IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

PLANNED PARENTHOOD OF THE HEARTLAND, INC. and SARAH TRAXLER, M.D., **Plaintiffs,** **v.** **MIKE HILGERS, in his official capacity as Attorney General for the State of Nebraska; et al.,** **Defendants.**	**Case No. CI 23-1820** **DEFENDANTS' BRIEF IN SUPPORT OF RULE 12(b)-CONVERTED MOTION TO DISMISS and in OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION**

Defendants, Michael Hilgers, Jim Pillen, Dannette Smith, Charity Menefee, and Timothy Tesmer, in their official capacities, hereby submit this brief in support of their Motion to Dismiss—as converted to a Motion for Summary Judgment by Neb. Ct. R. Pldg. § 6-1112(b)—and in opposition to Plaintiffs' motion for a temporary injunction.

Introduction

This is an action brought by an Iowa corporation and a Minnesota resident trying to tell the Nebraska Legislature how to do its job. By doing so, Plaintiffs seek to undermine years of Nebraska legislative practice. They cannot do so for four reasons.

First, Plaintiffs lack any specific right to bring their challenge as they lack standing. Specifically, Plaintiffs have not alleged any injury

in fact. Plaintiffs claim that they—as a Nebraska-licensed (nonresident) physician and a Nebraska-licensed (foreign corporation) health clinic / laboratory—are harmed because a law regulating the conduct of medical-licensed persons in Nebraska conflicts with their perceived view of their ethical obligations as medical providers. What Plaintiffs are alleging are political disagreements with the law passed by the Nebraska Unicameral. But political disagreements do not amount to injuries in fact. Plaintiffs have not identified any substantive right to support that they can practice medicine in Nebraska in their unfettered discretion. Plaintiffs attempt to conceal their lack of an injury by speculating about a parade of horribles which may befall their patients. But Nebraska law does not recognize third-party standing for a doctor or health clinic to sue on an unidentified patient's speculative injury.

Second, Plaintiffs have failed to state a claim. Their assertion that Legislative Bill ("L.B.") 574 violates the single-subject rule of article III, Section 14 of the Nebraska Constitution is meritless. The single-subject rule is a liberal standard. The Nebraska Supreme Court has stated: "If an act has but one general object, *no matter how broad that object may be*, and contains no matter not germane thereto, . . . , it does not violate [the single-subject rule]." *Anderson v. Tiemann*, 182 Neb. 393, 408-09, 155 N.W.2d 322, 332 (1967) (emphasis added) [hereinafter "*Anderson*"]. According to its title, L.B. 574 addresses matters "related to public health and welfare." While Plaintiffs' refer to L.B. 574 as "compound" this is incorrect. As it was passed on the last stage of debate (final reading) and sent to the Governor, L.B. 574 was simply one bill. And both component pieces of L.B. 574 prescribe duties to the Chief Medical Officer of the Nebraska Department of Health and Human Services ("DHHS"), regulating medical services and providers in the interest of public health and welfare. (Ex. 1). These objects are clearly related—as evidenced by the fact that both components concern Nebraska Revised Statutes Chapter 38. And Plaintiffs' mischaracterization would render Nebraska's bill making into a

burdensome and piecemeal process. Rather, evidence from the legislative process strongly indicates that Plaintiffs' sentiments and subjective values concerning abortion and transgender healthcare—and not genuinely a problem with the legislative process—motivate their positions in this lawsuit.

Third, Plaintiffs have no general right to bring their challenge as it is barred by sovereign immunity. The sovereign immunity analysis is coextensive with the merits of this case, because, as discussed above, L.B. 574 clearly did not violate the single-subject rule. Plaintiffs are suing a constitutional officer and state officials from the executive branch (in their official capacities) based on an alleged overreach by the Nebraska Legislature. Their avenue to do so is contingent on the Defendants acting outside of the scope of their authority. That is not the case here. Therefore, this matter should be dismissed on sovereign immunity grounds.

Fourth, Plaintiffs' grievance is not justiciable under the political question doctrine. In essence, Plaintiffs ask this Court to litigate whether the *legislative process* violated the single-subject rule—not the contents of L.B. 574. The legislative process presents a question that is not appropriate for judicial review. Plaintiffs ask this Court to adjudicate a task exclusively within the Legislature's control and discretion. Were this Court to entertain such a challenge, it would result in an unprecedented upheaval of Nebraska's legislative and judicial branches, potentially calling hundreds of Nebraska laws into constitutional doubt.

As Defendants' arguments pertain to the justiciability of this matter, they must be addressed before the Court considers Plaintiffs' request for a temporary injunction. These matters present dispositive questions of law that are amenable to resolution at this stage in the proceedings. The Court should only reach Plaintiffs' request for a temporary injunction if it holds that the matter is justiciable.

Otherwise, Plaintiffs' request becomes moot.

Turning to Plaintiffs' request for a temporary injunction, the lack of any cognizable and irreparable injury—in contrast to Defendants' strong interest in enforcing its laws to protect preborn children between twelve and twenty weeks gestational age and Nebraska's vulnerable children—provides adequate reasons to deny Plaintiffs' temporary injunction request.

Plaintiffs' grievance is to the legislative process, not to the bill. Plaintiffs have suffered no cognizable injury, lack standing, and, ultimately, fail to meet the high bar to declare L.B. 574 unconstitutional. By bringing this action, Plaintiffs invite this Court to second-guess the long-held and constitutionally-sound process of a separate branch of government. Ultimately, Plaintiffs' challenge lacks any merit as a matter of law and this Court should grant Defendants' Neb. Ct. R. Pldg. § 6-1112(b)-converted Motion to Dismiss, dismiss Plaintiffs' complaint, and deny their request for a temporary injunction.

Legal Standards

Motion to Dismiss Standard

To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Rodriguez v. Catholic Health Initiatives*, 297 Neb. 1, 9, 899 N.W.2d 227, 234 (2017). In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id.*

When a motion to dismiss is based on both rule 6-1112(b)(1) and 6-1112(b)(6) grounds, the court should consider the rule 6-1112(b)(1) grounds first and should not dismiss on rule 6-1112(b)(6) grounds unless it determines it has subject matter jurisdiction. *See Anderson v. Wells Fargo Fin. Acceptance Penn., Inc.*, 269 Neb. 595, 601, 694 N.W.2d 625, 630 (2005). If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in §§ 25-1330 to 25-1336 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute. Neb. Ct. R. Pldg. § 6-1112(b).

Motion for Summary Judgment Standard

"A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Neb. Rev. Stat. § 25-1331. "The judgment sought shall be rendered forthwith if the pleadings and the evidence admitted at the hearing show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332.

The party moving for summary judgment has the burden to show that no genuine dispute of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence was uncontroverted at trial. *Benard v. McDowall, LLC*, 298 Neb. 398, 405, 904 N.W.2d 679, 685 (2017). If the movant does so, the burden shifts to the party opposing the motion to produce evidence showing the existence of a genuine dispute of material fact that prevents judgment as a matter of law. *Id.* at 405, 686.

Argument

I. Plaintiffs lack standing.

"Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved." *Sanders v. Frakes*, 295 Neb. 374, 381, 888 N.W.2d 514, 521 (2016). "The defect of standing is a defect of subject matter jurisdiction." *State ex rel. Reed v. State, Game & Parks Com'n*, 278 Neb. 349, 565, 773 N.W.2d 349, 352 (2009). It is the Plaintiffs' burden to plead, and ultimately prove, that this Court has subject matter jurisdiction. *See TNT Cattle Co., Inc. v. Fife*, 304 Neb. 890, 912, 937 N.W.2d 811, 829-30 (2020); *see also* 61A Am. Jur. 2d *Pleadings* § 451, Westlaw (database updated May 2023). They have not done so here because Plaintiffs lack standing.

A. Plaintiffs cannot bring suit on behalf of third parties.

Plaintiffs bring their claim for relief under the Uniform Declaratory Judgments Act ("UDJA"), Neb. Rev. Stat. § 25-21,149 *et seq.*, and the courts "inherent equitable authority to enforce the Nebraska Constitution." (Compl., ¶ 11). Plaintiffs provide no case law to support this Court's inherent authority to enforce the constitution absent subject matter jurisdiction. Their suit under the UDJA is subject to the jurisdictional requirements of Nebraska law. This Court's inherent power does not allow it to waive sovereign immunity where the Legislature has not done so. *See McKenna v. Julian*, 277 Neb. 522, 529, 763 N.W.2d 384, 390 (2009), *abrogated on other grounds by Doe v. Bd. of Regents of U. of Nebraska*, 280 Neb. 492, 788 N.W.2d 264, (2010) ("The judiciary does not have the power to waive sovereign immunity regardless of the equities of the case.").

> To have standing, the plaintiff must have some legal or equitable right, title, or interest in the subject matter of the controversy. Generally, a party has standing only if he or she has suffered or will suffer an injury in fact. Such an injury must be 'concrete in both a qualitative and temporal sense,' and it must be 'distinct and palpable, as opposed to merely abstract,' and the alleged harm from such an injury must be "'actual or imminent, not conjectural or hypothetical.' We have emphasized that to show standing, it is generally insufficient for a plaintiff to have 'merely a general interest common to all members of the public.' And we have said that a person seeking to restrain the action of a governmental body must show some special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.

Pres. the Sandhills, LLC v. Cherry Cty., 313 Neb. 590, 597, 985 N.W.2d 599, 607 (2023) (cleaned up). The UDJA, itself, does not create a cause of action. Rather, it is only a procedural mechanism through which a party may bring an underlying injury in fact. *See* Neb. Rev. Stat. § 25-21,163; *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 882 (Tex. App. 2010) (recognizing that the UDJA is merely procedural in nature and that "[u]nder the UDJA, [the plaintiff] must establish standing by alleging an injury in fact . . . ."). *Accord N & M Properties, LLC v. Town of West Warwick ex rel. Moore*, 964 A.2d 1141, 1145 (R.I. 2009).

Plaintiffs claim that they are entitled to bring suit on behalf of multiple third parties. (Compl., at ¶¶ 13,14). Planned Parenthood of the Heartlands, Inc. ("PPH") attempts to bring suit on behalf of its staff. Likewise, PPH and Dr. Sarah Traxler attempt to bring suit on behalf of their patients. Both fail under Nebraska law. The well-established general rule is that a plaintiff must be the real party in interest and cannot bring suit on behalf of a third party. *See Eagle Partners, L.L.C. v. Rook*, 301 Neb. 947, 961, 921 N.W.2d 98, 109–10

(2018); *Applied Underwriters, Inc. v. S.E.B. Services of New York, Inc.*, 297 Neb. 246, 252–53, 898 N.W.2d 366, 372 (2017); *State ex rel. Department of Insurance v. Countrywide Truck Insurance Agency, Inc.*, 294 Neb. 400, 404, 883 N.W.2d 69, 72 (2016); *see also In re Sanitary and Imp. Dist. No. 1 of Gosper County*, 270 Neb. 856, 861, 708 N.W.2d 809, 815 (2006) (party cannot raise objections to improper service on other parties); *In re Interest of Natasha H.*, 258 Neb. 131, 136, 602 N.W.2d 439, 445 (1999) (mother did not have standing to challenge trial court's jurisdiction to terminate father's parental rights). Neb. Rev. Stat. § 25-304 identifies specific instances where the party to an action can differ from the real party in interest. Specifically:

> An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law and official bonds may be sued upon the same way. Assignees of choses in action assigned for the purpose of collection may sue on any claim assigned in writing.

Neb. Rev. Stat. § 25-304. Notably, neither a doctor nor health clinic suing on behalf of their patients is included in the statute: nor is a corporation suing on behalf of its staff.

Furthermore, to obtain declaratory relief under the UDJA, "a plaintiff has the burden to prove the existence of a justiciable controversy and an interest in the subject matter of the action." *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989). Neb. Rev. Stat. § 25-21,150 reads:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any

> question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Neb. Rev. Stat. § 25-21,150. When interpreting standing under the UDJA, this Court has said that the individual plaintiff must have a legally protectible interest and cannot bring suit on behalf of a third party. *Schroder v. City of Lincoln*, 155 Neb. 599, 52 N.W.2d 808 (1952).

Plaintiffs have failed to show legal standing to bring suit on behalf of either their patients or the facility staff. In addition, hypothetical or alleged injuries to non-party patients is immaterial to the standing analysis for PPH and Dr. Traxler. The same also applies to the injury analysis for the temporary injunction discussed below. *See infra* Part V.

B. Plaintiffs have failed to demonstrate an injury in fact.

Having demonstrated why Plaintiffs cannot assert third party standing, Defendants also raise the issue of subject matter jurisdiction in relation to the Plaintiffs, themselves. Nebraska law casts doubt as to whether the Plaintiffs have standing under the UDJA to challenge the law on the grounds that a procedural right was violated in the enactment of a law.

In *Griffith v. Nebraska Dep't of Corr. Servs.,* the plaintiffs attempted to bring a challenge to a Department of Correctional Services's regulation under the Administrative Procedure Act ("APA"), Neb. Rev. Stat. § 84-911. The plaintiffs were challenging a regulation creating protocols for execution—though the plaintiffs themselves were not convicted of a crime for which they were facing execution. The nature of the plaintiffs' challenge was a claim that the State of Nebraska and the Department of Corrections violated several statutory and constitutional requirements in creating the regulation

and asked for it to be declared void and to enjoin the regulations enforcement. When addressing the question of standing, the Nebraska Supreme Court referenced *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992) which cast doubt as to whether the court could find that:

> "[A] party had standing based on a government official's alleged failure to follow a statutory procedure notwithstanding [the plaintiff's] inability to allege any discrete injury flowing from that failure." The Supreme Court explained that individuals have standing to enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest . . . that is the ultimate basis of . . . standing."

Griffith v. Nebraska Dep't of Corr. Servs., 304 Neb. 287, 294, 934 N.W.2d 169, 175 (2019) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992)). Although *Griffith* dealt with a challenge to a rule or regulation under the APA, the standing analysis is sufficiently analogous to the UDJA to warrant its application in the present case.

PPH alleges that it operates health centers in Lincoln and Omaha and is subject to the licensure requirements of Neb. Rev. Stat. § 71-416. (Compl., ¶¶ 13, 64). However, the public websites for both the Lincoln and Omaha clinics indicate that they are operated by a separate and distinct entity: namely, Planned Parenthood North Central States. (Exs. 22, 23). If PPH is not the party who would face the consequences of a potential licensure revocation, it is not a real party in interest and lacks standing to bring suit.

Moreover, PPH and Dr. Traxler provide no indication that they do not understand what the law restricts, nor do they claim that they intend to perform an abortion after twelve weeks and subject themselves to licensure proceedings.

> [A] litigant first must clearly demonstrate that it has suffered an injury in fact. That injury must be concrete in both a

> qualitative and temporal sense. The complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. Further, the litigant must show that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.

Cent. Nebraska Pub. Power & Irr. Dist. v. N. Platte Nat. Res. Dist., 280 Neb. 533, 542, 788 N.W.2d 252, 260 (2010) (internal quotations omitted).

The Plaintiffs' complaint contains no assertion of an actual or imminent injury incurred by PPH or Dr. Traxler. Neither PPH nor Dr. Traxler provide any case law to suggest that they have any right under Nebraska law to be free to perform medical procedures independent of the laws of the State of Nebraska. L.B. 574 is a law that, like many other laws, specifies the circumstance in which medical providers and medical facilities may provide certain kinds of treatment and care to their patients. Thus, Plaintiffs have no injury in fact based on the contents of L.B. 574 because L.B. 574 does the same thing that nearly every bill relating to Chapter 38 of the Nebraska revised statutes does: it regulates health occupations and professions.

In addition to claiming injury from hypothetically being subjected to discipline under L.B. 574, PPH claims an injury in fact based on cancelled appointments with patients. PPH does not allege a loss of revenue or other harmful consequences as a result of the cancelled appointments. Therefore, Plaintiffs have failed to allege a cognizable injury in fact to demonstrate their standing.

II. L.B. 574 does not violate the single-subject rule.

Section 14, article III of the Nebraska Constitution states, in relevant part, that "[n]o bill shall contain more than one subject, and the subject shall be clearly expressed in the title." This provision

contains two requirements. First, that the bill must contain no more than one subject ("single-subject rule"). Second, that that the title of the act must be germane to its single subject ("title requirement"). While early case law frequently addressed the questions together, *see, e.g.*, *Trumble v. Trumble*, 37 Neb. 340, 55 N.W.2d 869 (1893) (discussing how a law likely violated the single-subject rule but ultimately holding it violated the title requirement), *State v. Lancaster Cty. Comm'r*, 6 Neb. 474 (1877) (same), subsequent case law has made clear that these requirements present separate and distinct analyses. *Compare Maher v. State*, 144 Neb. 463, 467-68, 13 N.W.2d 641, 645-46 (1944) (analyzing title requirement), *and Weis v. Ashley*, 59 Neb. 494, 494, 81 N.W.318, 318-19 (1899) (same as *Maher*), *with Anderson*, 182 Neb. at 408-09, 155 N.W.2d at 332 ("analyzing single-subject rule").

The standard governing the single-subject rule is liberal: "If an act has but one general object, *no matter how broad that object may be*, and contains no matter not germane thereto, . . . , it does not violate [the single-subject rule]." *Anderson*, 182 Neb. at 408-09, 155 N.W.2d at 332 (emphasis added). But Plaintiffs ask this Court to ignore how liberal this standard truly is: Nebraska courts have not clearly struck down a legislative bill solely for violating the single-subject rule. *See, e.g.*, *Jaksha v. State*, 241 Neb. 106, 131, 486 N.W.2d 858, 874 (1992); *Anderson*, 182 Neb. at 408-09, 155 N.W.2d at 332; *Midwest Popcorn Co. v. Johnson*, 152 Neb. 867, 871, 43 N.W.2d 174, 178 (1950); *State ex rel. Baldwin v. Strain*, 152 Neb. 763, 771, 42 N.W.2d 796, 801 (1950); *Dorrance v. County of Douglas*, 149 Neb. 685, 689-90, 32 N.W.2d 202, 205-06 (1948); *City of Mitchell v. W. Pub. Serv. Co.*, 124 Neb. 248, 485, 246 N.W. 484, 484 (1933); *Mehrens v. Greenleaf*, 119 Neb. 82, 227 N.W. 325, 326 (1929); *Birdhead v. State*, 105 Neb. 296, 296, 180 N.W. 583, 583 (1920); *State ex rel. Hall Cnty. Farm Bureau v. Miller*, 104 Neb. 838, 838, 178 N.W. 846, 847 (1920); *Sandlovich v. State*, 104 Neb. 169, 169, 176 N.W. 81, 81 (1920); *Gauchat v. Sch. Dist. No. 5 in Nemaha Cnty.*, 101 Neb. 377, 377, 163 N.W. 334, 334-35 (1917); *Van Horn v. State*, 46 Neb. 62, 64 N.W. 365, 366-69 (1895); *Kan. City & O.R. Co. v.*

Frey, 30 Neb. 790, 47 N.W. 87, 87-88 (1890). *See cf. Peet Stock Remedy Co. v. McMullen*, 32 F.2d 669, 673 (8th Cir. 1929) (holding a bill regulating the licensing and discipline of eleven separate health care professionals did not violate Nebraska's single-subject rule). *See generally State ex rel. Loontjer v. Gale*, 288 Neb. 973, 995, 853 N.W.2d 494, 510 (2014) (distinguishing the single-subject requirements of legislatively proposed constitutional amendments under Neb. Const. Art. XVI, § 1, from "the liberal single subject standard that applies to legislative bills under article III").

L.B. 574 is a bill "relating to public health and welfare[.]" (Ex. 1). This is a very broad subject that the Legislature has previously used to implement a wide variety of legislation. *See, e.g.*, (Ex. 18) (L.B. 752 (2022) adopted an interstate professional counselor compact while also changing notification requirements for stem cell therapy.); (Ex. 20) (L.B. 755 (2020) changed home service permit provisions under the Cosmetology, Electrology, Esthetics, Nail Technology, and Body Art Practice Act and the Barber Act; changed infant screening provisions; changed provisions of the Parkinson's disease drug report; and eliminated obsolete provisions under the Engineers and Architects Regulation Act.). Despite their framing, Plaintiffs cannot challenge the breadth of a bill's subject matter, but rather only whether the provisions fall within its scope. All provisions of L.B. 574 pertaining to preborn children and transgender healthcare clearly discuss the Chief Medical Officer's duties in regulating medical services and healthcare under Nebraska Revised Statutes, Chapter 38. Specifically, both components provide for licensure revocation for medical providers violating the provisions of the respective acts. This clearly falls within L.B. 574's broad subject matter.

As L.B. 574 clearly pertains to a single subject, enforcement of its provisions do not exceed Defendants' authorities under the law. Therefore, Plaintiffs' action should be dismissed for failure to state a claim. However, as will be discussed in the next part, the Court may

use this rationale to dismiss this matter based on sovereign immunity.

III. Because L.B. 574 does not violate the single-subject rule as a matter of law, Defendants are entitled to sovereign immunity.

As discussed above, *see supra* Part II, Plaintiffs' complaint fails to state a claim. On its face, and as a pure question of law, L.B. 574 does not violate the single-subject rule. *State v. Jenkins*, 303 Neb. 676, 706, 931 N.W.2d 851, 876 (2019) ("The constitutionality of a statute presents a question of law, which an appellate court independently reviews."). Accordingly, pursuant to 12(b)(6) this case should be dismissed.

However, based on federal case law, Defendants request the Court decide the single-subject rule question as a matter of sovereign immunity. The Court may do so because the merits of this case and the Court's jurisdiction are inextricably intertwined.

Nebraska's pleading rules are modeled after the Federal Rules of Civil Procedure. *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 44-45, 690 N.W.2d 574, 578 (2005). Therefore, this Court should look to federal decisions for guidance. While Federal law recognizes that "[a]s a general rule, a 12(b)(1) motion cannot be converted into a motion for summary judgment . . . [,]" *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987), *overruled on other grounds as recognized in Montanez v. Future Vision Brain Bank, LLC*, 536 F. Supp. 3d 828, 835 n.1 (D. Colo. 2021), "[t]here is, however, a widely recognized exception to this rule." *Id.* Specifically, "[i]f the jurisdictional question is intertwined with the merits of the case, the issue should be resolved under 12(b)(6) or [the summary judgment standard]." *Id.* In deciding a jurisdictional question that is intertwined with the merits, for the purposes of judicial economy, "the court should assume jurisdiction over the case and decide the case on the merits." *Eubanks v. McCotter*,

802 F.2d 790, 792-93 (5th Cir. 1986).

"When subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case, the jurisdictional claim and the merits are considered to be intertwined." *Wheeler*, 825 F.2d at 259. Here, the question of sovereign immunity is intertwined with the merits, because the Plaintiffs are proceeding under Nebraska's state law adoption of *Ex parte Young—Concerned Citizens of Kimball Cty., Inc. v. Dept. of Envt. Control*, 244 Neb. 152, 157, 505 N.W.2d 659 (1993). This exception is necessarily premised on the assumption that Defendants are acting outside of the scope of their lawful authority. Defendants, however, have already shown as a matter of law that L.B. 574 is constitutional. So, as a matter of law, their acts to enforce L.B. 574 cannot be "outside the scope of their lawful authority."

Subject-matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *J.S. v. Grand Island Pub. Sch.,* 297 Neb. 347, 353, 899 N.W.2d 893, 898 (2017). "Whether a court has subject matter jurisdiction is a threshold issue that should be resolved prior to an examination of the merits." *Doe v. State*, 312 Neb. 665, 675, 980 N.W.2d 842, 851 (2022). "Sovereign immunity deprives a court of subject matter jurisdiction unless that immunity is waived." *Zawaideh v. Nebraska Dept. of Health & Human Servs.,* 285 Neb. 48, 54, 825 N.W.2d 204, 211 (2013).

"The immunity of states from suit is a fundamental aspect of the sovereignty which the states enjoyed before ratification of the Constitution and which they retain today." *Anthony K. v. State*, 289 Neb. 523, 536, 855 N.W.2d 802, 812 (2014). "It is inherent in the nature of sovereignty for a state not to be amenable to the suit of an individual without its consent." *Id.* And "'sovereign immunity is an

immunity from trial, not just a defense to liability of the merits . . . .'" *O'Bryan v. Holy See*, 556 F.3d 361, 372 (6th Cir. 2009).

Suits brought against state officials in their official capacities generally represent another way of pleading an action against the State. *See Anthony K. v. Nebraska Dep't of Health & Hum. Servs.*, 289 Neb. 540, 547, 855 N.W.2d 788, 795 (2014). "Thus, in reviewing actions against state officials, 'a court must determine whether an action against individual officials sued in their official capacities is in reality an action against the state and therefore barred by sovereign immunity.'" *Id.* (quoting *Michael E. v. State*, 286 Neb. 532, 540, 839 N.W.2d 542, 550-51 (2013)).

Plaintiffs bring their challenge against Defendants in their official capacities pursuant to the UDJA. *See* (Compl., ¶ 11). The UDJA, however, does not waive the State's sovereign immunity. *Concerned Citizens of Kimball Cty., Inc.*, 244 Neb. at 157, 505 N.W.2d at 659 ("the current version of Nebraska's Uniform Declaratory Judgments Act does not waive the State of Nebraska's sovereign immunity."). Nebraska has recognized an exception to sovereign immunity that suits may be brought against state officials in their official capacities for prospective equitable relief. *See id.* at 156, 658. This exception, however, is necessarily premised on the legal fiction that "'acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state.'" *Id.* (quoting *Rein v. Johnson*, 149 Neb. 67, 69, 30 N.W.2d 548, 552 (1947)). By implication, this means that official-capacity actions seeking prospective relief from ***appropriate*** exercises of official authority remain barred by sovereign immunity. Thus, the questions of sovereign immunity and the merits are inextricably intertwined in this instance.

This case presents a narrow situation where both sovereign immunity and the merits present pure questions of law. *See Doe*, 312 Neb. at 675, 980 N.W.2d at 851 (recognizing that sovereign immunity

presents a question of subject matter jurisdiction which is a question of law); *State v. Jenkins*, 303 Neb. at 706, 931 N.W.2d at 876. Consequently, for this Court to acquire subject matter jurisdiction under the limited exception articulated in *Concerned Citizens of Kimball Cty.* the Court has to hold that L.B. 574 violates the single-subject rule. Otherwise, the officials are not acting outside of their legal authority. Therefore, if the Court determines that the law is constitutional, then the Plaintiffs have no right under Nebraska's equivalent of *Ex parte Young* to sue the Defendants. Accordingly, this case can be dismissed on sovereign immunity.

IV. Plaintiffs have failed to state a claim because their challenge presents a political question.

"In Nebraska, to obtain declaratory relief, a plaintiff must prove the existence of a justiciable controversy and an interest in the subject matter of the action." *Nebraska Coalition for Educational Equity & Adequacy v. Heineman*, 273 Neb. 531, 540, 731 N.W.2d 164, 172-73 (2007) [hereinafter *Coalition*]. The political question doctrine is a doctrine of justiciability that "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government." *Id.* at 546-47, 176-77.

The Nebraska Supreme Court has adopted the tests articulated in *Baker v. Carr*, 369 U.S. 186 (1962), to determine whether an issue presents a nonjusticiable political question. *Coalition*, 273 Neb. at 545, 731 N.W.2d at 176. *Baker* presents "six independent tests" for determining whether an issue is nonjusticiable:

> Prominent on the surface of any case held to involve a political question is found [(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, 177 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (alterations in quote). As these tests are disjunctive, an issue is nonjusticiable if even one of these tests is met. *Id.* at 548, 178.

Baker's enumerated tests 1 through 5 are inextricable from single-subject challenges to legislative bills under Neb. Const. art. III, § 14. Given the broad discretion afforded to the Legislature, it is possible that single-subject rule challenges under § 14, article III of the Nebraska Constitution should not continue to be considered justiciable controversies under Nebraska law.

But, notwithstanding that greater inquiry, Plaintiffs' specific challenge clearly implicates the political question doctrine. Plaintiffs' challenge ultimately asks this Court to inquire into the integrity of the Legislative process. That is why they dedicate approximately one-third of their allegations to L.B. 574's legislative history. (Compl., ¶¶ 26-48). Essentially, they assert that L.B. 574 is structurally deficient because what they believe to be a single subject was not consistently maintained *throughout the legislative process*. *See, e.g.*, (Compl., ¶ 41) ("Compound L.B. 574 itself violates the Rules of the Nebraska Unicameral Legislature . . . ."); *see also* 16 C.J.S. *Constitutional Law* § 404, Westlaw (database updated May 2023) ("Questions relating to the action of a legislature, while discharging its legal and constitutional functions as a law-making body, generally are outside the purview of the judicial function."). Plaintiffs likely seek to litigate the legislative process as L.B. 574's opponents sought to set the legislative history up

for future litigation. (Ex. 10, p. 71) (noting that a Legislator stated as part of the record of L.B. 574: "And issues as to process, issues as to substance, *we'll have a clear record, and that **will** be subject to potential future action*."). That is not the question before this Court under the single-subject rule, however: this Court's inquiry should be focused on the four corners of L.B. 574.

The Nebraska Legislature has come to rely on "Christmas Tree bills" as part of their lawmaking process. *See* (Ex. 10, pp. 135-36) (A Legislator noted that "we have been through at least a week or better of dealing with what we affectionately call 'Christmas tree' bills."). That is their choice and within the purview of this separate branch of government's powers. Any challenges to this practice—including Plaintiffs' challenge—present this Court with an inappropriate inquiry that should be left squarely in the hands of the Legislature.

To hold otherwise would pull the rug out from under numerous bills passed across years that combine multiple acts. For example, in last year's legislative session, the Legislature passed L.B. 922, "a Bill for an Act related to law[.]" (Ex. 11). In the Judiciary Committee, five other bills were combined into L.B. 922: (1) L.B. 1059, which exempted the Judicial Resources Commission from Nebraska's open meetings law; (2) L.B. 1171, which established the clerk of the district court as jury commissioner in all counties; (3) L.B. 870, which amended two state revolving funds to allow payment of attorneys' fees; (4) L.B. 903, which changed provisions related to criminal privacy violations and prohibited spying by unmanned aircraft; and (5) L.B. 990, which created the offense of stolen valor. *See* (Ex. 11); (Ex. 12, pp. 8-9) (comments by Senator Lathrop). Later, Amendment 2429 was added on the floor of the Nebraska Legislature. It added L.B. 830, which changed provisions related to child support laws. (Ex. 12, pp. 9-10 (comments by Senator DeBoer).

Notably, L.B. 922 authorized two additional district court judges for Nebraska's Fourth Judicial District Court. (Ex. 11). Were Plaintiffs to prevail under their theory that the entire legislative process may only consider a single act throughout the life of a bill, any civil, criminal, or other order or judgment entered by those new judges might now be collaterally attacked as void. This would render an absurd result, cause an unprecedented upheaval of Nebraska's legislative and judicial processes, and call into doubt years of Nebraska legislation.

Because Plaintiffs seek to litigate the legislative process via the single-subject rule rather than litigate how the bill applies to them, this Court should refrain from resolving this action under the political question doctrine and dismiss this case.

V. Plaintiffs' request for a preliminary injunction is moot or should otherwise be denied.

Plaintiffs' request for a preliminary injunction becomes moot upon a finding on any of the reasons stated above. *See generally Nesbitt v. Frakes*, 300 Neb. 1, 5, 911 N.W.2d 598, 603 (2018) ("An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action."). Therefore, there is no need to even consider a temporary injunction at this juncture.

However, if this Court holds that Plaintiffs' challenge is justiciable, their application for a temporary injunction should still be denied. Although the Nebraska Supreme Court has not specifically laid out the requirements for a temporary injunction, there is a clear standard set forth by a majority of other jurisdictions. *See* John P. Lenich, Nebraska Civil Procedure ("Lenich") § 18:2, *Requirements for interlocutory injunctions* (2021) (Prof. Lenich's civil procedure commentary comprehensively surveying Nebraska injunction law and

concluding that use of the federal court standard is likely); Am. Jur. 2d, *Injunctions* § 246. *See also Eggers v. Evnen*, 48 F.4th 561, 564 (8th Cir. 2022). Federal courts entertaining temporary injunctions in Nebraska have looked at the following factors: the requirements are (1) irreparable harm, (2) probability of success on the merits, (3) the balance of the hardships, and (4) if relevant, the public interest favors issuance of the injunction. *Eggers*, 48 F.4th at 564. "Because these requirements are so well-accepted elsewhere, presumably they apply in Nebraska as well." Lenich, § 18:2.

All four of the factors weigh against the Plaintiffs' request for a temporary injunction. As identified in the section addressing Plaintiffs' standing, Plaintiffs do not have an irreparable harm, nor can they assert a harm on behalf of third parties in order to be granted injunctive relief. Irreparable harm focuses on the harm or potential harm to a plaintiff from a defendant's conduct or threatened conduct. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). "An injury is irreparable when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard." *Rath v. City of Sutton*, 267 Neb. 265, 280, 673 N.W.2d 869, 884 (2004). Of the approximately seventeen paragraphs alleging harm in their complaint only two paragraphs describe any kind of harm suffered by PPH or Dr. Traxler. (Compl., ¶¶ 49-65). The first harm alleged is that PPH has been harmed by the cancellation of appointments for patients who are now past the gestational limit (although no such patients are identified). (Compl., ¶ 63). The second is the speculative harm that could occur if Dr. Traxler, or presumably another member of PPH staff, chose to violate provisions of L.B. 574. (Compl., ¶ 64). For the reasons identified in the argument concerning standing, these claims are neither an injury in fact, nor a showing of irreparable harm to justify injunctive relief. *See supra* Part I.

In contrast, the State (i.e. the Defendants being sued in their official capacities) has an irreparable harm from being restricted from enforcing duly enacted laws. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Moreover, Defendants assert that prevention of enforcement of the law will almost certainly result in the harm of preborn children between the gestational ages of twelve and twenty weeks being aborted. Between 2018 and 2021, an average of 209 abortions were performed in Nebraska when the preborn child was thirteen weeks gestational age or older. *See* Statistical Report of Abortions for 2018, 2019, 202, 2021 available at https://dhhs.ne.gov/Pages/Vital-Statistics.aspx. That is approximately seventeen abortions of preborn children a month that are otherwise prevented under the new law. Therefore, the factor of irreparable harm weighs strongly in favor of denying the temporary injunction.

In addition to lacking the requisite irreparable harm, the Plaintiffs are unlikely to succeed on the merits. As the Eighth Circuit noted in *Eggers:*

> Ordinarily, the movant must show only a "fair chance" of success on the merits. *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019). But "where a preliminary injunction is sought to enjoin . . . government action based on presumptively reasoned democratic processes," the movant must show that he "is likely to prevail on the merits." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc). State and federal statutes are the output of "presumptively reasoned democratic processes." *Id.* at 732 & n.6.

Eggers, 48 F.4th at 565.

The standard for whether a law violates the single-subject rule is incredibly deferential. L.B. 574 is constitutional if (1) its title

"discloses that it relates to" some general subject, and (2) "all provisions in the bill relate to and are germane to" that general subject. *Jaksha*, 241 Neb. at 131, 486 N.W.2d at 874. As already discussed extensively above, this standard is met as both components of L.B. 574 prescribe duties to the Chief Medical Officer of the DHHS in regulating medical services and providers in the interest of public health and welfare. Plaintiffs have therefore failed to demonstrate that they are likely to prevail on the merits and their request for an injunction should be denied.

The balance of hardships and public interest essentially merge when the government, or a state official in his or her official capacity, is the nonmoving party. *Eggers*, 48 F.4th at 564. The State, and by extension the government officials who enforce the law, have an interest in seeing duly enacted laws enforced. *See generally Abbott v. Perez*, 201 L. Ed. 2d 714, 138 S. Ct. 2305, 2324 (2018); *New Motor Vehicle Bd. of Cal.*, 434 U.S. at 1351 (Rehnquist, J., in chambers). The regulation of abortion is clearly within the jurisdiction of the State and its Legislature. As the U.S. Supreme Court has recently explained, "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022). Neither Plaintiff can claim a right to be free from regulation in the provision of medical services. Consequently, the only hardship they claim to suffer is the limitation on when they can offer abortion services. The regulation of when and how an abortion may be performed is a regulation generally applicable to all healthcare professionals and health care facilities licensed in the State of Nebraska.

In contrast, the Defendants have identified several harms which shift the balance of the hardships analysis in the favor of denying the injunction. The Legislature has made a determination to protect preborn life at twelve weeks of gestational age. The Plaintiffs' alleged hardship of canceling an undisclosed number of appointments does not

outweigh the public interest in protecting the life of preborn children. Likewise, the Plaintiffs have not alleged that they have incurred any hardship concerning their licenses since L.B. 574 has gone into effect, save for the fact they are subject to a generally applicable law regulating health occupations and professions in Nebraska. Thus, the Plaintiffs have failed to demonstrate that the factors for an injunction weigh in their favor and their request for a temporary injunction should therefore be denied.

WHEREFORE, Defendants respectfully request that this Court grant their Neb. Ct. R. Pldg. § 6-1112(b)-converted Motion to Dismiss, dismiss Plaintiffs' complaint, and deny Plaintiffs' motion for a temporary injunction.

Respectfully submitted June 8, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the required typeface and formatting rules set forth in Neb. Ct. R. Pldg. § 6-1503 and Neb. Ct. R. App. P. § 2-103 and contains 7,487 words and was prepared using the Microsoft Word program from Microsoft Office 365.

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