lines 19 and 26; page 4, line 12; page 6, line 12; and page 8, line 30, "59" has been struck and "61" inserted; and
  - b. On page 9, lines 6 and 7, "25, 58, and 59" has been struck and "26, 60, and 61" inserted; and in line 10 "58 and 59" has been struck and "60 and 61" inserted.
3. In the E and R amendments, ER41, on page 1, line 8, "60-317," has been inserted after the third comma and "60-393, 60-395, 60-396," has been inserted after the last comma; in line 11 "60-3,130.04," has been inserted after "60-3,128," and "60-3,151," has been inserted after "60-3,141,"; and in line 21 "to provide for Native American Cultural Awareness and History Plates and to create a fund;" has been inserted after the semicolon.
4. In the Standing Committee amendments, AM538:

a. On page 2, line 6; page 11, line 10; page 14, line 25; page 15, line 10; page 25, line 15; page 47, line 8; page 80, line 4; page 101, line 24; page 104, line 12; and page 109, line 27, "69" has been struck and "77" inserted;

b. On page 23, line 26; and page 75, line 6, "25" has been struck and "26" inserted; and

c. On page 112, line 21, "68 and 69" has been struck and "76 and 77" inserted; in line 23 "47, 92, and 95" has been struck and "52, 101, and 104" inserted; and the matter beginning with "25" in line 25 through line 27 has been struck and "26, 29, 30, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 54, 56, 57, 59, 60, 61, 64, 65, 66, 68, 69, 71, 73, 74, 75, 76, 77, 78, 79, 94, 95, 96, 97, 98, 99, 100, and 105 of" inserted.

**LEGISLATIVE BILL 276.** Placed on Final Reading.

**LEGISLATIVE BILL 487.** Placed on Final Reading.

(Signed) Anna Wishart, Chairperson

### COMMITTEE REPORT(S)

Enrollment and Review

**LEGISLATIVE BILL 605.** Placed on Select File.

**LEGISLATIVE BILL 481.** Placed on Select File with amendment.

ER56

1 1. On page 1, line 2, strike "28-2802" and insert "38-2802".

**LEGISLATIVE BILL 72.** Placed on Select File with amendment.

ER57

1 1. On page 6, line 3, after "bonds" insert an underscored comma.

2 2. On page 9, line 3, strike "and" and show as stricken; and in line

3 6 strike the period, show as stricken, and insert "; and".

(Signed) Anna Wishart, Chairperson

### AMENDMENT(S) - Print in Journal

Senator Harr filed the following amendments to LB461:

AM1060

(Amendments to Standing Committee amendments, AM954)

1 1. On page 47, line 15, strike "and" and insert "real property is

2 sixty-five to one hundred percent of actual value, and the acceptable

3 range for all"; and in lines 18, 22, and 24, strike the new matter and

4 reinstate the stricken matter.

AM1062

(Amendments to Standing Committee amendments, AM954)

1 1. On page 47, line 15, strike "and commercial"; in line 16 after

2 "value" insert ", and the acceptable range for all commercial real

3 property is sixty-five to one hundred percent of actual value"; and in

4 lines 18, 22, and 24, strike the new matter and reinstate the stricken  
5 matter.

## AM1061

(Amendments to Standing Committee amendments, AM954)

1 1. On page 48, strike beginning with "real" in line 27 through  
2 "land" in line 28, show the old matter as stricken, and insert  
3 "residential real property, sixty-five percent of actual value, and for  
4 commercial real property".

## AM1058

(Amendments to Standing Committee amendments, AM954)

1 1. On page 7, line 10, after "increase" insert "or decrease".  
2 2. On page 8, line 27, strike "exceeds" and insert "has increased or  
3 decreased from".

## AM1064

Is available in the Bill Room.

## AM1063

(Amendments to Standing Committee amendments, AM954)

1 1. On page 43, line 4, after the period insert "For tax year 2018  
2 and each tax year thereafter, the amount of relief granted under the act  
3 shall be the amount of money available in the Property Tax Credit Cash  
4 Fund after making the transfer required in subsection (8) of this  
5 section".  
6 2. On page 45, after line 6 insert the following new subsection:  
7 "(8) For tax year 2018 and each tax year thereafter, the State  
8 Department of Education shall certify to the State Treasurer the  
9 statewide increase in state aid to be paid to local systems as defined in  
10 section 79-1003 pursuant to the Tax Equity and Educational Opportunities  
11 Support Act as a result of the adoption of the Agricultural Valuation  
12 Fairness Act. The State Treasurer shall transfer an amount equal to such  
13 certified amount from the Property Tax Credit Cash Fund to the Tax Equity  
14 and Educational Opportunities Fund to pay such increase in state aid to  
15 local systems".

## AM1059

(Amendments to Standing Committee amendments, AM954)

1 1. On page 48, strike beginning with "the" in line 29 through "Act"  
2 in line 31, show the old matter as stricken, and insert "fifty-five  
3 percent of actual value".

## AM1027

(Amendments to Standing Committee amendments, AM954)

1 1. On page 24, strike beginning with "Tax" in line 8 through "year"  
2 in line 13 and insert "Tax Rate Review Committee shall compare the net  
3 General Fund receipts for the most recently completed fiscal year to the  
4 prior fiscal year and shall determine the actual rate of growth in net

5 General Fund receipts for such period. If the actual rate of growth in  
6 net General Fund receipts was not at least five and one-half percent";  
7 and strike beginning with "if" in line 24 through "year" in line 26 and  
8 insert "if the actual rate of growth in net General Fund receipts, as  
9 determined under subsection (3) of this section, was at least five and  
10 one-half percent".

AM1028

(Amendments to AM1027)

1 1. On page 1, strike beginning with "compare" in line 2 through  
2 "percent" in line 6 and insert "examine the expected rate of growth in  
3 net General Fund receipts from the current fiscal year to the upcoming  
4 fiscal year, as determined by the Nebraska Economic Forecasting Advisory  
5 Board. If the expected rate of growth in net General Fund receipts is not  
6 at least five and one-half percent for the upcoming fiscal year"; and  
7 strike beginning with "actual" in line 8 through "percent" in line 10 and  
8 insert "expected rate of growth in net General Fund receipts, as  
9 determined under subsection (3) of this section, is at least five and  
10 one-half percent for the upcoming fiscal year".

AM1029

(Amendments to AM1027)

1 1. On page 1, line 6, strike "five and one-half percent" and insert  
2 "three and one-half percent more than the rate of inflation for the same  
3 period, as determined using the Consumer Price Index for All Urban  
4 Consumers"; and strike beginning with "five" in line 9 through "percent"  
5 in line 10 and insert "three and one-half percent more than the rate of  
6 inflation, as determined using the Consumer Price Index for All Urban  
7 Consumers".

AM1030

(Amendments to AM1027)

1 1. On page 1, strike beginning with "compare" in line 2 through  
2 "percent" in line 6 and insert "examine the expected rate of growth in  
3 net General Fund receipts from the current fiscal year to the upcoming  
4 fiscal year, as determined by the Nebraska Economic Forecasting Advisory  
5 Board. If the expected rate of growth in net General Fund receipts for  
6 the upcoming fiscal year is not at least three and one-half percent more  
7 than the rate of inflation for the previous twelve months, as determined  
8 using the Consumer Price Index for All Urban Consumers"; and strike  
9 beginning with "actual" in line 8 through "percent" in line 10 and insert  
10 "expected rate of growth in net General Fund receipts for the upcoming  
11 fiscal year, as determined under subsection (3) of this section, is at  
12 least three and one-half percent more than the rate of inflation for the  
13 previous twelve months, as determined using the Consumer Price Index for  
14 All Urban Consumers".

AM1031

(Amendments to Standing Committee amendments, AM954)

1 1. On page 26, lines 2 and 16, strike "2019" and insert "2018".**ATTORNEY GENERAL'S OPINION**Opinion 17-002SUBJECT:           Constitutionality of LB 44 – The Remote Seller Sales  
Tax Collection Act.REQUESTED BY: Senator John Kuehn  
Nebraska LegislatureWRITTEN BY:     Douglas J. Peterson, Attorney General  
L. Jay Bartel, Assistant Attorney General**INTRODUCTION**

You have requested our opinion on the constitutionality of LB 44 in light of the United States Supreme Court decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) [*Quill*]. In *Quill*, the Court held that a North Dakota use tax collection statute requiring out-of-state mail order sellers to collect and remit use tax on purchases made by resident consumers violated the "substantial nexus" requirement of the commerce clause of the U.S. Constitution (art. I, § 8, cl. 3). The Court defined "substantial nexus" as "physical presence" in the taxing state. *Id.* at 312. LB 44 proposes to require remote sellers who do not have physical presence in the state to collect and remit sales tax on purchases made by persons in the state if the remote seller's gross revenue in Nebraska exceeds \$100,000 or the remote seller's sales in the state comprise two hundred or more separate transactions. LB 44, §§ 3, 4. If a remote seller refuses to collect Nebraska sales tax, the remote seller is subject to notice and reporting requirements, including: (1) Notifying Nebraska purchasers that sales or use tax is due and that the purchaser is required to file a sales or use tax return; (2) Sending a notification to all Nebraska purchasers by January 1 of each year showing the total amount of purchases made in the previous year; and (3) Filing an annual statement for each purchaser with the Department of Revenue by March 1 of each year showing the total amount paid for Nebraska purchases by such purchasers during the previous year. LB 44, § 5. The bill also provides penalties if the remote seller fails to provide the required notices and statements. *Id.*

For the reasons stated below, we conclude that the sales tax collection obligation imposed on remote sellers having no physical presence in Nebraska is unconstitutional under the commerce clause as interpreted by the U. S. Supreme Court in *Quill*. Moreover, as *Quill's* interpretation of the commerce clause is binding on any state or federal lower court, it can be

changed only by the Court or action by Congress exercising its power to regulate interstate commerce. The notice and reporting requirements, if amended, would not be contrary to *Quill*, and would not violate the commerce clause, based on a recent decision of the Tenth Circuit U. S. Court of Appeals.<sup>1</sup> Because the notice and reporting requirements are not severable from the unconstitutional collection obligation under the bill as currently drafted, we conclude that LB 44 is presently unconstitutional in its entirety. The bill may, however, be amended to remedy these constitutional deficiencies.

## ANALYSIS

### I. LB 44's Requirement That Remote Sellers With No Physical Presence In Nebraska Collect And Remit Sales Tax From Nebraska Purchasers Is Unconstitutional Under *Quill*.

*Quill* addressed the constitutionality of a North Dakota statute requiring mail-order sellers who had no physical presence in the state to collect and remit use tax on sales to North Dakota residents. North Dakota brought a declaratory judgment action against *Quill* seeking a determination that it was liable for failing to collect and remit use tax. *Quill* argued the collection obligation was unconstitutional under both the due process and commerce clauses of the U.S. Constitution. 504 U.S. at 301-306. In an earlier case, *National Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967) ["*Bellas Hess*"], the Court held an Illinois statute similar to North Dakota's that required a mail order seller with no physical presence in Illinois to collect use tax on products sold to Illinois residents "violated the Due Process Clause of the Fourteenth Amendment and created an unconstitutional burden on interstate commerce." *Id.* at 301. The Supreme Court of North Dakota, however, "declined to follow *Bellas Hess* because 'the tremendous social, economic, commercial, and legal innovations' of the past quarter-century ha[d] rendered its holding 'obsole[te].'" *Id.* (quoting *State by and through Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 208 (N.D. 1991)). Reversing North Dakota court's decision that the statute was constitutional, the Court undertook separate inquiries under the due process and commerce clauses. While the Court determined that *Quill*'s contacts with the state were sufficient for due process purposes, it found *Quill*'s lack of physical presence in the state rendered the collection obligation invalid under the commerce clause. 504 U.S. at 308, 317-18.

Addressing the due process issue, the Court stated "[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" 504 U.S. at 306 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)). It

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<sup>1</sup> *Direct Marketing Ass'n v. Brohl*, 814 F.3d 1129 (10<sup>th</sup> Cir.), cert. denied 137 S. Ct. 593 (2016).

noted that its "due process jurisprudence ha[d] evolved substantially in the 25 years since *Bellas Hess*..." beyond the point of requiring "physical presence" to permit a state to exercise jurisdiction over a defendant. 504 U.S. at 307-308. Thus, despite Quill's lack of physical presence in North Dakota, the Court found that, as Quill "purposefully directed its activities at North Dakota residents, [the] magnitude of those contacts [was] more than sufficient for due process purposes." 504 U.S. at 308.

On the commerce clause issue, the Court recognized that "Article I, § 8, cl. 3, of the Constitution expressly authorizes Congress to 'regulate Commerce with foreign nations, and among the several states.'" 504 U.S. at 309. While the clause "says nothing about the protection of interstate commerce in the absence of any action by Congress...", it "is more than an affirmative grant of power; it has a negative sweep as well." *Id.* The Court stated its "interpretation of the 'negative' or 'dormant' Commerce Clause ha[d] evolved substantially over the years, particularly as the Clause concerns limitations on state taxation powers." *Id.* The Court drew a distinction between the due process and commerce clauses based on the different constitutional concerns underlying the two clauses. It reasoned that, while the due process clause is concerned with "the fundamental fairness of governmental activity", the commerce clause is focused on "structural concerns about the effects of state regulation on the national economy." *Id.* at 312. "Thus, the 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." *Id.* at 313.

The Court noted the four-part test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1974) ["*Complete Auto*"], under which a tax will be found not to violate the commerce clause if the "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 504 U.S. at 311 (quoting *Complete Auto* at 279). *Bellas Hess* involved the first prong, "substantial nexus" with the taxing state, which, in the context of imposing use tax collection duties on an out-of-state seller, required "physical presence". 504 U.S. at 312. The Court declined to overrule *Bellas Hess*' "bright-line rule", as it "firmly establishe[d] the boundaries of legitimate state authority to impose a duty to collect sales and use taxes", and "encourage[d] settled expectations by businesses and individuals." *Id.* at 315-16. Noting it had "frequently relied on the *Bellas Hess* rule in the last 25 years...", the Court found the "rule ha[d] engendered substantial reliance and ha[d] become part of the basic framework of a sizable industry." *Id.* at 317. "[T]he doctrine of *stare decisis*..." thus "counsel[ed] adherence to [*Bellas Hess*'] settled precedent." *Id.* Finally, the Court emphasized that Congress had "the ultimate power to resolve" the issue, and was "now free



to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Id.* at 318.<sup>2</sup>

Two years ago, the Court recognized the continuing impact of *Quill* as limiting state authority to impose tax collection obligations on out-of-state sellers. *Direct Marketing Ass'n v. Brohl*, 135 S.Ct. 1124 (2015) ("*Brohl I*"). While emanating from a challenge to the constitutionality of use tax notice and reporting requirements imposed by Colorado on noncollecting sellers lacking a physical presence in the state, the issue in *Brohl I* was whether bringing that challenge in federal court was barred by the Tax Injunction Act, 28 U.S.C. § 1341 ["TIA"]. The TIA provides that federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." § 1341. Citing *Quill*, the majority opinion noted that, "[u]nder our negative Commerce Clause precedents, Colorado [could] not require retailers who lack a physical presence in the State to collect these taxes on behalf of the Department." 135 S. Ct. at 1127. The Court reversed the Tenth Circuit's holding that the TIA barred the suit and remanded for further proceedings, finding the notice and reporting requirements imposed by Colorado did not involve the "assessment, levy, or collection" of any state tax. *Id.* at 1131. Nor did the suit "restrain" the "assessment, levy, or collection" of a state tax, as it "merely inhibit[ed] those activities." *Id.* at 1133.

In a concurring opinion, however, Justice Kennedy wrote separately regarding "what may well be a serious injustice faced by Colorado and many other States." 135 S Ct. at 1134 (Kennedy, J., concurring). Justice Kennedy characterized *Quill's* holding as "tenuous", and as "a holding now inflicting extreme harm and unfairness on the States." *Id.* He asserted the Court should have taken the opportunity in *Quill* "to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy..." asserting "[t]here is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently 'substantial nexus' to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet." *Id.* at 1134-35. This argument, in his view, "has grown stronger, and the cause more urgent, with time." *Id.* at 1135. Justice Kennedy noted that in 1992, when *Quill* was decided, "the Internet was in its infancy..." and that, "[b]y 2008,

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<sup>2</sup> Despite the Court's suggestion in *Quill* that Congress address the issue, Congress has not acted. A version of the Marketplace Fairness Act was approved by the Senate in 2013 (S. 743), but languished in the House of Representatives. Two newer proposals are the Marketplace Fairness Act of 2015 (S. 698) and the Remote Transaction Parity Act (H.R. 2775). At this time, the likelihood of congressional action in the near future appears remote.

e-commerce alone totaled \$3.16 trillion per year in the United States." *Id.* In his view, "[b]ecause of *Quill* and *Bellas Hess*, States have been unable to collect many of the taxes due on these purchases...", resulting in "a startling revenue shortfall in many States, with concomitant unfairness to local retailers and their customers who do pay taxes at the register." *Id.* Calling *Quill* "[a] case questionable when decided", he noted that "*Quill* now harms States to a degree far greater than could be anticipated earlier." *Id.* While stating that, given "changes in technology and consumer sophistication, it [was] unwise to delay any longer reconsideration of the Court's holding in *Quill*...", he recognized "[t]he instant case [did] not raise this issue in a manner appropriate for the Court to address it." *Id.* Justice Kennedy concluded by stating the case provided "the means to note the importance of reconsidering doubtful authority...", and urged "[t]he legal system [to] find an appropriate case for [the] Court to reexamine *Quill* and *Bellas Hess*." *Id.*

Taking up Justice Kennedy's invitation to challenge *Quill*, South Dakota enacted a statute in 2016 requiring certain remote sellers to comply with the state's sales tax laws "as if the seller had a physical presence in the state." S.B. 106, 2016 Leg., 91<sup>st</sup> Sess. (S.D. 2016).<sup>3</sup> The law applies only to sellers that exceed \$100,000 in gross revenues from sales within South Dakota, or have more than 200 separate transactions within the state in the prior calendar year. S.B. 106, § 1(1)-(2). The statute permits the State to bring a declaratory judgment action in state court to establish that the collection requirement imposed on remote sellers is "valid under state and federal law." S.B. 106, § 2. The filing of such a declaratory judgment action operates as an injunction prohibiting enforcement of the collection obligation. S.B. 106, § 3. South Dakota proceeded to file an action as allowed by the statute against several remote sellers that did not voluntarily agree to undertake sales tax collection. *State of South Dakota v. Wayfair, Inc., et al.*, 32CIV16-000092 (Sixth Judicial Circuit Court). The companies removed the case to federal district court. *State of South Dakota v. Wayfair, Inc.*, 3:16-cv-03019. The federal district court, however, granted the State's motion to remand the matter to state court. *Id.* (Order and Opinion Granting Plaintiff's Motion to Remand to State Court (Jan. 17, 2017)).<sup>4</sup> On March 6,

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<sup>3</sup> Wyoming recently passed remote seller collection legislation similar to South Dakota. Ch. 85 (H.B. 19), Wyoming Laws 2017 (*to be codified at* Wyo. Stat. Ann. §§ 39-15-101 and 39-15-501)). Similar remote seller collection legislation is also being considered in Indiana (S.B. 545).

<sup>4</sup> The federal district court remanded the case to state court for lack of federal jurisdiction based on *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983). Order and Opinion at 1. The district court concluded the TIA was not a bar to the suit proceeding in federal court, as it originated in state court as a suit brought by the State, and did not involve an action by a taxpayer seeking to enjoin collection. *Id.* at 19-20. A suit to enjoin the collection obligation brought by a remote seller subject to LB 44 would fall squarely within the TIA, precluding suit in federal court.

2017, the state court granted the defendant retailers' motion for summary judgment. *State of South Dakota v. Wayfair, Inc.*, 32CIV16-000092 (Order Granting Defendants' Motion for Summary Judgment). In its order, the circuit court noted the State acknowledged that, under *Quill*, it was "prohibited from imposing sales tax collection and remittance obligations on the Defendants...", and that the court was "required to grant summary judgment in Defendants' favor, because of the *Quill* ruling." *Id.* at 2. The circuit court recognized it was "duty bound to follow applicable precedent of the United States Supreme Court...", and "[t]his [was] true even when changing times and events clearly suggest a different outcome...", as it was "not the role of a state circuit court to disregard a ruling from the United States Supreme Court." *Id.* at 2-3. South Dakota has appealed the circuit court's decision to the South Dakota Supreme Court, and review of the decision by that court will undoubtedly be sought in the U.S. Supreme Court to provide the "appropriate case" referred to by Justice Kennedy to "reexamine *Quill* and *Bellas Hess*." 135 S. Ct. at 1135.<sup>5</sup>

If a "precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," lower courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). State and lower federal courts are "bound by [the Supreme] Court's interpretation of federal law." *James v. City of Boise*, 136 S. Ct. 685, 686 (2016). *See also Elmendorf v. Taylor*, 23 U.S. 152, 160 (1825) ("[T]he construction given by [the Supreme] Court to the constitution and laws of the United States is received by all as the true construction."). The South Dakota circuit court correctly recognized it was bound to follow *Quill*. The same would be true of any Nebraska court in a suit challenging the constitutionality of the sales tax collection requirement imposed on remote sellers with no physical presence in the state by LB 44. *Quill's* interpretation of the commerce clause is binding on any state or federal lower court, and can be changed only by the Court or action by Congress exercising its power to regulate interstate commerce.

As stated by Justice Kennedy in his concurrence in *Brohl I*, there are compelling arguments for the Court to revisit and ultimately overrule its decisions in *Quill* and *Bellas Hess*. The "physical presence" requirement may well be outdated and unrealistic given economic and technological changes which have occurred since *Quill* was decided. Unless or until *Quill*

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<sup>5</sup> Tennessee and Alabama have adopted regulations challenging *Quill* which impose sales tax collection requirements on out-of-state sellers lacking physical presence in the state. Ala. Admin. Code R. 810-6-1-.90.03; Tenn. Comp. R. & Regs. 1320-05-01-.129. A challenge to Alabama's regulation is pending in the Alabama Tax Tribunal. *Newegg, Inc. v. Alabama Dep't of Revenue*, No. S. 16-613 (filed June 8, 2016).

is overruled by the Court or Congress, however, LB 44's imposition of a sales tax collection requirement on remote sellers with no physical presence in the state is unconstitutional under the commerce clause.<sup>6</sup>

## II. LB 44's Notice And Reporting Requirements, If Amended, Would Not Violate The Commerce Clause.

On remand from the Supreme Court, the U.S. Court of Appeals for the Tenth Circuit addressed whether use tax notice and reporting requirements imposed by Colorado on noncollecting sellers lacking a physical presence in the state violated the commerce clause. *Direct Marketing Ass'n v. Brohl*, 814 F.3d 1129 (10<sup>th</sup> Cir.), cert. denied 137 S. Ct. 593 (2016) ["*Brohl II*"]. In 2010, Colorado enacted legislation imposing notice and reporting obligations on non-collecting retailers. Colo. Rev. Stat. § 39-21-112(3.5)(b)-(d)(I)-(III). A "non-collecting retailer" was defined as "a retailer that sells goods to Colorado purchasers and that does not collect Colorado sales or use tax." 1 Colo. Code Regs. § 201-1:39-21-112.3.5(1)(a)(i). Retailers making less than \$100,000 in total gross sales in Colorado were exempted from the notice and reporting requirements. *Id.* § 201-1:39-21-112.3.5(1)(a)(iii). The requirements included sending: (1) A "transactional notice" to purchasers advising they may be subject to Colorado's use tax; (2) An "annual purchase summary" with the dates, categories, and amounts of purchases, again informing purchasers of their obligation to pay use tax; and (3) An annual "customer information report" to the Colorado Department of Revenue listing customer names, addresses, and total amount spent. Colo. Rev. Stat. § 39-21-112(3.5)(c)(I), (d)(I)(A), and (d)(II)(A). Penalties were provided for failure to provide the required notices and reports. Colo. Rev. Stat. § 39-21-112(3.5)(d)(III)(A)-(B). Direct Marketing Association ["DMA"] filed a facial challenge to the Colorado law, asserting, in part, that it "violated the dormant commerce clause because it discriminate[d] against and unduly burden[ed] interstate commerce." 814 F.3d at 1133-34.

Reversing the federal district court's decision holding the law unconstitutional, the Tenth Circuit held that Colorado's remote seller notice and reporting requirements did not violate the dormant commerce clause.

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<sup>6</sup> Vermont has also enacted legislation similar to South Dakota and Wyoming with the same dollar and transaction thresholds. H. 873, § 27, Vermont Laws 2016. Recognizing the preclusive effect of *Quill*, however, the effective date of the collection requirement imposed on remote vendors under the Vermont statute is delayed until "after a controlling court decision or federal legislation abrogates the physical presence requirements of *Quill v. North Dakota*, 504 U.S. 298 (1992)." *Id.* at § 41(5). Similar remote seller collection legislation proposed in North Dakota also has an effective date contingent on the Supreme Court's issuance of an opinion overruling *Quill*. S.B. 2298.

Addressing *Quill's* "bright-line" physical presence rule, the court noted that, "[e]ven though the Supreme Court has not overruled *Quill*, it has not extended the physical presence rule beyond the realm of sales and use tax collection." 814 F.3d at 1137. The Tenth Circuit concluded *Quill* "applie[d] narrowly to sales and use tax collection", and its physical presence rule was not applicable to Colorado's remote seller notice and reporting requirements. *Id.* at 1136, 1139.

In assessing if the Colorado law discriminated against interstate commerce, the court found it was not "facially discriminatory" because it "did not distinguish between in-state and out-of-state economic interests", but "instead impose[d] differential treatment based on whether the retailer collects Colorado sales or uses taxes." 814 F.3d at 1141. The "direct effects" of the law were also found not to be discriminatory because: (1) "[T]he reporting obligation [did] not give in-state retailers a competitive advantage"; (2) "[T]he non-collecting retailers [were] not similarly situated to the in-state retailers, who must comply with tax collection and reporting requirements that [were] not imposed on the out-of-state non-collecting retailers"; and (3) "[T]he reporting requirements [were] designed to increase compliance with preexisting tax obligations, and appl[ied] only to retailers that [were] not otherwise required to comply with the greater burden of tax collection and reporting." *Id.* at 1143-44. The court thus concluded that "DMA ha[d] not shown the Colorado Law imposes a discriminatory economic burden on out-of-state vendors when viewed against the backdrop of the collecting retailers' tax collection and reporting obligations." *Id.* at 1144.

The Tenth Circuit also found the Colorado remote seller reporting requirements did not impose an undue burden on interstate commerce. It found *Quill* was "not binding in light of Supreme Court and Tenth Circuit decisions construing it narrowly to apply only to the duty to collect and remit taxes." 814 F.3d at 1146. The court noted that the Supreme Court in *Brohl I* "not only characterized *Quill* as establishing the principle that a state 'may not require retailers who lack a physical presence in the State to *collect* these taxes...', it also concluded that the notice and reporting requirements in the Colorado Law do not constitute a form of tax collection." *Id.* (quoting *Brohl I*, 135 S. Ct. at 1127 (emphasis in original)). "Because the Colorado Law's notice and reporting requirements are regulatory and are not subject to the bright-line rule of *Quill*, [the court determined] this end[ed] the undue burden inquiry." 814 F.3d at 1147.

LB 44 imposes notice and reporting requirements on remote sellers that "refuse[ ] to collect Nebraska sales tax." LB 44, § 5. The notice and reporting obligations established in LB 44 are similar to those contained in Colorado's statute and regulations. Section 5 of the bill does not, however, independently include the revenue and transaction limits required to impose these obligation, but instead references the limits imposed in Section 4 (gross revenue from sales exceeding \$100,000 or 200 or more separate

transactions) that trigger the obligation for remote sellers to collect sales tax. Thus, the notice and reporting requirements could be defended as constitutional against a commerce clause challenge in light of *Brohl II*, provided the bill is amended to specifically include the thresholds within the notice and reporting sections, based on our conclusion that the collection obligation imposed in Section 4 is unconstitutional.<sup>7</sup>

### III. The Mandatory Collection Obligation Imposed By Section 4 of LB 44 Is Contrary to *Quill's* Physical Presence Rule.

It has been suggested that the collection requirement in Section 4 of LB 44 is not invalid because it is optional, as remote sellers that refuse to collect the tax can comply by satisfying the act's notice and reporting requirements. The Tenth Circuit rejected a similar argument in *Brohl II*. Colorado "contend[ed] the law [was] not discriminatory because out-of-state retailers [could] either (a) comply with the notice and reporting requirements or (b) collect and remit taxes like in-state retailers." 814 F.3d at 1144. The court "disagree[d] with the [State] that out-of-state retailers' having the option to collect and remit sales taxes makes the Colorado Law nondiscriminatory...", stating that "*Quill* unequivocally holds that out-of-state retailers without a physical presence in the state need not collect sales tax." *Id.* It noted that "*Quill* privileges out-of-state retailers in that regard, and the possibility that they might choose to give up that privilege rather than comply with the challenged Colorado Law does not make the Colorado law constitutional." *Id.* As *Quill* applied only to the *collection* of sales and use taxes, however, the court found it was inapplicable to Colorado's notice and reporting obligations. *Id.*

Section 4 of LB 44 provides remote sellers meeting the required gross revenue and transaction thresholds "shall be subject to the Nebraska Revenue Act of 1967" and "shall remit the sales tax due" under the Revenue Act. "As a general rule, in the construction of statutes, the word 'shall' is considered mandatory and inconsistent with the idea of discretion." *Loup City Public Schools v. Nebraska Dep't of Revenue*, 252 Neb. 387, 393, 562 N.W.2d 551, 555 (1997). The remittance obligation imposed by Section 4 of LB 44 is mandatory. Indeed, the notice and reporting provisions apply only if a remote seller "refuses to collect Nebraska sales tax" in contravention of the mandatory collection obligation imposed under Section 4. LB 44, § 5.

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<sup>7</sup> In a 1995 opinion, we concluded that it was unclear whether legislation proposing to require retailers having "minimum contacts" with the State, but not physical presence, to report information regarding purchases by Nebraska residents, would violate the commerce clause under the *Quill* decision. Op. Att'y Gen. No. 95038 (May 16, 1995). The Tenth Circuit's recent decision in *Brohl II* supports the validity of imposing notice and reporting requirements on remote sellers without physical presence, and properly limits *Quill* to the imposition of state tax collection requirements.

As the Tenth Circuit instructed in *Brohl II*, however, *Quill* precludes states from imposing a collection requirement on remote sellers lacking physical presence in the taxing state. Providing an "option" to those sellers by satisfying notice and reporting requirements does not make the collection requirement constitutional.

**IV. As The Notice and Reporting Requirements Are Not Severable From The Unconstitutional Collection Requirement, LB 44, In Its Current Form, Is Unconstitutional In Its Entirety.**

We have concluded that Section 4 of LB 44, which mandates that remote sellers not having a physical presence in Nebraska meeting specified revenue and transaction requirements collect and remit sales tax, is unconstitutional under *Quill*. As the collection requirement in Section 4 is invalid, the question which remains is whether it is severable from the notice and reporting provisions in Section 5. "The general rule is that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions." *Big John's Billiards, Inc. v. State*, 288 Neb. 938, 951, 852 N.W.2d 727, 739 (2014).

To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating the Legislature would have enacted the bill without the invalid portion. *Id.*

Applying this test, the bill is not workable without the invalid portion, as the notice and reporting requirements in Section 5 do not independently set out the criteria for determining which remote sellers must meet those requirements, which are part of the invalid Section 4. Accordingly, the valid provisions cannot be enforced independently. Moreover, the invalid portion is likely an inducement to passage of the invalid portion, and, as such, severing the invalid portion would do violence to the Legislature's intent. Finally, the statute contains no severability clause. Applying each of the severability factors, we conclude that LB 44, in its present form, is unconstitutional in its entirety.

That is not to say, however, that the bill could not be amended to satisfy constitutional requirements. If the unconstitutional mandatory collection requirement was removed, and the notice and reporting requirements were amended to add the criteria for determining which remote sellers would be subject to those requirements, the bill would track the statute and regulations implementing Colorado's notice and reporting requirements which were held

not to violate the commerce clause in *Brohl II*. If a collection requirement is enacted, it could be made valid by delaying its effective date to such time as *Quill* is overruled or federal legislation is enacted to permit states to require remote sellers without physical presence to collect sales tax, as was done in Vermont.<sup>8</sup> Further, amending the notice and reporting requirement to provide that a remote seller who "voluntarily" agrees to collect and remit sales tax is excused from such requirements would also remedy any constitutional concern, as it does not attempt to mandate collection in contravention of *Quill*. While the bill in its present form is unconstitutional, the Legislature has options to remedy these constitutional deficiencies.

### CONCLUSION

In sum, we conclude that the sales tax collection obligation imposed on remote sellers having no physical presence in Nebraska under Section 4 of LB 44 is unconstitutional under the commerce clause as interpreted by the U. S. Supreme Court in *Quill*. Moreover, as *Quill's* interpretation of the commerce clause is binding on any state or federal lower court, it can be changed only by the Supreme Court or action by Congress exercising its power to regulate interstate commerce. The notice and reporting requirements in Section 5, if amended, would not be contrary to *Quill*, and would not violate the commerce clause, based on the Tenth Circuit's recent decision *Brohl II*. Because the notice and reporting requirements are not severable from the unconstitutional collection obligation under the bill as currently drafted, however, we conclude that LB 44 is presently unconstitutional in its entirety. As explained above, the bill could be amended to remedy these constitutional defects.

Very truly yours,  
DOUGLAS J. PETERSON  
Attorney General  
(Signed) L. Jay Bartel  
Assistant Attorney General

07-1109-29

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<sup>8</sup> See footnote 6, *supra*.



**GENERAL FILE**

**LEGISLATIVE BILL 640.** The Groene amendment, AM992, found on page 1021 and considered in this day's Journal, to the committee amendment, was renewed.

**SPEAKER SCHEER PRESIDING****PRESIDENT FOLEY PRESIDING**

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

Senator Groene moved for a call of the house. The motion prevailed with 45 ayes, 0 nays, and 4 not voting.

The Groene amendment was adopted with 30 ayes, 3 nays, 13 present and not voting, and 3 excused and not voting.

The Chair declared the call raised.

Senator Briese offered the following amendment to the committee amendment:

AM1036 is available in the Bill Room.

Pending.

**RESOLUTION(S)**

**LEGISLATIVE RESOLUTION 103.** Introduced by Kolterman, 24.

WHEREAS, Concordia University will confer a Distinguished Service Award on Ruth and Lloyd Probasco at the commencement ceremony on May 6, 2017; and

WHEREAS, the Distinguished Service Award is presented to individuals who have distinguished themselves through outstanding public service; and

WHEREAS, the couple is recognized for their passionate leadership, engagement, and dedication to the many ministries they support with their time and talents; and

WHEREAS, Ruth earned degrees from Concordia College in Portland, now Concordia University, Portland, Oregon, and Concordia University, Nebraska; and

WHEREAS, Ruth has served the church as a teacher and worked as a successful travel agent; and

WHEREAS, the philanthropic spirit in Ruth has been demonstrated through her work with the Rupert Dunklau Foundation and through her service on the Christ Lutheran Church Foundation Board, as campaign director at Concordia Seminary, as gift officer at Lutheran Family and

Children's Services in St. Louis, Missouri, and as the director of alumni and university relations for Concordia University, Nebraska; and

WHEREAS, Lloyd earned a degree from Concordia College in Portland, now Concordia University, Portland, Oregon, and attended Concordia Teachers College, now Concordia University, Nebraska, and Weber State College in Ogden, Utah; and

WHEREAS, having earned Certified Financial Planner, Certified Fundraising Executive, and Development Marketing Associates certifications, Lloyd served as a fundraiser and fundraising consultant for a variety of ministries in the Lutheran Church-Missouri Synod; and

WHEREAS, Lloyd is a founding member of the Association of Lutheran Development Executives and has served as vice-president, president, and national mentoring chair in addition to chairing the national conference in Kansas City; and

WHEREAS, the couple currently works together in their business, Probasco Partners, Inc., a stewardship, gift planning, and strategic planning consulting firm.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDRED FIFTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Legislature congratulates Ruth and Lloyd Probasco for being honored by Concordia University with the Distinguished Service Award.

2. That a copy of this resolution be sent to Concordia University and to Ruth and Lloyd Probasco.

Laid over.

#### AMENDMENT(S) - Print in Journal

Senator Friesen filed the following amendment to LB640:  
AM1065

(Amendments to Standing Committee amendments, AM752)

- 1 1. On page 9, line 9, strike "fifty-five percent of the" and insert
- 2 an underscored colon; strike line 10 and insert the following new
- 3 subdivisions:
- 4 "(a) Fifty-five percent of the total general fund revenue for such
- 5 local system for tax years 2018 and 2019;
- 6 (b) Fifty percent of the total general fund revenue for such local
- 7 system for tax years 2020 and 2021;
- 8 (c) Forty-five percent of the total general fund revenue for such
- 9 local system for tax years 2022 and 2023; and
- 10 (d) Forty percent of the total general fund revenue for such local
- 11 system for tax year 2024 and each tax year thereafter."; and in line 13
- 12 strike "fifty-five percent" and insert "the percent designated in
- 13 subsection (2) of this section for such tax year".

**MOTION(S) - Print in Journal**

Senator Baker filed the following motion to LB640:  
MO88  
Indefinitely postpone.

**VISITORS**

Visitors to the Chamber were 45 fourth-grade students from Lincoln Christian; 25 twelfth-grade students and teachers from Omaha Burke High School; and 70 fourth-grade students from St. Pius X/St. Leo School, Omaha.

**RECESS**

At 11:52 a.m., on a motion by Senator Craighead, the Legislature recessed until 1:30 p.m.

**AFTER RECESS**

The Legislature reconvened at 1:30 p.m., President Foley presiding.

**ROLL CALL**

The roll was called and all members were present except Senator Krist who was excused; and Senators Kolterman, McCollister, Stinner, and Watermeier who were excused until they arrive.

**MESSAGE(S) FROM THE GOVERNOR**

April 17, 2017

Mr. President, Speaker Scheer  
and Members of the Legislature  
State Capitol  
Lincoln, NE 68509

Dear Mr. President, Speaker Scheer and Members of the Legislature:

Contingent upon your approval, the following individual is being appointed to the Nebraska State Fair Board:

Beth Smith, 2310 Woodsdale Blvd., Lincoln, NE 68502

The aforementioned appointee is respectfully submitted for your consideration. Copies of the certificate and background information are included for your review.

(Signed) Sincerely,  
Pete Ricketts  
Governor

Enclosures

**SELECT FILE**

**LEGISLATIVE BILL 91A.** Senator Hilkemann offered the following amendment:

AM1057

1 1. Strike the original section and insert the following new section:  
2 Section 1. There is hereby appropriated \$64,941 from the Health and  
3 Human Services Cash Fund for FY2018-19 to the Department of Health and  
4 Human Services, for Program 33, to aid in carrying out the provisions of  
5 Legislative Bill 91, One Hundred Fifth Legislature, First Session, 2017.  
6 Total expenditures for permanent and temporary salaries and per  
7 diems from funds appropriated in this section shall not exceed \$45,126  
8 for FY2018-19.

The Hilkemann amendment was adopted with 34 ayes, 0 nays, 10 present and not voting, and 5 excused and not voting.

Advanced to Enrollment and Review for Engrossment.

**LEGISLATIVE BILL 225A.** Advanced to Enrollment and Review for Engrossment.

**LEGISLATIVE BILL 263A.** Advanced to Enrollment and Review for Engrossment.

**LEGISLATIVE BILL 427.** ER50, found on page 973, was adopted.

Senator Scheer offered his amendment, AM987, found on page 1002.

The Scheer amendment was adopted with 38 ayes, 0 nays, 9 present and not voting, and 2 excused and not voting.

Senator Erdman offered his amendment, AM968, found on page 1022.

Senator Baker moved the previous question. The question is, "Shall the debate now close?" The motion prevailed with 27 ayes, 5 nays, and 17 not voting.

Senator Erdman moved for a call of the house. The motion prevailed with 36 ayes, 3 nays, and 10 not voting.

Senator Erdman requested a roll call vote on his amendment.

Voting in the affirmative, 21:

Albrecht	Clements	Groene	Larson	Watermeier
Bostelman	Craighead	Halloran	Lowe	
Brasch	Erdman	Hilgers	Murante	
Brewer	Friesen	Hughes	Riepe	
Briese	Geist	Kuehn	Scheer	

Voting in the negative, 18:

Baker	Hansen	Kolowski	Pansing Brooks	Wayne
Blood	Harr	McCollister	Quick	Wishart
Bolz	Hilkemann	McDonnell	Vargas	
Chambers	Howard	Morfeld	Walz	

Present and not voting, 8:

Crawford	Kolterman	Linehan	Smith
Ebke	Lindstrom	Schumacher	Williams

Excused and not voting, 2:

Krist	Stinner
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The Erdman amendment lost with 21 ayes, 18 nays, 8 present and not voting, and 2 excused and not voting.

The Chair declared the call raised.

Advanced to Enrollment and Review for Engrossment.

**LEGISLATIVE BILL 44.** Senator Watermeier offered the following amendment:

AM1074

1 1. Strike the original sections and insert the following new

2 sections:

3 Section 1. Sections 1 to 6 of this act shall be known and may be

4 cited as the Remote Seller Sales Tax Collection Act.

5 Sec. 2. The Legislature finds that:

6 (1) The inability to effectively collect the sales or use tax from

7 remote sellers who deliver tangible personal property, products delivered

8 electronically, or services directly into Nebraska is seriously eroding

9 Nebraska's sales tax base, causing revenue losses and imminent harm to

10 the state through the loss of critical funding for state and local

11 services;

12 (2) The structural advantages of remote sellers, including the

13 absence of point-of-sale tax collection, along with the general growth of

14 online retail, make clear that further erosion of Nebraska's sales tax

15 base is likely in the near future;

16 (3) In contrast with the expanding harms caused to Nebraska from the

17 lack of sales tax collection by remote sellers, the costs of that

18 collection have fallen. Given modern computing and software options, it  
19 is neither unusually difficult nor burdensome for remote sellers to  
20 collect and remit sales taxes associated with sales into Nebraska; and  
21 (4) It is necessary for Nebraska to pass the Remote Seller Sales Tax  
22 Collection Act to clarify the obligations of remote sellers with respect  
23 to sales made into Nebraska.

24 Sec. 3. For purposes of the Remote Seller Sales Tax Collection Act:  
25 (1) Delivered electronically has the same meaning as in section  
26 77-2701.49;

27 (2) Department means the Department of Revenue;

1 (3) Remote seller means any person who does not have a physical  
2 presence in this state and who meets either of the following criteria in  
3 the previous or current calendar year:

4 (a) The person's gross revenue from the sale of tangible personal  
5 property, products delivered electronically, and services delivered into  
6 Nebraska exceeds one hundred thousand dollars; or

7 (b) The person sold tangible personal property, products delivered  
8 electronically, or services for delivery into Nebraska in two hundred or  
9 more separate transactions;

10 (4) Service means a service described in subsection (4) of section  
11 77-2701.16; and

12 (5) Tangible personal property has the same meaning as in section  
13 77-2701.39.

14 Sec. 4. (1) Notwithstanding any other provision of law, a remote  
15 seller may voluntarily choose to (a) be subject to the Nebraska Revenue  
16 Act of 1967, the Local Option Revenue Act, and sections 13-319 and  
17 13-2813, (b) remit the sales tax due under such acts and sections, and  
18 (c) follow all applicable procedures and requirements of law as if the  
19 remote seller had a physical presence in this state.

20 (2) No remote seller who remits sales tax under this section shall  
21 be liable to a purchaser who claims that the sales tax has been  
22 overcollected because this section is later deemed unlawful.

23 (3) Nothing in this section affects the obligation of any purchaser  
24 from this state to remit use tax as to any applicable transaction in  
25 which the remote seller does not collect and remit an offsetting sales  
26 tax.

27 Sec. 5. If a remote seller does not voluntarily choose to comply  
28 with subdivisions (1)(a), (b), and (c) of section 4 of this act, such  
29 remote seller shall:

30 (1) Notify Nebraska purchasers that sales or use tax is due on  
31 certain purchases made from the remote seller and that the State of  
1 Nebraska requires the purchaser to file a sales or use tax return.  
2 Failure to provide the notice required in this subdivision shall subject  
3 the remote seller to a penalty of five dollars for each such failure  
4 unless the remote seller shows reasonable cause for such failure;

5 (2) Send notification to all Nebraska purchasers by January 31 of  
6 each year showing the total amount paid by the purchaser for Nebraska  
7 purchases made from the remote seller in the previous calendar year and  
8 such other information as the department shall require by rule and

9 regulation. Such notification shall include, if available, the dates of  
10 purchases, the amounts of each purchase, and the category of the  
11 purchase, including, if known by the remote seller, whether the purchase  
12 is exempt or not exempt from taxation. The notification shall state that  
13 the State of Nebraska requires a sales or use tax return to be filed and  
14 sales or use tax to be paid on certain Nebraska purchases made by the  
15 purchaser from the remote seller. The notification shall be sent  
16 separately to all Nebraska purchasers by first-class mail and shall not  
17 be included with any other shipments. The notification shall include the  
18 words "Important Tax Document Enclosed" on the exterior of the mailing.  
19 The notification shall include the name of the remote seller. Failure to  
20 send the notification required in this subdivision shall subject the  
21 remote seller to a penalty of ten dollars for each such failure unless  
22 the remote seller shows reasonable cause for such failure; and  
23 (3) File an annual statement for each purchaser with the department  
24 on such forms as are provided or approved by the department showing the  
25 total amount paid for Nebraska purchases by such purchasers during the  
26 preceding calendar year or any portion thereof, and such annual statement  
27 shall be filed on or before March 1 of each year. The department may  
28 require any remote seller that makes total Nebraska sales of more than  
29 one hundred thousand dollars in a year to file the annual statement  
30 described in this subdivision electronically for that year. Failure to  
31 file the annual statement required in this subdivision shall subject the  
1 remote seller to a penalty of ten dollars for each purchaser that should  
2 have been included in such annual statement unless the remote seller  
3 shows reasonable cause for such failure.  
4 Sec. 6. The department may adopt and promulgate rules and  
5 regulations to carry out the Remote Seller Sales Tax Collection Act.  
6 Sec. 7. If any section in this act or any part of any section is  
7 declared invalid or unconstitutional, the declaration shall not affect  
8 the validity or constitutionality of the remaining portions.  
9 Sec. 8. Since an emergency exists, this act takes effect when  
10 passed and approved according to law.

Senator Chambers offered the following amendment to the Watermeier amendment:

FA64

Amend AM1074

Strike Section 5.

Pending.

**LEGISLATIVE BILL 512.** ER49, found on page 936, was adopted.

Senator Morfeld offered his amendment, AM862, found on page 934.

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

Senator Briese offered his amendment, AM970, found on page 986.

The Briese amendment was adopted with 33 ayes, 0 nays, 13 present and not voting, and 3 excused and not voting.

Pending.

**COMMITTEE REPORT(S)**  
Enrollment and Review

**LEGISLATIVE BILL 68.** Placed on Select File with amendment.  
ER58

1 1. In the Standing Committee amendment, AM630, on page 21, line 31,  
2 strike "62-2404" and insert "69-2404".  
3 2. On page 1, strike beginning with "15-255" in line 1 through line  
4 6 and insert "15-255, 17-556, 18-1703, 28-101, 28-1201, 28-1204,  
5 28-1204.01, 28-1212, 28-1212.03, 69-2401, and 69-2404, Reissue Revised  
6 Statutes of Nebraska, and sections 14-102, 16-227, 23-187, 69-2402,  
7 69-2403, 71-904.01, and 71-963, Revised Statutes Cumulative Supplement,  
8 2016; to prohibit certain regulation of firearms, ammunition, and firearm  
9 accessories by cities, villages, and counties as prescribed; to provide  
10 for a cause of action; to define terms; to prohibit possession of  
11 firearms, air guns, air rifles, or paintball guns in a public place in a  
12 city of the metropolitan class as prescribed; to prohibit the  
13 transportation of firearms in a city of the metropolitan class as  
14 prescribed; to provide penalties; to change provisions relating to  
15 prohibited acts involving stolen firearms; to change provisions relating  
16 to handgun certificates; to provide for an affirmative defense; to  
17 harmonize provisions; and to repeal the original sections."

(Signed) Anna Wishart, Chairperson

**COMMITTEE REPORT(S)**  
Government, Military and Veterans Affairs

**LEGISLATIVE BILL 25.** Placed on General File.

(Signed) John Murante, Chairperson

Transportation and Telecommunications

**LEGISLATIVE BILL 351.** Placed on General File with amendment.  
AM853

1 1. On page 12, line 28, after "served" insert "as a commissioned  
2 officer".  
3 2. On page 15, after line 11 insert the following new subsection:  
4 "(4) The eligibility requirements described in section 60-4,189 that  
5 are used in determining eligibility for a veteran designation on an  
6 operator's license or a state identification card shall apply only for



7 purposes of such section and shall not apply in determining veteran  
8 status for any other purpose.".

(Signed) Curt Friesen, Chairperson

**AMENDMENT(S) - Print in Journal**

Senator Lowe filed the following amendment to LB346:

AM1066

1 1. Insert the following new sections:

2 Section 1. Section 60-373, Reissue Revised Statutes of Nebraska, is  
3 amended to read:

4 60-373 (1) Each licensed motor vehicle dealer or trailer dealer as  
5 defined in sections 60-1401.26 and 60-1401.37, respectively, doing  
6 business in this state, in lieu of registering each motor vehicle or  
7 trailer which such dealer owns of a type otherwise required to be  
8 registered, or any full-time or part-time employee or agent of such  
9 dealer may, if the motor vehicle or trailer displays dealer number  
10 plates:

11 (a) Operate or tow the motor vehicle or trailer upon the highways of  
12 this state solely for purposes of transporting, testing, demonstrating,  
13 or use in the ordinary course and conduct of business as a motor vehicle  
14 or trailer dealer. Such use may include personal or private use by the  
15 dealer and personal or private use by any bona fide employee ~~licensed~~  
16 ~~pursuant to the Motor Vehicle Industry Regulation Act~~, if the employee  
17 can be verified by payroll records maintained at the dealership as  
18 ordinarily working more than thirty hours per week or fifteen hundred  
19 hours per year at the dealership;

20 (b) Operate or tow the motor vehicle or trailer upon the highways of  
21 this state for transporting industrial equipment held by the licensee for  
22 purposes of demonstration, sale, rental, or delivery; or

23 (c) Sell the motor vehicle or trailer.

24 (2) Each licensed manufacturer as defined in section 60-1401.24  
25 which actually manufactures or assembles motor vehicles or trailers  
26 within this state, in lieu of registering each motor vehicle or trailer  
27 which such manufacturer owns of a type otherwise required to be  
1 registered, or any employee of such manufacturer may operate or tow the  
2 motor vehicle or trailer upon the highways of this state solely for  
3 purposes of transporting, testing, demonstrating to prospective  
4 customers, or use in the ordinary course and conduct of business as a  
5 motor vehicle or trailer manufacturer, upon the condition that any such  
6 motor vehicle or trailer display thereon, in the manner prescribed in  
7 section 60-3,100, dealer number plates as provided for in section  
8 60-3,114.

9 (3) In no event shall such plates be used on motor vehicles or  
10 trailers hauling other than automotive or trailer equipment, complete  
11 motor vehicles, or trailers which are inventory of such licensed dealer  
12 or manufacturer unless there is issued by the department a special permit  
13 specifying the hauling of other products. This section shall not be

14 construed to allow a dealer to operate a motor vehicle or trailer with  
 15 dealer number plates for the delivery of parts inventory. A dealer may  
 16 use such motor vehicle or trailer to pick up parts to be used for the  
 17 motor vehicle or trailer inventory of the dealer.

18 Sec. 2. Section 60-3,116, Revised Statutes Cumulative Supplement,  
 19 2016, is amended to read:

20 60-3,116 (1) Any licensed dealer or manufacturer may, upon payment  
 21 of an annual fee of two hundred fifty dollars, make an application, on a  
 22 form approved by the Nebraska Motor Vehicle Industry Licensing Board, to  
 23 the county treasurer of the county in which his or her place of business  
 24 is located for a certificate and one personal-use dealer license plate  
 25 for the type of motor vehicle or trailer the dealer has been authorized  
 26 by the Nebraska Motor Vehicle Industry Licensing Board to sell and  
 27 demonstrate. Additional personal-use dealer license plates may be  
 28 procured upon payment of an annual fee of two hundred fifty dollars each,  
 29 subject to the same limitations as provided in section 60-3,114 as to the  
 30 number of additional dealer license plates. A personal-use dealer license  
 31 plate may be displayed on a motor vehicle having a gross weight including  
 1 any load of six thousand pounds or less belonging to the dealer, may be  
 2 used in the same manner as a dealer license plate, and may be used for  
 3 personal or private use of the dealer, the dealer's immediate family, or  
 4 any bona fide employee of the dealer licensed pursuant to the Motor  
 5 Vehicle Industry Regulation Act.

6 (2) Personal-use dealer license plates shall have the same design  
 7 and shall be displayed as provided in sections 60-370 and 60-3,100.

8 2. On page 13, line 29, after "sections" insert "60-373,"; and in  
 9 line 31 strike "section" and insert "sections 60-3,116 and".

10 3. Renumber the remaining sections accordingly.

#### **MOTION(S) - Print in Journal**

Senator Lindstrom filed the following motion to LB257:

MO89

Bracket until May 18, 2017.

#### **SELECT FILE**

**LEGISLATIVE BILL 512.** Senator Harr offered the following  
 amendment:

AM1008

(Amendments to Standing Committee amendments, AM724)

1 1. On page 14, line 21, after "for" insert "current and future"; in  
 2 line 23 strike "on or before" and insert "prior to"; and in line 24 after  
 3 the first comma insert "amounts levied by a school district otherwise at  
 4 the maximum levy pursuant to subdivision (2)(a) of this section to pay  
 5 for current and future sums agreed to be paid by such school district in  
 6 exchange for the voluntary termination of a certificated teacher  
 7 occurring on or after the operative date of this section if such current  
 8 and future sums do not exceed forty thousand dollars in total for such  
 9 certificated teacher and such current and future sums are paid prior to

10 such certificated teacher becoming eligible for medicare or within five  
 11 years after the voluntary termination, whichever occurs first."  
 12 2. On page 31, lines 17 and 18 and 26 through 29, strike the new  
 13 matter; in line 18 after "for" insert "current and future"; in line 26  
 14 after "year" insert "and prior to the operative date of this section or  
 15 (ii) expenditures to pay for current and future sums agreed to be paid by  
 16 a school district in exchange for the voluntary termination of a  
 17 certificated teacher occurring on or after the operative date of this  
 18 section if such current and future sums do not exceed forty thousand  
 19 dollars in total for such certificated teacher and such current and  
 20 future sums are paid prior to such certificated teacher becoming eligible  
 21 for medicare or within five years after the voluntary termination,  
 22 whichever occurs first, to the extent that the district has demonstrated  
 23 to the State Board of Education pursuant to section 79-1028.01 that the  
 24 agreement will result in a net savings in salary and benefit costs to the  
 25 school district over a five-year period occurring on or after the first  
 26 day of the 2018-19 school year".  
 1 3. On page 42, line 31, after "for" insert "current and future".  
 2 4. On page 43, line 8, strike "on or before" and insert "prior to";  
 3 after line 8 insert the following new subdivision:  
 4 "(h) Expenditures, by a school district with budgeted expenditures  
 5 otherwise equal to the budget authority for the general fund budget of  
 6 expenditures for such school district as calculated pursuant to section  
 7 79-1023 for such school fiscal year, for current and future sums agreed  
 8 to be paid by a school district in exchange for the voluntary termination  
 9 of a certificated teacher occurring on or after the operative date of  
 10 this section if such current and future sums do not exceed forty thousand  
 11 dollars in total for such certificated teacher and such current and  
 12 future sums are paid prior to such certificated teacher becoming eligible  
 13 for medicare or within five years after the voluntary termination,  
 14 whichever occurs first, to the extent that the district has demonstrated  
 15 to the State Board of Education pursuant to subsection (3) of this  
 16 section that the agreement will result in a net savings in salary and  
 17 benefit costs to the school district over a five-year period occurring on  
 18 or after the first day of the 2018-19 school year;"; in line 9 strike  
 19 "(h)", show as stricken, and insert "(i)"; in line 10 strike "(i)", show  
 20 as stricken, and insert "(j)"; and in line 11 strike "(j)", show as  
 21 stricken, and insert "(k)".

**SENATOR HUGHES PRESIDING**

**PRESIDENT FOLEY PRESIDING**

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

Senator Harr moved for a call of the house. The motion prevailed with 33 ayes, 7 nays, and 9 not voting.

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

Voting in the affirmative, 19:

Baker	Hilkemann	McDonnell	Riepe	Wayne
Chambers	Howard	Morfeld	Schumacher	Williams
Crawford	Kolowski	Pansing Brooks	Vargas	Wishart
Hansen	McCollister	Quick	Walz	

Voting in the negative, 18:

Albrecht	Briese	Geist	Hughes	Scheer
Bostelman	Clements	Groene	Kuehn	Smith
Brasch	Erdman	Halloran	Linehan	
Brewer	Friesen	Hilgers	Lowe	

Present and not voting, 8:

Bolz	Ebke	Kolterman	Murante
Craighead	Harr	Lindstrom	Stinner

Excused and not voting, 4:

Blood	Krist	Larson	Watermeier
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The Harr amendment lost with 19 ayes, 18 nays, 8 present and not voting, and 4 excused and not voting.

The Chair declared the call raised.

Pending.

## RESOLUTION(S)

**LEGISLATIVE RESOLUTION 104.** Introduced by Kolterman, 24.

WHEREAS, Concordia University will confer the honorary degree of Doctor of Laws on Kennard "Ken" Pohlman at the commencement ceremony on May 6, 2017; and

WHEREAS, the Doctor of Laws degree is conferred upon individuals who have distinguished themselves through prolonged superior service in their field of study; and

WHEREAS, Ken earned a Bachelor of Science and a Master of Science from the University of Nebraska in 1962 and 1966 respectively; and

WHEREAS, Ken founded Midwest Laboratories in Omaha in 1975 and continues to serve as the Chief Executive Officer; and

WHEREAS, Midwest Labs began as a small soil-testing business and has expanded nationally to become one of the largest and most successful analytical laboratories in the world; and

WHEREAS, throughout his life, Ken has promoted, led, and supported area ministries. Ken has been a member of various congregations of the Lutheran Church-Missouri Synod for more than 60 years and has served on various boards at parishes in Omaha, Lincoln, Norfolk, and Lexington. He has been a member of King of Kings Lutheran Church in Omaha since 1975, where he has served on the Board of Education, Board of Elders, and Building Committee.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDRED FIFTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Legislature congratulates Kennard Pohlman for being honored by Concordia University with a Doctor of Laws degree.
2. That a copy of this resolution be sent to Concordia University and to Kennard Pohlman.

Laid over.

#### **COMMITTEE REPORT(S)**

Enrollment and Review

**LEGISLATIVE BILL 253.** Placed on Select File with amendment.  
ER59

1. On page 1, line 2, after the second semicolon insert "to change
- 2 provisions relating to joint action agreements;"; and in line 4 strike
- 3 "provide for a special tax levy" and insert "authorize a use for a sewer
- 4 tax levy".

(Signed) Anna Wishart, Chairperson

#### **COMMITTEE REPORT(S)**

Enrollment and Review

**LEGISLATIVE BILL 91A.** Placed on Final Reading.  
**LEGISLATIVE BILL 225A.** Placed on Final Reading.  
**LEGISLATIVE BILL 263A.** Placed on Final Reading.

(Signed) Anna Wishart, Chairperson

#### **SELECT FILE**

**LEGISLATIVE BILL 512.** Senator Harr offered the following motion:  
MO90  
Reconsider the vote taken on AM1008.

Pending.

**GENERAL FILE**

**LEGISLATIVE BILL 223.** Title read. Considered.

Committee AM950, found on page 964, was adopted with 40 ayes, 0 nays, 3 present and not voting, and 6 excused and not voting.

Advanced to Enrollment and Review Initial with 38 ayes, 0 nays, 5 present and not voting, and 6 excused and not voting.

**LEGISLATIVE BILL 578.** Title read. Considered.

Committee AM917, found on page 967, was adopted with 34 ayes, 0 nays, 9 present and not voting, and 6 excused and not voting.

Advanced to Enrollment and Review Initial with 36 ayes, 0 nays, 7 present and not voting, and 6 excused and not voting.

**SELECT FILE**

**LEGISLATIVE BILL 512.** Senator Harr asked unanimous consent to withdraw his motion, MO90, found in this day's Journal, to reconsider the vote taken on AM1008. No objections. So ordered.

Senator Harr offered the following amendment:  
AM1083

(Amendments to Standing Committee amendments, AM724)

- 1 1. On page 14, line 21, after "for" insert "current and future"; in
- 2 line 23 strike "on or before" and insert "prior to"; and in line 24 after
- 3 the first comma insert "amounts levied by a school district otherwise at
- 4 the maximum levy pursuant to subdivision (2)(a) of this section to pay
- 5 for current and future sums agreed to be paid by such school district in
- 6 exchange for the voluntary termination of a certificated teacher
- 7 occurring on or after the operative date of this section and not as a
- 8 result of a collective-bargaining agreement if such current and future
- 9 sums do not exceed thirty-five thousand dollars in total for such
- 10 certificated teacher and such current and future sums are paid prior to
- 11 such certificated teacher becoming eligible for medicare or within five
- 12 years after the voluntary termination, whichever occurs first."
- 13 2. On page 31, lines 17 and 18 and 26 through 29, strike the new
- 14 matter; in line 18 after "for" insert "current and future"; in line 26
- 15 after "year" insert "and prior to the operative date of this section or
- 16 (ii) expenditures to pay for current and future sums agreed to be paid by
- 17 a school district in exchange for the voluntary termination of a
- 18 certificated teacher occurring on or after the operative date of this
- 19 section and not as a result of a collective-bargaining agreement if such
- 20 current and future sums do not exceed thirty-five thousand dollars in
- 21 total for such certificated teacher and such current and future sums are
- 22 paid prior to such certificated teacher becoming eligible for medicare or

23 within five years after the voluntary termination, whichever occurs  
 24 first, to the extent that the district has demonstrated to the State  
 25 Board of Education pursuant to section 79-1028.01 that the agreement will  
 26 result in a net savings in salary and benefit costs to the school  
 1 district over a five-year period occurring on or after the first day of  
 2 the 2018-19 school year".  
 3 3. On page 42, line 31, after "for" insert "current and future".  
 4 4. On page 43, line 8, strike "on or before" and insert "prior to";  
 5 after line 8 insert the following new subdivision:  
 6 "(h) Expenditures, by a school district with budgeted expenditures  
 7 otherwise equal to the budget authority for the general fund budget of  
 8 expenditures for such school district as calculated pursuant to section  
 9 79-1023 for such school fiscal year, for current and future sums agreed  
 10 to be paid by a school district in exchange for the voluntary termination  
 11 of a certificated teacher occurring on or after the operative date of  
 12 this section and not as a result of a collective-bargaining agreement if  
 13 such current and future sums do not exceed thirty-five thousand dollars  
 14 in total for such certificated teacher and such current and future sums  
 15 are paid prior to such certificated teacher becoming eligible for  
 16 medicare or within five years after the voluntary termination, whichever  
 17 occurs first, to the extent that the district has demonstrated to the  
 18 State Board of Education pursuant to subsection (3) of this section that  
 19 the agreement will result in a net savings in salary and benefit costs to  
 20 the school district over a five-year period occurring on or after the  
 21 first day of the 2018-19 school year."; in line 9 strike "(h)", show as  
 22 stricken, and insert "(i)"; in line 10 strike "(i)", show as stricken,  
 23 and insert "(j)"; and in line 11 strike "(j)", show as stricken, and  
 24 insert "(k)".

Senator Chambers requested a roll call vote on the Harr amendment.

The Harr amendment was adopted with 30 ayes, 6 nays, 7 present and not voting, and 6 excused and not voting.

Senator Groene offered the following amendment:

AM1076

(Amendments to Standing Committee amendments, AM724)

1 1. On page 53, line 10, strike "3311(b)" and insert "3311(b)(9)".

The Groene amendment was adopted with 37 ayes, 0 nays, 6 present and not voting, and 6 excused and not voting.

Advanced to Enrollment and Review for Engrossment.

**COMMITTEE REPORT(S)**  
 Enrollment and Review

**LEGISLATIVE BILL 427.** Placed on Final Reading.

(Signed) Anna Wishart, Chairperson

**RESOLUTION(S)**

**LEGISLATIVE RESOLUTION 105.** Introduced by Scheer, 19.

WHEREAS, the cities of Norfolk, Nebraska and Blantyre, Malawi have established a relationship based on the work of Joe Mtika in educating the students of Malawi; and

WHEREAS, H.E. Ambassador Edward Yakoloe Sawerengera and Mayor Wild Ndipo are visiting Norfolk in honor of the commencement of a ceremony to induct Norfolk and Blantyre as sister cities; and

WHEREAS, the City of Norfolk recognizes the significance and importance of the ceremony as a momentous occasion for furthering education in Malawi and extends a gracious welcome to H.E. Ambassador Edward Yakoloe Sawerengera and Mayor Wild Ndipo; and

WHEREAS, the City of Norfolk assures its continued support as a great resource for the college education system and Northeast Community College will continue to provide its assistance in such efforts.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDRED FIFTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Legislature welcomes H.E. Ambassador Edward Yakoloe Sawerengera and Mayor Wild Ndipo to Nebraska and expresses its optimism in fostering a strong relationship for the years to come.

2. That the Legislature congratulates and salutes the cities of Blantyre, Malawi and Norfolk, Nebraska on the occasion of their twinning.

3. That the Legislature expresses its commitment and optimism in maintaining and strengthening the relationship between Nebraska and Malawi through the Norfolk Private Schools-Malawi, and its efforts.

4. That Nebraska hopes to develop further opportunities for the City of Norfolk and Northeast Community College for the continued education of the students in Malawi.

Laid over.

**AMENDMENT(S) - Print in Journal**

Senator Hansen filed the following amendment to LB259:  
AM1082

(Amendments to Standing Committee amendments, AM933)

- 1 1. On page 1, strike lines 22 through 24.
- 2 2. On page 2, strike beginning with "If" in line 7 through the
- 3 underscored period in line 10.
- 4 3. On page 4, line 15, strike "an" through "organization" and insert
- 5 "a person, an organization"; and in line 16 after "program" insert
- 6 "approved by the county board".



**VISITORS**

Visitors to the Chamber were 100 fourth-grade students and teachers from Field Club Elementary, Omaha.

The Doctor of the Day was Dr. Brent Jameson from Stromsburg.

**ADJOURNMENT**

At 6:20 p.m., on a motion by Senator Ebke, the Legislature adjourned until 9:00 a.m., Wednesday, April 19, 2017.

Patrick J. O'Donnell  
Clerk of the Legislature

