No. S-23-644

IN THE NEBRASKA SUPREME COURT

PLANNED PARENTHOOD OF THE HEARTLAND, INC., ET AL.,

Plaintiffs-Appellants,

v.

MIKE HILGERS, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEBRASKA, ET AL.,

Defendants-Appellees.

On Appeal from the District Court of Lancaster County
The Honorable Lori A. Maret

BRIEF OF APPELLEES AND BRIEF ON CROSS-APPEAL

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STATEMENT OF THE CASE

Nature of the Case. Planned Parenthood and Dr. Sarah Traxler (Appellants) are abortion service providers who allege that their business in Nebraska has suffered because L.B. 574 became law. L.B. 574 prohibits physicians from performing abortions on children with a probable gestational age of 12 or more weeks. Appellants claim that L.B. 574 violated the Constitution's legislative single-subject rule and seek to enjoin State officials (Appellees) from enforcing the law.

Issues Presented in the District Court. Appellees argued that Appellants lacked standing, that the case presented a non-justiciable political question, and that L.B. 574 did not violate the single-subject rule.

Resolution of the Issues Presented. The district court held that Planned Parenthood had standing but that Traxler did not, that the case was justiciable, and that L.B. 574 did not violate the single-subject rule.

Scope of Review. No legislative act shall be held unconstitutional except by the concurrence of five judges. Neb. Const. art. V, § 2. This Court will not find a statute unconstitutional "[u]nless [it is] satisfied beyond a reasonable doubt that the law is unconstitutional." *Com. Sav. & Loan Ass'n v. Pyramid Realty Co.*, 121 Neb. 493, 499, 237 N.W. 575, 577 (1931).

PROPOSITIONS OF LAW

1. "No bill shall contain more than one subject, and the subject shall be clearly expressed in the title." Neb. Const. art. III, § 14.

2. "If an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution." *Jaksha v. State*, 241 Neb. 106, 131, 486 N.W.2d 858, 874 (1992) (quoting *Anderson v. Tiemann*, 182 Neb. 393, 408–09, 155 N.W.2d 322, 332 (1967)).

3. "A statute does not violate article III, § 14, if it can fairly be said that the title calls attention to the subject matter of the bill." *Id.* at 131, 486 N.W. at 874.

4. "The legislature must be permitted to select whatever title for an act it sees fit[.]" *State v. Ream*, 16 Neb. 681, 683, N.W. 398, 400 (1884).

5. "[I]f the subject-matter is within the title selected, this court cannot declare the act unconstitutional because a more expressive title could have been chosen." *Id.*

6. "The test is not whether the title chosen is the most appropriate but whether it fairly indicates the scope and purpose of the act." *Midwest Popcorn Co. v. Johnson*, 152 Neb. 867, 872, 43 N.W.2d 174, 179 (1950).

7. The legislative single-subject rule is "construe[d] . . . quite liberally" and "has no application" to the initiative single-subject rule. *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 995, 853 N.W.2d 494, 510 (2014).

STATEMENT OF FACTS

I. Factual Background

L.B. 574 was introduced in the Legislature in January 2023. (T313). As introduced, L.B. 574's title expressed that it "relat[ed] to public health and welfare[.]" (*Id.*). It sought to prohibit certain "gender altering procedures" for minors. (T315–19). In May 2023, Senator Ben Hansen moved to amend L.B. 574 to add language prohibiting physicians from performing abortions in Nebraska after 12 weeks' gestation. (T340–55).

Legislative debate ensued on the proposed amendment. (*See* T425–517). During the debate, a challenge was made to whether the addition of new abortion sections complied with the Legislature's rule on germaneness. (*See* T481, 816). The germaneness rule requires that amendments must "relate only to details of the specific subject of the bill and must be in a *natural and logical sequence* to the *subject matter of the original proposal*." Rules of the Nebraska Unicameral Legislature, 108th Leg., Rule 7, § 3(d) (2023) ("Rule 7") (T816) (emphasis added). The Chair ruled that the amendment was germane. (T483). On a motion to overrule the Chair's ruling, the Legislature debated whether the proposed amendment complied with the legislative rule on germaneness. (T481–508). By a supermajority vote of 34 to 14, the Legislature decided that amended L.B. 574 complied with the germaneness rule. (T508, 765–66). Because the abortion amendment related to the bill's "specific subject," Leg. Rule 7, § 3(d), L.B. 574's subject was unchanged: it remained a bill "relating to public health and welfare[.]" (*See* T991). The Legislature adopted the abortion amendment on the second stage of debate (select file) by a supermajority vote. (T516, 769).

The Legislature also debated whether L.B. 574, as amended, would violate the constitutional single-subject rule under Article 3, Section 14, of the Nebraska Constitution. (*E.g.*, T490, 507, 509–10, 562, 565–66, 572–73). A legislative rule distinct from the germaneness rule implements the Constitution's single-subject requirement by providing that "[n]o bill shall contain more than one subject and the same shall be clearly expressed in the title." Rules of the Nebraska Unicameral Legislature, 108th Leg., Rule 5 § 2(b) ("Rule 5") (T807); *see* Neb. Const. art. III, § 14. No one called for a vote on the bill's compliance with Rule 5. The Legislature passed the final bill by another supermajority vote. (T781–82). The Governor signed the bill into law six days later. (*See* T306). The law's abortion restrictions took effect immediately. (T996).

II. Procedural History

Appellants brought suit in May 2023, after L.B. 574 became law. (T1–3). They sought to enjoin enforcement of the law, alleging it violated the constitutional single-subject rule. (T13–14). Appellees moved to dismiss the lawsuit (which was converted to a motion for summary judgment) on multiple grounds, including that Appellants failed to state a claim because L.B. 574 did not violate the single-subject rule. (T147, T185, T195–98). Appellants cross-moved for summary judgment. (T212).

The district court granted Appellees' converted motion to dismiss and denied Appellants' dispositive motions. (T1767). The Court held that L.B. 574 did not violate the single-subject rule. (T1763–66). The Court also ruled that Traxler did not have standing. (T1756). Appellants appealed and moved for a stay pending appeal and to expedite the briefing schedule. This Court

declined to issue a stay but advanced the case for argument. Order (Sept. 13, 2023).

SUMMARY OF THE ARGUMENT

L.B. 574 did not violate the Constitution's single-subject rule for legislative bills. The bill had a single subject expressed in its title—public health and welfare. Each provision of the bill was germane and related to public health and welfare. This is sufficient under this Court's precedent. Appellants' attempt to cast L.B. 574's subject as something other than public health and welfare departs from this Court's history of deferring to the Legislature's description of its own bills. Appellants' arguments asking this Court to adopt standards other than the Court's deferential standard are also unavailing. Accepting those standards would threaten a large number of state laws because of the Legislature's reliance on this Court's legislative single-subject decisions. Finally, this Court need not address Traxler's standing or the district court's evidentiary rulings to decide this appeal.

ARGUMENT

I. L.B. 574 Did Not Violate the Single-Subject Rule.

L.B. 574 satisfied this Court's single-subject standard. *See Jaksha v. State*, 241 Neb. 106, 131, 486 N.W.2d 858, 874 (1992). The Legislature expressed that L.B. 574 was about the single subject of "public health and welfare," which is a common and permissible legislative subject. All the provisions in L.B. 574 relate and are germane to public health and welfare. Appellants' alternative standards would elevate newspaper articles above the bill's title adopted by the Legislature, require courts to make

inferences about legislators' motivations, and jeopardize many existing laws. They should be rejected.

A. L.B. 574 adhered to the *Jaksha* rule.

The single-subject rule provides that "[n]o bill shall contain more than one subject, and the subject shall be clearly expressed in the title." Neb. Const. art. III, § 14. This Court's most recent legislative single-subject decision, *Jaksha v. State*, explains that "[i]f an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate" the single-subject rule. 241 Neb. at 131, 486 N.W.2d at 874 (quoting *Anderson v. Tiemann*, 182 Neb. 393, 408–09, 155 N.W.2d 322, 332 (1967)). Earlier, this Court stated that "[it] is sufficient" if a bill's provisions are "germane to the purpose *announced in the title to the act*." *Blackledge v. Richards*, 194 Neb. 188, 192, 231 N.W.2d 319, 323 (1975) (emphasis added).

L.B. 574 satisfies this rule. The Legislature expressed L.B. 574's single subject in its title: "A BILL FOR AN ACT relating to *public health and welfare*[.]" (T991) (emphasis added). Each of L.B. 574's provisions "relate and are germane to" public health and welfare. *Jaksha*, 241 Neb. at 131–32, 486 N.W.2d at 874. Sections 1 to 7 and 9 to 13 of the bill regulate abortions—surgical or by drugs—undoubtedly medical procedures. Sections 14 to 20 regulate gender-altering procedures—surgical or by drugs—also undoubtedly medical procedures. Finally, Section 8 regulates both, amending the unprofessional-conduct statute to incorporate both policies. Medical procedure regulations relate and are germane to the single subject of public health and welfare. *Cf. Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 721 (Iowa 2022) (holding regulations on

abortion and regulations on the removal of life support both fell under the single subject of "medical procedures"). That is where the analysis ends.

This conclusion aligns with the Legislature's own determination on a similar question. The Legislature voted 34 to 14 that L.B. 574 satisfied its legislative rule requiring provisions of an amended bill to be germane to *each other*. (T765–66). Separately, the Legislature specifically debated whether L.B. 574 complied with the Constitution's single-subject rule. (*E.g.*, T490, 507, 509–10, 562, 565–66, 572–73). By a supermajority vote, the body passed the bill, reflecting its comfort with the bill's constitutionality. The district court reached the same conclusion, holding that each provision in L.B. 574 related to the even narrower subject of "health care." (T1764).

The district court's judgment finds additional support in *Jaksha*, which decided a single-subject challenge to a wide-ranging tax law. Portions of the act regulated property taxes, which fund only political subdivisions. *Jaksha*, 241 Neb. at 131, 486 N.W. at 874. Other portions amended sales and use tax and corporate income tax laws, which fund the State. *Id.* Still other sections "govern[ed] such diverse topics as the procedure for obtaining a tax refund and the retroactive application of judicial decisions declaring a tax or penalty unconstitutional." *Id.*

This Court applied its rule in two steps, holding that the bill did not violate the single-subject rule. The Court began with the bill's subject. "A statute does not violate article III, § 14, if it can fairly be said that the title calls attention to the subject matter of the bill." *Id.*; *accord Blackledge,* 194 Neb. at 192, 231 N.W.2d at 323; *Anderson*, 182 Neb. at 408–09, 155 N.W.2d at 332. The *Jaksha* bill did so. Its subject was: "AN ACT relating to *revenue and taxation*[.]" 1991 Neb. Laws, L.B. 829, p. 2229

(emphasis added). The Court did not question whether "revenue and taxation" was too broad a subject. Instead, it stated that "no matter how broad that object may be," the Court would consider only whether the bill's contents were "germane" to that subject. *Jaksha*, 241 Neb. at 131, 486 N.W.2d at 874 (emphasis added) (quoting *Anderson*, 182 Neb. at 408–09, 155 N.W.2d at 332). The bill's contents were germane. Every provision in L.B. 829 was related to "revenue and taxation." *See* 1991 Neb. Laws, L.B. 829, p. 2229–71. "[T]his [wa]s enough." *Jaksha*, 241 Neb. at 132, 486 N.W.2d at 875; *accord Blackledge,* 194 Neb. at 192, 231 N.W.2d at 323; *Beisner v. Cochran*, 138 Neb. 445, 451, 293 N.W. 289, 293 (1940).

B. Appellants misstate L.B. 574's subject.

Appellants do not dispute that each of L.B. 574's sections relates and is germane to "public health and welfare" or that the bill's title identifies that as its single subject. Instead, they suggest that this Court should reject "public health and welfare" as L.B. 574's subject and find that it contains two subjects: "gender-affirming care" (a term that does not even appear in L.B. 574) and "abortion." Appellants Br. 14. They invite the judiciary to insert itself into the deliberative process of a co-equal branch of government. *See* Cross-Appellants Br. 41–43. Their reasoning is legally unsupported, and the Court should reject the invitation.

1. "The legislature must be permitted to select whatever title for an act it sees fit[.]" *State v. Ream*, 16 Neb. 681, 683, N.W. 398, 400 (1884). "[I]f the subject-matter is within the title selected, this court cannot declare the act unconstitutional because a more expressive title could have been chosen." *Id.*; *see also People v. McCallum*, 1 Neb. 182, 194 (1871). "The constitution has made the title the conclusive index to the legislative intent" of a

bill's subject. *State v. Lancaster Cnty. Comm'rs*, 6 Neb. 474, 486 (1877) (quoting Cooley, Const. Lim., 149).

This Court's earliest cases affirm that the Constitution charges the Legislature with identifying the subjects of its own bills. In 1871, this Court was asked to determine whether a bill violated the nearly identical single-subject rule in Nebraska's 1866 Constitution ("No bill shall contain more than one subject, which shall be clearly expressed in its title . . . ."). *See McCallum*, 1 Neb. at 194. The Court explained that because "[t]he constitution [has not] fixed the degree of particularity with which a title is to express the subject, it is enough that the legislature, with this provision before them, have selected their own title." *Id.* The Court reasoned that even if it "might not agree upon [the title] as the most suitable or comprehensive, the act for that reason is not to be declared void." *Id.* More recently, this Court has confirmed that the title is not required to be "a complete abstract of the bill." *Midwest Popcorn Co. v. Johnson*, 152 Neb. 867, 872, 43 N.W.2d 174, 179 (1950). "The test is not whether the title chosen is the most appropriate but whether it fairly indicates the scope and purpose of the act." *Id.*

Appellants ask the Court to look past its cases deferring to the Legislature's identification of the subjects of its bills and borrow from the stricter standard applicable in initiative single-subject cases. Appellants Br. 20. This Court has already rejected that suggestion. The legislative single-subject rule is "construe[d] . . . quite liberally" and "has no application" to the initiative single-subject rule. *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 995, 853 N.W.2d 494, 510 (2014). Appellants seem to acknowledge that their position would require this Court to overrule *Loontjer*. Appellants Br. 20. This Court should not do so. Products of the initiative process—both constitutional amendments and statutes—

are more difficult to repeal than acts of the Legislature are. *See Loontjer*, 288 Neb. at 995–97, 853 N.W.2d at 510–11. The Legislature cannot unilaterally amend the Constitution, Neb. Const. art. XVI, §§ 1, 2, and laws enacted by initiative require a legislative supermajority to repeal, *id.* art. III, § 2. By contrast, bills enacted into law by the Legislature can be amended through subsequent legislation passed on a simple-majority vote.

Additional deference is also warranted because the reliance interests are greater for bills subject to the legislative single-subject rule. Ballot-initiative single-subject cases are litigated *before* initiatives are approved and become law. *See State ex rel. Wagner v. Evnen*, 307 Neb. 142, 150, 948 N.W.2d 244, 252 (2020). But legislative single-subject cases have been litigated only once a bill has won the approval of both political branches and become law. The Legislature passed L.B. 574 in at least implicit, albeit not express, reliance on *Loontjer*. Those reliance interests add support for this Court's rule that it will uphold acts of the Legislature unless it is "satisfied beyond a reasonable doubt that the law is unconstitutional." *See Com. Sav. & Loan Ass'n v. Pyramid Realty Co.*, 121 Neb. 493, 499, 237 N.W. 575, 577 (1931).

Appellants also offer several red herrings. They complain about the district court's identification of the bill's subject as "health care" when the bill's title says "public health and welfare." Appellants Br. 23–24. But just as Appellants do not dispute that "public health and welfare" describes L.B. 574's contents, they do not identify any section of L.B. 574 that went beyond "health care." Even if this Court were to reject "public health and welfare" as the bill's subject, Appellants do not explain why it is appropriate for this Court to depart from L.B. 574's title to define its subject as "abortion" or "gender-affirming procedures," but not "health care" or "medical procedures." *See Reynolds*, 975 N.W.2d

at 721 (rejecting Planned Parenthood's single-subject challenge to a bill regulating abortion and the removal of life support because both provisions were related to "medical procedures"). Appellants also suggest L.B. 574 contains more than one subject because it was codified in both Chapters 38 and 71, contrary to the expectation of Appellees' lawyers. Appellants Br. 23. But as with L.B. 574, a bill's chapter is "often" chosen by the Legislature's Office of the Revisor, not the Legislature. *Tegra Corp. v. Boeshart*, 311 Neb. 783, 801, 976 N.W.2d 165, 181 (2022). The Revisor's chapter-placement decisions do not factor into statutory interpretation. *Id.*

2. Appellants' arguments that L.B. 574 contains two subjects also fail. Subpart II.A of their brief endeavors to prove that the bill had two subjects, but not one word of this subpart proposes a rule or standard for this analysis. Despite the Constitution's statement that a bill's subject is stated in its title, Neb. Const. art. III, § 14, Appellants' test appears to depend on what journalists, the Governor (who is not a legislator), and Legislature webpages say about a bill. Appellants Br. 15. For the proposition that "[l]aypersons have not described . . . L.B. 574 as a bill containing only one subject," Appellants cite the websites of a newspaper and television news outlet that characterize the bill's sections. *Id.* They also rely on the Governor's statement that that "L.B. 574, is simply . . . two things," (T836), apparently reading the single-subject rule to forbid a bill from doing multiple "things." Nothing in the single-subject rule or this Court's decisions requires this Court to canvass newspaper articles or parse websites to discern whether a bill adhered to the single-subject rule. On the contrary, this Court "look[s] to the bill itself to ascertain whether or not it contains more than one subject." *Van Horn v. State*, 46 Neb. 62, 72, 64 N.W. 365, 368 (1895).

Appellants additionally identify differences between the bill's sections. They point out that the bill describes itself as containing more than one "Act," a common practice for bills in the Legislature. Appellants Br. 14; *e.g.*, 2022 Neb. Laws, L.B. 450, p. 22; 2022 Neb. Laws, L.B. 752, p. 188; 2021 Neb. Laws, L.B. 139, p. 196. Appellants also point out that the bill creates "different enforcement mechanisms," has "different operative dates," and delegates rulemaking authority in connection with its gender-altering procedures sections but not its abortion sections. Appellants Br. 14–15. The Constitution proscribes only bills that contain more than one subject. Neither the Constitution nor this Court's precedents forbids variety in policies that fall under the same subject. This Court has also never "held that the constitution required any subdivision of legislation into distinct acts, each having reference to only so much as might practicably form a single act." *Van Horn*, 46 Neb. at 74, 64 N.W. at 369.

Indeed, such distinctions are common in bills enacted into law. L.B. 755, for example, amended provisions to the Cosmetology, Electrology, Esthetics, Nail Technology, and Body Art Practice Act; the Barber Act; the Medicine and Surgery Practice Act; the Podiatry Practice Act; and the Engineers and Architects Regulation Act, all of which have different enforcement bodies and mechanisms. *See* 2020 Neb. Laws, L.B. 755, p. 203. L.B. 755 also had a different operative date for one provision than it did for the rest. *See id.* § 10.

C. Appellants' rule is wrong and inconsistent with precedent and past practice.

1. Another test that Appellants propose glosses over *Jaksha* (this Court's most recent application of the single-subject rule) and turns to a 1950 decision that rejected a single-subject

challenge. Appellants Br. 16. *Midwest Popcorn v. Johnson* stated: "An act, no matter how comprehensive, is valid as containing but one subject if a single main purpose is within its purview and nothing is included within it except that which is naturally connected with and incidental *to that main purpose*." 152 Neb. at 871–72, 43 N.W.2d at 178 (emphasis added). Assuming the truth of the premise that L.B. 574's "subject would have to be banning abortion or restricting gender-affirming [sic] for minors," Appellants then rewrite *Midwest Popcorn*'s rule so that both of those parts must be "'naturally connected with and incidental to' *the other*"—instead of the main purpose in the bill's title. Appellants Br. 16 (quoting *id.*); *see also* Appellants Br. 21, 22.

But L.B. 574 satisfies even Appellants' rewritten single-subject test. Both parts of L.B. 574 regulate medical procedures and drug therapies that disrupt natural biological development and have permanent effects. Both protect vulnerable populations: minors and preborn children. And both operate by regulating healthcare practitioners—not patients. Indeed, L.B. 574's abortion and gender-altering policies are so closely related that Section 8 amends a single statute to implement both policies. No decision of this Court requires a bill's parts to be naturally connected and incidental to *each other* instead of the main purpose, but L.B. 574's sections are.

2. This Court's previous decisions finding legislative single-subject violations are distinguishable. Appellants rely on only two. Both cases involved bills that went beyond the subjects announced in their titles. As this Court has explained, the first case, *Lancaster County Commissioners*, "was based, not upon [subject] duplicity, but upon the fact that the legislature had adopted a title which was too restrictive, and did not clearly express the subject of the act." *Van Horn*, 46 Neb. at 73, 64 N.W. at

368 (citing *Lancaster Cnty. Comm'rs*, 6 Neb. 474). The title-subject of the bill at issue in *Lancaster County Commissioners* was "to provide for township organization," yet the bill "also provide[d] for county organization[,] . . . county officers, . . . and it also materially amend[ed] and change[d] the general revenue laws." *Lancaster Cnty. Comm'rs*, 6 Neb. at 485, 486. *Lancaster County Commissioners* also refused to redefine the bill's subject where the Legislature had spoken clearly. When the State asked the Court to enlarge the subject of the bill beyond what the Legislature had expressed in the title, the Court explained that the Constitution "made the title the conclusive index" of a bill's subject. *Id.* at 485–86 (Cooley, Const. Lim., 149).

Similarly, the bill in the second case, *Trumble v. Trumble*, went beyond "the professed subject of the act." *Van Horn*, 46 Neb. at 74, 64 N.W. at 368 (citing *Trumble v. Trumble*, 37 Neb. 340, 55 N.W. 869 (1893)). The bill did not express a general subject; instead, the title only described the statutes the bill amended. *See Trumble*, 37 Neb. at 342–43, 55 N.W. at 869. Noting that the subject of the bill was to amend two chapters related to "decedents," this Court later explained that "[e]very subject not so germane, was therefore a separate subject." *Van Horn*, 46 Neb. at 74, 64 N.W. at 368 (citing *Trumble*, 37 Neb. at 344–45, 55 N.W. at 869). And while the Court "[could] not conceive" how all the provisions could relate to a single subject, the Court was "even more clearly convinced that the subject, or rather subjects, of the act, are not clearly expressed in its title, as the constitution requires." *Trumble*, 37 Neb. at 346, 55 N.W. at 870. But again, Appellants do not allege the violations in *Lancaster County* or *Trumble*: legislating beyond the single subject expressed in a bill's title.

Appellants also rely on *Van Horn*, which *rejected* a single-subject challenge, but said in dicta that a bill whose main

purpose is "to provide for supersedeas bonds" could not "also provide for the issuing of original summonses, or the effect of a demurrer." *Van Horn*, 46 Neb. at 74, 64 N.W. at 368. Appellants suggest that this means the Legislature can legislate on a "broad" subject only if it does so "thoroughly." Appellants Br. 17–18. But *Van Horn* does not say that a bill that provides for supersedeas bonds must make that its single subject. Nor does it suggest that a bill cannot legislate on both supersedeas bonds and original summonses if it did so pursuant to the subject of, for example, civil procedure. Indeed, *Van Horn* explained that the single-subject rule had never been used to require "*any* subdivision of legislation into distinct acts." *Id.* at 74, 64 N.W. at 369 (emphasis added). Yet that is exactly what Appellants seek. They argue the single-subject rule requires the Legislature to subdivide provisions regulating abortion and gender-altering procedures.

3. Finally, Appellants ignore that, because of the Legislature's reliance on *Jaksha* and cases preceding it, their rule would jeopardize a large number of laws. The Legislature has enacted many bills with the subject of "public health and welfare." In just the past three years, the Legislature has passed several bills under a "public health and welfare" subject that adopted or amended multiple acts. *See, e.g.*, 2021 Neb. Laws, L.B. 139, p. 196; 2020 Neb. Laws, L.B. 755, p. 203; 2020 Neb. Laws, L.B. 1053, p. 634. None of these bills were comprehensive acts governing all things "public health and welfare." And "public health and welfare" is not the only seemingly broad subject on which the Legislature has chosen to legislate. In the last few years, the Legislature has passed bills under the subjects of "legal process," 2021 Neb. Laws, L.B. 501, p. 701, "administration of justice," L.B. 50, 108th Legis., 1st Sess. (2023) (enacted), "children and families," 2022 Neb. Laws, L.B. 741, p. 119, "crimes and offenses,"

2019 Neb. Laws, L.B. 209, p. 371, and "natural resources," L.B. 565, 108th Legis., 1st Sess. (2023) (enacted). Each of these bills has multiple provisions, and none of them can be described as comprehensive legislation of their subject. The League of Women Voters' amicus brief admits several acts may fail under Appellants' test. *See* League of Women Voters Br. 11–12. The League notes that the Legislature has passed "Christmas tree" bills, which combine several measures near the end of a legislative session to ensure important issues are addressed before the body adjourns. *Id.* at 11.

In contrast to the potentially far-reaching consequences of Appellants' rule, Appellants worry about far-fetched hypotheticals. They fear that upholding L.B. 574 will license the Legislature to "assign[] every bill a subject like 'good legislation.'" Appellants Br. 23. This cynical argument has no constitutional or factual grounding. Of course, Appellants cite no previous act of the Legislature with a similar subject or that otherwise would suggest that the Legislature would approach its work so cavalierly. And, of course, such a meaningless subject like "good legislation" would violate even the Legislature's own rules for bill subjects. *See* Leg. Rule 5 § 2(b), Rule 7, § 3(d). Along these fearful lines, Appellants worry that the Legislature may regulate "abortion" and "trampolines" in a single bill. Appellants Br. 23. The comparison between gender-altering procedures and gymnastic equipment is absurd, and this speculative slippery slope argument is equally misguided.

D. Appellants' purpose-based rule is without precedent and would not apply to L.B. 574.

1. Finally, Appellants suggest that L.B. 574 violates the single-subject rule's purpose. Appellants Br. 24–25; *see also*

League of Women Voters Br. 10–12. According to Appellants, the single-subject rule's purpose is to prevent logrolling. Appellants Br. 24. L.B. 574 was not passed through logrolling, and it would be constitutional even if it were.

Appellants define logrolling as "the joining of several measures in one act, in order to combine the friends of each measure, and pass the bill as a whole." Appellants Br. 24 (quoting *Trumble*, 37 Neb. at 344, 55 N.W. at 870). They say that "proving what would have happened if the Legislature had voted on each subject separately cannot be the test." *Id.* To show that L.B. 574 resulted from logrolling, Appellants cite the sole fact that L.B. 574's *12-week* abortion rule was added after a *six-week* abortion rule failed in a different bill. *Id.* They add that "[i]t is sufficient to consider whether a provision was added in a bid to enhance a bill's chances of approval." *Id.* Citing nothing, they say "[t]hat is what happened here." *Id.*

Appellants' rule is nearly standardless and would place courts in the position of analyzing whether amendments were "added . . . to enhance a bill's chances of approval." *Id.* at 25. Aside from its impracticability to administer, the test is not even tailored to logrolling. Many bills have language added to improve their chances at passage, but those additions say nothing of those sections' germaneness. And the Legislature's rejection of a six-week abortion rule has little relevance because that is not what the Legislature added to L.B. 574. It added a 12-week rule.

The League of Women Voters describes one senator's "mixed feelings about the transgender measure." League of Women Voters Br. 7. This also does not prove logrolling. This senator voted with 33 other senators that L.B. 574's abortion and gender-altering procedures sections were germane to each other.

(T766). The district court correctly concluded it is "speculative that logrolling in fact occurred." (T1766).

2. Appellants (and the League of Women Voters) also argue that this Court should strike L.B. 574 to give the single-subject rule "teeth" and prevent legislators from evading it. Appellants Br. 23; League of Women Voters Br. 5, 11. Appellants wrongly assume their conclusion; the single-subject rule was followed, not evaded. *See* pp. 11–13, *supra*. Moreover, Appellants assume that courts are the only bodies capable of interpreting and enforcing the rule. "[T]he nature of the single-subject . . . [rule] does not demand judicial enforcement." Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 258 (2022). And this Court has pondered whether the single-subject rule is "for the government of the legislature, an observance of which is enjoined by a sense of duty and the official oath of each member, and not subject to any supervisory power of the courts." *McCallum*, 1 Neb. at 194; *see* Cross-Appellants Br. 43.

The Legislature can and does enforce the single-subject rule. It did so here. The 108th Legislature passed into its own rules a single-subject rule identical to the constitutional rule and a separate rule requiring amendments to be germane to the original bill. Leg. Rule 5 § 2(b), Rule 7 § 3(d). Legislators debated whether L.B. 574 complied with both its germaneness rule as well as the constitutional single-subject rule. By a supermajority vote, the Legislature determined that L.B. 574's restrictions on abortion and gender-altering procedures were germane to each other. Despite debate on the subject, no legislator called for a vote on the legislative single-subject rule.

This Court's first case interpreting the single-subject rule announced that its "purpose" "is to prevent surprise in legislation, by leaving matter of one nature embraced in a bill whose

title expresses another." *McCallum*, 1 Neb. at 194. Stated another way, the rule is meant "to prevent surreptitious legislation." *State ex rel. Liberty High Sch. Dist. of Sioux Cnty. v. Johnson*, 116 Neb. 249, 253, 216 N.W. 828, 830 (1927). L.B. 574 was not deceptive or surreptitious. Appellants do not allege any legislator was deceived by the title of the bill. L.B. 574 did not violate the single-subject rule.

II. This Court Does Not Need to Review Traxler's Standing or the District Court's Evidentiary Rulings.

In addition to the merits, Appellants seek this Court's review of several evidentiary rulings of the district court and the district court's holding that Traxler lacks standing. Because neither issue affects Planned Parenthood's entitlement to relief, this Court does not need to address the merits of either argument.

A. None of the issues on appeal hinge on whether Traxler has standing independently of Planned Parenthood. Under the one-plaintiff rule, when parties "seek identical injunctive [and] declaratory relief," the Court may exercise jurisdiction once it "determines that one of the plaintiffs has standing." *Stewart v. Heineman*, 296 Neb. 262, 294–95, 892 N.W.2d 542, 563 (2017); *cf.* Appellants Br. 11 ("[T]he case is justiciable if one plaintiff has standing."). Planned Parenthood and Traxler both sought a declaration that L.B. 574 was unconstitutional and an injunction barring its enforcement. (T14). The district court rejected Traxler's standing. (T1768). But it concluded that Planned Parenthood has standing, which Appellees do not appeal. (*Id.*).

If the Court still reaches Traxler's standing, it should affirm the district court. As a plaintiff, Traxler bears the burden to establish her standing. *SID No. 67 v. Dep't of Roads*, 309 Neb. 600, 605, 961 N.W.2d 796, 801 (2021). At summary judgment, the

plaintiff must make that showing with evidence. *See Clark v. Scheels All Sports, Inc.*, 314 Neb. 49, 68–69, 989 N.W.2d 39, 53 (2023). Traxler produced no evidence that L.B. 574 harms her. Traxler testified that she had performed abortions in Nebraska and that Planned Parenthood "staff" wish to perform abortions after 12-weeks' gestation. (T977). But she did not submit evidence establishing that she would perform abortions in Nebraska after 12 weeks' gestation but for L.B. 574. Without that evidence, Traxler failed to show that L.B. 574 affects her. (T1757–58). Traxler's affidavit was at most "unclear" about whether she would perform abortions after 12 weeks in Nebraska, but the district court's contrary factual finding cannot be overturned barring clear error. *See Jacobs Eng'g Grp. Inc. v. ConAgra Foods, Inc.*, 301 Neb. 38, 55, 917 N.W.2d 435, 452 (2018); (T1758, 1768).

B. There also is no reason for this Court to review the district court's evidentiary rulings. Appellants ask this Court to "reverse" the district court's "conclusion as to relevance" and "foundation" for specific documents. Appellant Br. 27. But they do not explain why admitting the excluded evidence would warrant reversal of the judgment or a contrary ruling on the constitutionality of L.B. 574.

L.B. 574 is constitutional even if Traxler's affidavit, certain webpages, and the Governor's signing statements are considered. *See* p. 18, *supra*. Accordingly, their exclusion was at most harmless error. For "the exclusion of evidence" to be reversible, the "exclusion . . . must unfairly prejudice a substantial right of a litigant complaining about the evidence admitted or excluded." *Buttercase v. Davis*, 313 Neb. 1, 25, 982 N.W.2d 240, 259 (2022), *opinion modified on denial of reh'g*, 313 Neb. 587, 985 N.W.2d 588 (2023). The excluded materials are not relevant to the single-subject analysis because that analysis turns on the text of the bill

alone. *See* p. 16, *supra*; *Jaksha*, 241 Neb. at 131–32, 486 N.W.2d at 874–75. And even if the excluded evidence could bear on the analysis, it would not affect the outcome. Restrictions on abortion and gender-altering procedures both plainly "relat[e] to public health and welfare." (T991). Appellants' extratextual sources from non-legislators (the Governor and legislative staff writing online Unicameral Updates) do not change that.

CONCLUSION

The Court should affirm the district court's order of dismissal.

Dated: December 18, 2023

Respectfully submitted.

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No. S-23-644

IN THE NEBRASKA SUPREME COURT

PLANNED PARENTHOOD OF THE HEARTLAND, INC., ET AL.,

Plaintiffs–Cross-Appellees,

v.

MIKE HILGERS, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEBRASKA, ET AL.,

Defendants–Cross-Appellants.

On Appeal from the District Court of Lancaster County
The Honorable Lori A. Maret

BRIEF ON CROSS-APPEAL

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STATEMENT OF JURISDICTION

This Court has subject-matter jurisdiction, but this case is not justiciable. The district court entered final judgment for Appellees on August 11, 2023. (T1768). On August 18, 2023, Appellants timely filed a notice of appeal and paid the docketing fee. (T1770). This Court has subject-matter jurisdiction over this cross-appeal. *See* Neb. Rev. Stat. §§ 24-1106(1), 25-1911, 25-1912 (Cum. Supp. 2022 & Reissue 2016); Neb. Ct. R. App. P. § 2-109(D)(4). "But, 'there is a significant difference between determining whether a . . . court has 'jurisdiction of the subject matter' and determining whether a cause over which a court has subject matter jurisdiction is 'justiciable.'" *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 273 Neb. 531, 543, 731 N.W.2d 164, 174 (2007) (quoting *Powell v. McCormack*, 395 U.S. 486, 512 (1969)). Even though this Court has subject-matter jurisdiction, it should not reach the merits because Appellants' single-subject claim is a nonjusticiable political question.

STATEMENT OF THE CASE

Nature of the Case. Planned Parenthood of the Heartland and Dr. Sarah Traxler (Appellants) sued State of Nebraska officials (Appellees) in their official capacities in district court seeking a declaration that L.B. 574 violated the Nebraska Constitution's legislative single-subject rule and to enjoin Appellees from enforcing the law. (T1–15).

Issues Presented in the District Court. Appellees argued that single-subject challenges are nonjusticiable political questions and alternatively moved for dismissal on the merits. (T1737, 1743). Appellants cross-moved for summary judgment. (T212).

Resolution of the Issues Presented. The district court disagreed that legislative single-subject challenges are nonjusticiable. (T1766–67). It concluded that L.B. 574 did not violate the Constitution's single-subject rule. (T1768).

Scope of Review. Whether a single-subject challenge presents a nonjusticiable political question is a question of law reviewed de novo. *See Neb. Coal.*, 273 Neb. at 540, 731 N.W.2d at 172.

ASSIGNMENT OF ERROR

1. The district court erred by ruling that legislative single-subject challenges do not present nonjusticiable political questions.

PROPOSITIONS OF LAW

1. The political-question doctrine is rooted in the separation of powers. *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 273 Neb. 531, 540, 731 N.W.2d 164, 172 (2007).

2. When cases present "political[] rather than judicial" questions, this Court has long abstained from deciding them. *State ex rel. Cromelien v. Boyd*, 36 Neb. 181, 188, 54 N.W. 252, 254 (1893).

3. The six *Nebraska Coalition* "tests are disjunctive," so a nonjusticiable political question exists if just one is met. *Neb. Coal.*, 273 Neb. at 547–48, 731 N.W.2d at 177 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

4. "[I]t is not this [C]ourt's place to make . . . policy judgments." *Monty S. v. Jason W.*, 290 Neb. 1048, 1056, 863 N.W.2d 484, 491 (2015).

STATEMENT OF FACTS

I. Factual Background

L.B. 574 was introduced in the Legislature in January 2023. (T313). As introduced, L.B. 574's title expressed that it "relat[ed] to public health and welfare[.]" (*Id.*). It sought to prohibit certain "gender altering procedures" for minors. (T315–19). In May 2023, Senator Ben Hansen moved to amend L.B. 574 to add language prohibiting physicians from performing abortions in Nebraska after 12 weeks' gestation. (T340–55).

Legislative debate ensued on the proposed amendment. (*See* T425–517). During the debate, a challenge was made to whether the addition of new abortion sections complied with the Legislature's rule on germaneness. (*See* T481, 816). The germaneness rule requires that amendments must "relate only to details of the specific subject of the bill and must be in a *natural and logical sequence* to the *subject matter of the original proposal*." Rules of the Nebraska Unicameral Legislature, 108th Leg., Rule 7, § 3(d) (2023) ("Rule 7") (T816) (emphasis added). The Chair ruled that the amendment was germane. (T483). On a motion to overrule the Chair's ruling, the Legislature debated whether the proposed amendment complied with the legislative rule on germaneness. (T481–508). By a supermajority vote of 34 to 14, the Legislature decided that amended L.B. 574 complied with the germaneness rule. (T508, 765–66). Because the abortion amendment related to the bill's "specific subject," Leg. Rule 7, § 3(d), L.B. 574's subject was unchanged: it remained a bill "relating to public health and welfare[.]" (*See* T991). The Legislature adopted the abortion amendment on the second stage of debate (select file) by a supermajority vote. (T516, 769).

The Legislature also debated whether L.B. 574, as amended, would violate the constitutional single-subject rule under Article 3, Section 14, of the Nebraska Constitution. (*E.g.*, T490, 507, 509–10, 562, 565–66, 572–73). A legislative rule distinct from the germaneness rule implements the Constitution's single-subject requirement by providing that "[n]o bill shall contain more than one subject and the same shall be clearly expressed in the title." Rules of the Nebraska Unicameral Legislature, 108th Leg., Rule 5 § 2(b) ("Rule 5") (T807); *see* Neb. Const. art. III, § 14. No one called for a vote on the bill's compliance with Rule 5. The Legislature passed the final bill by another supermajority vote. (T781–82). The Governor signed the bill into law six days later. (*See* T306). The law's abortion restrictions took effect immediately. (T996).

II. Procedural History

Appellants sued to challenge L.B. 574 in May 2023, after the bill became law. (T1–3). They sought to enjoin enforcement of the law, alleging it violated the constitutional single-subject rule under Article 3, Section 14, of the Nebraska Constitution. (T13–14). The single-subject rule provides that "[n]o bill shall contain more than one subject, and the subject shall be clearly expressed in the title." Neb. Const. art. III, § 14. Appellees moved to dismiss the lawsuit (which was converted to a motion for summary judgment) both on the merits and because legislative single-subject challenges present nonjusticiable political questions. (T1737–45). Appellants cross-moved for summary judgment. (T212).

The district court disagreed that legislative single-subject challenges are nonjusticiable but concluded that L.B. 574 contained only one subject and entered judgment for Appellees. (T1766–68). Appellants appealed the district courts' single-

subject ruling. Appellants Br. 13–25. Appellees contend that their arguments are unavailing and that this Court should affirm. Appellees Br. 10–13.

Appellees also ask this Court to affirm the district court's dismissal for an alternative reason—that legislative single-subject challenges are nonjusticiable political questions. The district court "specifically rejected" Appellees' request to dismiss this case on political-question grounds. *McDonald v. DeCamp Legal Servs., P.C.*, 260 Neb. 729, 735, 619 N.W.2d 583, 588 (2000); (T1766–67). So Appellees "cross-appeal in order for that argument to be considered." *McDonald*, 260 Neb. at 735, 619 N.W.2d at 588.

SUMMARY OF THE ARGUMENT

Compliance with the legislative single-subject rule is a nonjusticiable political question. This Court established its modern political-question doctrine in 2007 when it held in *Nebraska Coalition* that the level of government support required by the Free Instruction Clause is a nonjusticiable political question. This Court has not decided a legislative single-subject appeal since then.

At least four of the *Nebraska Coalition* tests apply to legislative single-subject challenges. *First*, whether a bill contains more than one subject is textually committed to the political branches. The Constitution says that no "*bill* shall contain more than one subject." The Legislature drafts and passes bills, and the Governor signs bills into law. But this Court reviews only enacted laws, not "bills." *Second*, judicial resolution of single-subject cases creates the potential of embarrassment from multiple rulings by different branches of government on the same question. The Legislature voted that L.B. 574's provisions are germane to each other, a higher standard than the Constitution demands.

The Legislature also specifically debated the single-subject rule and passed L.B. 574 by supermajority vote, creating potentially conflicting rulings on the bill's constitutionality.

Third, single-subject cases also involve an initial policy determination of a kind clearly for nonjudicial discretion. Whether restrictions on abortion and gender-altering procedures advance "public health and welfare" requires a political judgment. *Finally*, independent resolution of the single-subject issue could be perceived as expressing lack of the respect due a coordinate branch of government. The Legislature self-polices compliance with the single-subject rule (and its similar germaneness rule). Reaching the merits would mean second-guessing the Legislature's application of its own rules.

ARGUMENT

Compliance with the Legislative Single-Subject Rule Is a Nonjusticiable Political Question.

A. *Nebraska Coalition* makes legislative single-subject challenges nonjusticiable political questions.

The political-question doctrine is rooted in the separation of powers. *Neb. Coal. for Educ. Equity & Adequacy v. Heineman (Nebraska Coalition)*, 273 Neb. 531, 540, 731 N.W.2d 164, 172 (2007). It ensures that the judiciary does not decide policy-laden controversies that the Constitution commits to the political branches. *Id.* at 547, 731 N.W.2d at 177. When cases present such "political[] rather than judicial" questions, this Court has long abstained from deciding them. *State ex rel. Cromelien v. Boyd*, 36 Neb. 181, 188, 54 N.W. 252, 254 (1893).

This Court formalized its political-question doctrine in 2007. Consistent with the U.S. Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), *Nebraska Coalition* announced "six independent tests" to determine justiciability. 273 Neb. at 547, 731 N.W.2d at 177 (internal quotation omitted). Under those tests, nonjusticiable political questions involve:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 547–48, 731 N.W.2d at 177 (quoting *Baker*, 369 U.S. at 217). Because these six "tests are disjunctive," a nonjusticiable political question exists if just one is met. *Id.* Appellants' single-subject challenge to L.B. 574 satisfies at least four.

1. There is a textually demonstrable constitutional commitment to a coordinate political department of whether a bill contains more than one subject. Article III, Section 14, of the Constitution provides that "[n]o *bill* shall contain more than one subject." Neb. Const. art. III, § 14 (emphasis added). The Legislature drafts and passes "bills." The Executive signs them into law. The Judiciary does not review them. It reviews "*legislative act[s]*" and "hear[s] and determine[s] all cases involving the

constitutionality of *a statute*." *Id.* art. V, § 2 (emphasis added). By contrast, Articles III and IV of the Constitution, which vest the legislative and executive powers in the political branches, are replete with references to "bills." *Id.* art. III, §§ 10, 11, 13, 14, 22; *id.* art. IV, §§ 7, 15. That word never appears in Article V, which vests the judicial power in the courts.

Acts and statutes are the law. Bills are not. "In legislation and constitutional law," a bill is a "*draft* of an act of the legislature *before it becomes a law*." *Bill*, Black's Law Dictionary 133 (1st ed. 1891) (emphasis added). Indeed, under the Constitution, a bill "shall become a law" only when passed by the Legislature and signed by the Governor. Neb. Const. art. IV, § 15. Because the single-subject rule is "directed at the legislature's own process for enacting laws," the Legislature polices the rule itself. Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 258 (2022). One legislative rule requires that amendments relate to the "specific subject" of the original bill, and another states that "[n]o bill shall contain more than one subject." Leg. Rule 5 § 2(b), Rule 7, § 3(d).

Because it applies only to "bills," Nebraska's single-subject rule stands in contrast to many other States' single-subject provisions, which apply to "laws," "acts," and "statutes." *E.g.*, Ala. Const., art. IV, § 45 ("Each law shall contain but one subject"); Ariz. Const. art. IV, pt. 2 § 13 ("Every act shall embrace but one subject"); Cal. Const. art. IV, § 9 ("A statute shall embrace but one subject"); *see* Fla. Const. art. III, § 6; Haw. Const. art. III, § 14; Idaho Const. art. III, § 16; Ind. Const. art. IV, § 19; Iowa Const. art. III, § 29; Ky. Const. § 51; Md. Const. art. III, § 29; Mich. Const. art. IV, § 24; Minn. Const. art. IV, § 17; Nev. Const. art. IV, § 17; N.J. Const. art. IV, § 7, ¶ 4; Okla. Const. art. V,

§ 57; Or. Const. art. IV, § 20; S.C. Const. art. III, § 17; S.D. Const. art. III, § 21; Va. Const. art. IV, § 12; W. Va. Const. art. VI, § 30.

Had the Framers of the Nebraska Constitution intended to subject each legislative session's laws to the single-subject rule, it would not have used the term "bills." Only laws, acts, and statutes are subject to judicial review—not the "bills" to which Nebraska's single-subject rule applies. The Nebraska Constitution thus textually commits the political branches—not the courts—with ensuring that no "bill" contains more than one subject.

2. Legislative single-subject challenges create the potential of embarrassment from multiple rulings by different branches of government on the same question. In fact, accepting Appellants' arguments guarantees it.

This Court's single-subject test asks whether each provision of a bill is germane to the bill's general subject as expressed in its title. *Jaksha v. State*, 241 Neb. 106, 131–32, 486 N.W.2d 858, 874–75 (1992); *see also* Appellees Br. 11–13. The Legislature's self-imposed germaneness test appears to be if anything more restrictive. It requires that amendments be germane "to details of the specific subject of the bill" and fall "in a natural and logical sequence to the subject matter of the original proposal." Leg. Rule 7, § 3(d).

The Legislature specifically considered whether L.B. 574 complied with its single-subject test. It voted 34 to 14 that the regulations on abortion and gender-altering procedures are germane to each other. (T765–66). By affirming that restrictions on abortion and gender-altering procedures are germane to each other, the Legislature affirmed *a fortiori* that the two policies are germane to the more general subject of "public health and welfare." Indeed, the Legislature went on to consider whether L.B.

574, as amended, complied with the constitutional single-subject rule. *Compare* Leg. Rule 5, § 2(b), *with* Neb. Const. art. III, § 14; (*see* T490, 509–10, 562, 565–66, 572–73). The Legislature passed L.B. 574 by a supermajority vote, signaling the Legislature's judgment that the bill was constitutional. A decision on the merits could reach a contrary conclusion, leading to different answers from different branches of government on the same question. *Nebraska Coalition* sought to avoid that situation.

Appellants would also have this Court second-guess the subject that the Legislature gave L.B. 574. The Constitution and the Legislature's rules require bills to identify their subject in the title. Neb. Const. art. III, § 14; Leg. Rule 5, § 2(b). L.B. 574's single subject, expressed in its title, is "public health and welfare." (T991). But according to Appellants, L.B. 574 *really* has two subjects that must be narrowly defined as only "abortion" and "gender-affirming [sic] for minors." Appellants Br. 16; Appellees Br. 17–18.

The political-question doctrine "arise[s] out of prudential considerations of the proper role of the judiciary in democratic government." *Neb. Coal.*, 273 Neb. at 546, 731 N.W.2d at 176. That role should not include doubting the Legislature's choice of subject or title for its own legislation. The Constitution allows the Legislature to make those decisions itself. Neb. Const. art. III, § 14.

3. This Court cannot decide a legislative single-subject challenge without making an initial policy determination of a kind clearly for nonjudicial discretion. Single-subject challenges require the Court to determine whether the bill legislates on the bill's subject. *See Jaksha*, 241 Neb. at 131–32, 486 N.W.2d at 874–75. Here, that means deciding whether L.B. 574's abortion and gender-altering regulations advance public health and

welfare. The Legislature (and the Governor) decided that they do. "[I]t is not this [C]ourt's place to make such policy judgments." *Monty S. v. Jason W.*, 290 Neb. 1048, 1056, 863 N.W.2d 484, 491 (2015).

Whether legislation on abortion, gender-altering procedures, or anything else advances public health and welfare is a "political[] rather than judicial" inquiry. *Boyd*, 36 Neb. at 188, 54 N.W. at 254. This Court has long recognized as much: It "is primarily for *the Legislature* to determine" what promotes "the public health, safety, morals, security, prosperity, contentment, and the general welfare of all the inhabitants." *State ex rel. Douglas v. Neb. Mortg. Fin. Fund*, 204 Neb. 445, 457–58, 283 N.W.2d 12, 21 (1979) (emphasis added). Unlike legislators, judges determine only "what the law is." *Neb. Coal.*, 273 Neb. at 546, 731 N.W.2d at 176 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Even to ask whether regulations on abortion and gender-altering procedures enhance public health and welfare departs from the judicial task.

4. The Court's independent resolution of the single-subject issue could be perceived as expressing lack of the respect due a coordinate branch of government. In *Nebraska Coalition*, this Court rejected the invitation to review the sufficiency of school funding because the Constitution leaves "[f]iscal policy issues" to the Legislature alone. 273 Neb. at 554, 731 N.W.2d at 181. Similarly, by entertaining legislative single-subject cases, this Court risks invading the Legislature's constitutional prerogative to "determine the rules of its proceedings." Neb. Const. art. III, § 10. The Legislature has enacted two legislative rules to ensure that it complies with the Constitution's single-subject rule. (T807, 816). And as the debate over L.B. 574 shows, it consciously enforces those rules.

Single-subject provisions are "directed at the legislature's own process for enacting laws," a process that "a state legislature might be expected to look after for itself to prevent judicial intrusion into the legislature's own manner of enacting laws." Sutton, *supra*, at 258. Holding a statute unconstitutional for a single-subject violation would mean policing the Legislature's application of its own procedural rules. *See State ex rel. Wagner v. Evnen*, 307 Neb. 142, 149–50, 948 N.W.2d 244, 252 (2020) (holding that single-subject challenges are "procedural," not "substantive"). Doing so, like questioning the Legislature's school-funding decisions, would "invad[e] the legislative branch's exclusive realm of authority." *Neb. Coal.*, 273 Neb. at 554, 731 N.W.2d at 181. It would also imply that legislators violated their constitutional oath. *See People v. McCallum*, 1 Neb. 182, 194 (1871).

This Court treads carefully when presented with nonsubstantive challenges to legislation. The Court's earliest single-subject case cautioned that invalidating a statute merely for "criticisms upon its form or phraseology"—i.e., matters governed by legislative discretion and the Legislature's rules of procedure—"would be prolific of evil, and would soon be universally condemned." *McCallum*, 1 Neb. at 195 (internal quotation omitted). That same case even questioned (but did not decide) whether single-subject challenges were "subject to any supervisory power of the courts" since the single-subject rule was perhaps "designed as a rule for the government of the legislature." *Id.* at 194. *McCallum* thus portended what *Nebraska Coalition* now makes clear: "the nature of the single-subject [rule] does not demand judicial enforcement." Sutton, *supra*, at 258.

B. Single-subject challenges to ballot initiatives are justiciable.

The Nebraska Constitution also provides that citizen-led ballot "[i]nitiative measures shall contain only one subject." Neb. Const. art. III, § 2. A different analysis necessarily applies to single-subject challenges to ballot initiatives. Control over ballot initiatives is textually committed to "the people," not the Legislature or any other branch of government. *Id.*; *Neb. Coal.*, 273 Neb. at 548, 731 N.W.2d at 177.

There is also no risk of conflicting rulings from various branches. *Neb. Coal.*, 273 Neb. at 548, 731 N.W.2d at 177. True, the Secretary of State must decide whether to place an initiative on the ballot. But the Secretary's decision only has the "force of law *until changed by the courts*." Neb. Rev. Stat. § 32-201 (Reissue 2016) (emphasis added). There is no risk of interbranch conflict or disrespecting a coordinate department by following the Legislature's plan in reviewing ballot initiatives. *Neb. Coal.*, 273 Neb. at 548, 731 N.W.2d at 177.

Nor do challenges to ballot initiatives involve an unusual need for adhering to political decisions already made. *Id.* Unlike legislative single-subject cases, where a lawsuit is not ripe until the bill becomes law, a ballot initiative is challenged *before* it is put to a vote. *See Wagner*, 307 Neb. at 150, 948 N.W.2d at 252. So the reliance interests in the ballot-initiative context are virtually nonexistent.

C. Whether legislative single-subject challenges are justiciable is a question of first impression.

This Court has never decided whether legislative single-subject challenges are justiciable. *Cf. McCallum*, 1 Neb. at 194.

And this Court has not decided any legislative single-subject case since establishing its formal political-question test in 2007 in *Nebraska Coalition*. For the first time, this case presents the question whether legislative single-subject challenges are nonjusticiable political questions.

That this Court has decided legislative single-subject challenges does not prevent a holding that such claims are nonjusticiable. The political-question doctrine "is not entangled with subject matter jurisdiction." *Neb. Coal.*, 273 Neb. at 544, 731 N.W.2d at 175. So the Court's previous legislative single-subject cases "did not implicitly conclude that the claim was justiciable." *Id.* Indeed, *Nebraska Coalition* held that the Court's exercise of jurisdiction over a claim does not preclude the Court from later deciding that the same claim is a nonjusticiable political question. *Id.*; *see also Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims present nonjusticiable political questions after previously deciding such claims). So too here.

CONCLUSION

The Court should affirm the district court's order of dismissal because Appellants' claim is a nonjusticiable political question.

Dated: December 18, 2023

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

The Brief of Appellees and Brief on Cross-Appeal comply with the typeface and word-count requirements of Neb. Ct. R. App. P. § 2-103 because they contain 10,883 words excluding this certificate. Both briefs were prepared using Microsoft Word 365.

/s/ Eric J. Hamilton
ERIC J. HAMILTON

Certificate of Service

I hereby certify that on Monday, December 18, 2023 I provided a true and correct copy of this *Brief of Appe Hilgers With Cross Appeal* to the following:

Planned Parenthood of the Heartland Inc represented by Jane Seu (27452) service method: Electronic Service to **jseu@aclunebraska.org**
Planned Parenthood of the Heartland Inc represented by Julie A Murray (0) service method: **No Service**
Planned Parenthood of the Heartland Inc represented by Matthew R Segal (0) service method: **No Service**
Planned Parenthood of the Heartland Inc represented by Mindy Marie Rush Chipman (24499) service method: **No Service**
Planned Parenthood of the Heartland Inc represented by Rebecca Scout Richters (25690) service method: Electronic Service to **srichters@aclunebraska.org**
Planned Parenthood of the Heartland Inc represented by Robert F Bartle (15010) service method: Electronic Service to **tpetsche@bartlegeierlaw.com**
Planned Parenthood of the Heartland Inc represented by Rosangela Godinez (25925) service method: Electronic Service to **rgodinez@aclunebraska.org**
Planned Parenthood of the Heartland Inc represented by Vincent M Powers (15866) service method: Electronic Service to **powerslaw@me.com**

Sarah Traxler M.D. represented by Jane Seu (27452) service method: Electronic Service to **jseu@aclunebraska.org**
Sarah Traxler M.D. represented by Mindy Marie Rush Chipman (24499) service method: **No Service**
Sarah Traxler M.D. represented by Rebecca Scout Richters (25690) service method: Electronic Service to **srichters@aclunebraska.org**
Sarah Traxler M.D. represented by Rosangela Godinez (25925) service method: Electronic Service to **rgodinez@aclunebraska.org**

League of Women Voters represented by Amanda Coleman (0) service method: **No Service**
League of Women Voters represented by Beth Neitzel (0) service method: **No Service**
League of Women Voters represented by Robert F Bartle (15010) service method: Electronic Service to **tpetsche@bartlegeierlaw.com**

Signature: /s/ Eric James Hamilton (25886)