IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

PLANNED PARENTHOOD OF THE HEARTLAND, INC., *et al.*, *Plaintiffs*, v. MIKE HILGERS, in his official capacity as Attorney General for the State of Nebraska, *et al.*, *Defendants*.	Case No. CI 23-1820 **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION AND BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS / FOR SUMMARY JUDGMENT**

Plaintiffs Planned Parenthood of the Heartland, Inc. ("PPH") and Dr. Sarah Traxler, by and through undersigned counsel, hereby submit their Reply Brief in Support of Plaintiffs' Motion for a Temporary Injunction and Brief in Opposition to Defendants' Motion to Dismiss. As Defendants acknowledge, their Motion constitutes a Motion for Summary Judgment under Neb. Ct. R. Pldg. § 6-1112(b).

INTRODUCTION

As Governor Jim Pillen put it when signing the bill, "LB 574 is simply two things." (Pls. Ex. 27). One of its subjects is an abortion ban. The other is a set of restrictions on gender-affirming care. The Nebraska Legislature initially addressed these separate subjects in separate bills—as the Constitution requires—but combined them when one of them stalled. That maneuver violated the plain text and anti-logrolling aims of Article III, § 14, of the Nebraska Constitution, which requires bills to contain only "one subject." In short, L.B. 574 is a two-subject bill that violates the single-subject rule.

Defendants seek to avoid this straightforward conclusion. They contend that Plaintiffs are not entitled to a temporary injunction and in fact should have judgment entered against them. But their arguments lack support in Nebraska law.

First, Defendants contend that abortion and gender-affirming care fit under the "very broad" subject of "public health and welfare." Defs.' SJ Br. 13. But as the Nebraska Supreme Court recently warned, in what it called a "similar context," single-subject rules "may not be circumvented by selecting a [general subject] so broad that the rule is evaded as a meaningful constitutional check." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 145 & n.35, 948 N.W.2d 244, 250 & n.35 (2020) (quoting cases on legislative single-subject rules). To apply the single-subject rule at the level of generality urged by the Defendants, and to sanction the logrolling of two disparate subjects in L.B. 574, is to erase the single-subject rule from the Nebraska Constitution.

Defendants also contend that the Nebraska Legislature has been adopting bills like LB 574 for years. Yet the bills to which Defendants point are not remotely like LB 574, and even if they were, their mere existence, unchallenged by any party, would not prove their constitutionality.

Similarly, as to the equitable standards for temporary injunctive relief, Defendants argue that the Court cannot consider any harm that L.B. 574 is causing to patients because no patient plaintiff is named. But Defendants concede that the Court should consider the public interest in weighing a temporary injunction, *see* Defs.' SJ Br. 23, and the interests of Nebraskans in need of abortion care are cognizable here. A temporary injunction preserving a fifty-year status quo is warranted to provide the Court with time to resolve the Defendants' Motion for Summary Judgment and Plaintiffs' pending Cross-Motion for Summary Judgment, filed June 9, 2023.

The Defendants' jurisdictional arguments fare no better. They question whether the Plaintiffs have standing, but PPH and Dr. Traxler have suffered injury in fact from a law that bans roughly one-third of the abortions they provide. Traxler Aff. ¶¶ 18, 20. Accordingly, Defendants' insistence that Plaintiffs lack third-party standing to bring their claims on behalf of patients is beside the point. Defendants also invoke sovereign immunity, but it is black-letter law that sovereign immunity does not bar lawsuits for declaratory and injunctive relief against state officials where, as here, the plaintiffs

challenge the constitutionality of a state law. *Logan v. Dep't of Corr. Servs.*, 254 Neb. 646, 653, 578 N.W.2d 44, 50 (1998). And while Defendants contend that the single-subject rule is a "political question" that cannot be adjudicated, Nebraska courts have been adjudicating single-subject cases for more than a century. *See, e.g., Van Horn v. State*, 46 Neb. 62, 64 N.W. 365 (1895). Moreover, even if this Court limited its review to SB 574's "four corners," *see* Defs.' SJ Br. 19, Plaintiffs' single-subject claim would still prevail.

LEGAL STANDARDS

The standards for granting temporary injunctive relief are set forth at page 9 of Plaintiffs' opening brief.

Motions to dismiss are governed by Neb. Ct. R. Pldg. § 6-1112(b). Where, as here, a defendant moving to dismiss for failure to state a claim seeks to introduce matters outside the pleadings, the motion is treated as one for summary judgment. *Id.* § 6-1112(b)(6); Neb. Rev. Stat. §§ 25-1330 to 25-1336. Summary judgment is warranted 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 judgment as a matter of law. *Williamson v. Bellevue Med. Ctr.*, 304 Neb. 312, 319, 934 N.W.2d 186, 192 (2019). At summary judgment, "the trial court determines whether the parties are disputing a material issue of fact; it does not resolve the factual issues." *Id.*

ARGUMENT

I. Plaintiffs have standing.

When legislation outlaws part of someone's job, that person has standing to challenge the legislation's constitutionality. That is the situation here.

The bulk of the government's standing argument takes aim at Plaintiffs' ability to challenge LB 574 on behalf of their patients. That argument is a distraction and the Court need not decide it. Plaintiffs have challenged LB 574 on their *own* behalf and assert a violation of their *own* right not to be regulated by an unconstitutional law. Moreover, the abortion component of L.B. 574 is designed to have, and

is having, a profound impact on Nebraska abortion providers, including Plaintiffs PPH and Dr. Traxler. On this basis alone, PPH and Dr. Traxler are entitled at final judgment to injunctive relief and a declaration of LB 574's invalidity. And because the harms to PPH and Dr. Traxler are also irreparable, *see, e.g.*, Traxler Aff. ¶ 67 (describing harms to medical ethical obligations and reputation), irrespective of any harm to their patients, Plaintiffs likewise have standing to seek a temporary injunction.

A. Plaintiffs have standing to challenge laws that harm them.

Nebraska courts "are not bound by the strictures of constitutional standing requirements." *Thompson v. Heineman*, 289 Neb. 798, 822, 857 N.W.2d 731, 751 (2015). At a minimum, therefore, a person may challenge the constitutionality of a statute when "it is being or is about to be applied to his disadvantage.'" *Nebraska Accountability & Disclosure Comm'n v. Skinner*, 288 Neb. 804, 822, 853 N.W.2d 1, 15 (2014) (quoting *State ex rel. Nelson v. Butler*, 145 Neb. 638, 651, 17 N.W.2d 683, 691–92 (1945)) (emphasis added). To do so, the plaintiff must "show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right." *Id.*

The Nebraska Supreme Court's single-subject cases demonstrate that the relevant right, for standing purposes, is simply the right not to be regulated by a law enacted in violation of the state constitution. The Nebraska Supreme Court has decided a case brought by a plaintiff who alleged that an income tax provision had been enacted in violation of the single-subject rule at issue here. *Anderson v. Tiemann*, 182 Neb. 393, 394, 155 N.W.2d 322, 325 (1967). The Nebraska Supreme Court has heard a case brought by a Nebraska resident who alleged that the certification of a ballot initiative concerning cannabis violated the single-subject rule of Neb. Const. art. III, § 2. *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 145, 948 N.W.2d 244, 250 (2020). And the Nebraska Supreme Court has heard a case brought by a relator who alleged that a proposed constitutional amendment regarding horserace wagering violated the separate-vote provision of art. XVI, § 1, of the

Nebraska Constitution. *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 853 N.W.2d 494 (2014).

In these cases there was no freestanding right to be free of taxation, or cannabis, or gambling; the relevant right was the "clear right" not to be governed by unconstitutional laws. *Loontjer*, 288 Neb. at 1006; 853 N.W.2d at 517. *Accord People v. Olender*, 222 Ill. 2d 123, 129, 854 N.E.2d 593, 598 (2005) (recognizing criminal defendant's standing to bring single-subject challenge to law under which he was indicted); *Blackledge v. Richards*, 194 Neb. 188, 191, 231 N.W.2d 319, 322 (1975) (holding that plaintiff lacked standing to challenge law restricting capital improvements by utility franchise holders because he was not a utility franchise holder).

B. L.B. 574 is harming the Plaintiffs.

Here, too, Plaintiffs have standing because L.B. 574 has profoundly impaired their medical practice, and they have the right not to be governed by an unconstitutional law. It is undisputed that, right up until L.B. 574 banned abortions beginning at 12 weeks of pregnancy, Plaintiffs provided abortions at and after 12 weeks. Traxler Aff. ¶¶ 18, 20. It is undisputed that they no longer provide that care because L.B. 574 bans it. *Id.* ¶¶ 12, 15; Supp. Traxler Aff. ¶¶ 8–9. And it is undisputed that Plaintiffs would face severe repercussions under L.B. 574, including loss of medical licensure and civil penalties, for providing even one abortion after 12 weeks in violation of LB 574. *See* Pls.' Br. in Supp. of Mot. for Temp. Inj. (hereinafter, "Pls.' TI Br.") Similarly, Defendants do not dispute that by forcing Plaintiffs to turn away patients, LB 574 is imposing reputational harm on PPH, including by forcing it to narrow the scope of its health care services such that, in the view of some patients, become less reliable for the care they depend on. Traxler Aff. ¶ 67.

These are cognizable injuries in fact. *See Egan v. Cnty. of Lancaster*, 308 Neb. 48, 57, 952 N.W.2d 664, 671 (2020) (plaintiff whose home was 0.6 miles from site of the proposed facility had standing to challenge it). And, as relevant to Plaintiffs' temporary-injunction request, they are irreparable. *See* Pls.' TI Br. 17–18.

Contrary to Defendants' suggestion, there is no legal requirement that Plaintiffs put their medical practices at risk by "perform[ing] an abortion after twelve weeks and subject[ing] themselves to licensure proceedings." Defs.' SJ Br. 10. Plaintiffs have already been injured because the government has outlawed part of their practice, and there is "a credible threat of enforcement" of that law should Plaintiffs violate it. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014); *see also* Traxler Aff. ¶ 67; Supp. Traxler Aff. ¶ ("But for LB 574, PPH and its staff would return to scheduling appointments for and actually providing abortion in Nebraska through 16 weeks, 6 days of pregnancy, as we did before LB 574 took effect."); LB 574 Slip Law § 9 (adding Neb. Rev. Stat. § 38-192(3)); *id.* § 11 (adding Neb. Rev. Stat. § 38-196(2)).

Nor are Defendants right to imply that PPH would not be put at risk by violating L.B. 574. Defs.' SJ Br. 10. PPH has Nebraska state licenses for health centers in Omaha and Lincoln at which it provides medical services. Traxler Aff. ¶¶ 1, 17–19; Supp. Traxler Aff. ¶ 4. The harm and jeopardy that L.B. 574 visits upon PPH and Dr. Traxler could hardly be more acute.

II. Temporary injunctive relief is warranted.

The opening brief explained that a temporary injunction is warranted because L.B. 574 is unconstitutional and is, right now, irreparably harming PPH, Dr. Traxler, and their patients. Pls.' TI Br. at 10–21. Banning abortion and restricting gender-affirming care are different and narrow subjects. Accordingly, L.B. 574 is neither permissible comprehensive legislation, nor is it permissible legislation on one narrow subject.

LB 574 is instead two distinct subjects held together only by makeshift attempts to characterize them as one. For that reason, and given the equities of this case, it should be enjoined. *See Weis v. Ashley*, 59 Neb. 494, 81 N.W. 318, 319 (1899) ("Our conclusion is that the act of 1887 amending the prior act for the protection of owners of stallions, jacks, and bulls was not adopted in accordance with the requirements of the constitution, and is therefore null."); *Van Horn*, 46 Neb. 62, 64 N.W. 365 ("In *State v. Lancaster Co.*, 17 Neb. 85, 22 N. W. 228, while

the syllabus refers only to the title, it is clear from the opinion that the court deemed the act itself bad for duplicity.").

A. Plaintiffs have stated a valid single-subject claim that is likely to succeed on the merits.

1. Defendants' primary merits argument is that the abortion ban and the gender-affirming care restrictions in L.B. 574 fit within the subject of "public health and welfare." Defs.' SJ Br. 14. Yet Defendants' concession that this subject is "very broad," *id.*, is putting it mildly. If Defendants are correct that "public health and welfare" is a single subject capable of salvaging L.B. 574, then Plaintiffs were right to wonder whether any regulation that combines two nouns arguably related to outcomes for human beings—from oxycodone to trampolines—could be a single subject for purposes of article III, § 14.

But Defendants are incorrect. "Public health and welfare" cannot, as a matter of law, serve as a single subject linking the two otherwise distinct, narrow components of L.B. 574.

As the Nebraska Supreme Court has explained, although the single-subject rule can permit "comprehensive acts" that broadly cover a field, it does not permit the Legislature to hitch one narrow provision to another and then try to say that some broad field covers both. *Van Horn*, 46 Neb. at 64, 64 N.W. at 369; Pls.' TI Br. 11–12, 16. None of the cases cited by Defendants holds otherwise. Defendants suggest that language in *Anderson* permits any formulation of a single subject, no matter how broad. Defs.' SJ Br. 2 (citing *Anderson*, 182 Neb. at 408–99, 155 N.W.2d at 332). But the judiciary's approval of legislation that is *actually* broad and comprehensive, as described in *Van Horn* and *Anderson*, is not a license to combine narrow, logrolled provisions and simply assign them a *broad-sounding subject*.

In fact, the Nebraska Supreme Court recently warned against doing precisely what the Defendants urge this Court to do here. That warning came in the Nebraska Supreme Court's examination of the ballot initiative at issue in *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 145, 948 N.W.2d 244, 250 (2020). Although *Wagner* concerned the single-subject rule for ballot initiatives, *see* Neb. Const. art. III, § 2, the Court's instructions on how to identify the relevant subject pointed

specifically to authorities *on the single-subject rule for legislation*. The Court explained: "As two other jurisdictions have stated in a similar context, '"the single subject requirement may not be circumvented by selecting a [general subject] so broad that the rule is evaded as a meaningful constitutional check"' on the initiative process."'" *Wagner*, 307 Neb. at 145 & n.35, 948 N.W.2d at 250 & n.35 (quoting *Gregory v. Shurtleff*, 299 P.3d 1098, 1112 (Utah 2013), and *Wirtz v. Quinn*, 2011 IL 111903, 953 N.E.2d 899, 352 Ill. Dec. 218 (2011)).

Both cases excerpted by the Nebraska Supreme Court in *Wagner* involved legislative single-subject rules. The Utah Supreme Court's *Shurtleff* decision, which in turn quoted the Supreme Court of Illinois in *Wirtz*, stated:

> [T]he single subject requirement may not be circumvented by selecting a topic so broad that the rule is evaded as a meaningful constitutional check *on the legislature's actions*.

Shurtleff, 299 P.3d at 1112 (emphasis added) (quoting *Wirtz*, 2011 IL 111903, ¶ 14, 953 N.E.2d at 905).

Wagner also gave examples of overly broad subjects. Citing a law review article—which, again, was not limited to the ballot initiative context—the Court disapproved "such broad topics as 'land,' 'education,' 'transportation,' 'utilities,' 'state taxation,' 'public safety,' 'capital projects,' and 'operations of state government.'" *Wagner*, 307 Neb. at 145 n.34, 948 N.W.2d at 250 (quoting Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 Alb. L. Rev. 1629, 1637 (2019)).

Applying those principles—drawn from legislative single-subject cases—the *Wagner* Court concluded that, "[a]t an appropriate level of specificity," the initiative's "general subject [was] to create a constitutional right for persons with serious medical conditions to produce and medicinally use an adequate supply of cannabis, subject to a recommendation by a licensed physician or nurse practitioner." *Wagner*, 307 Neb. at 153, 948 N.W.2d at 254–55. The general subject was not "public health and welfare." It was not even "cannabis." It was far, far more specific.

Defendants' reading of the case law simply cannot be reconciled with *Wagner* or, for that matter, *Van Horn*. Accordingly, although Plaintiffs believe that the Nebraska Supreme Court's precedent, when properly read, can be harmonized and supports invalidation of L.B. 574, *Wagner* would have effectively overruled any earlier cases to the contrary. (Plaintiffs, of course, preserve for appeal all other arguments available to them to argue for the overruling of Nebraska Supreme Court precedent.)

2. Under the principles set forth in *Van Horn* and *Wagner*, L.B. 574 cannot fairly be characterized as single-subject legislation concerning "public health and welfare." It is a bill restricting gender-affirming care, to which Senators added an abortion ban that had failed to advance as a separate bill. The two subjects have different titles: "The Let them Grow Act" and the "Preborn Child Protection Act." They have different effective dates: October 2023 and May 2023. They have different enforcement systems: the gender-affirming care restriction is enforced via a civil cause of action and a complex rulemaking regime, while the abortion ban is enforced with mandatory license revocation. *See* Pls.' TI Br. 6–8, 15–16.

Moreover, contrary to Defendants' position, the Legislature did *not* codify the two acts and all other provisions in Chapter 38, "Health Occupations and Professions." *See* Pls.' Statement of Disputed Facts ¶ 7. Although some sections of L.B. 574 will revise portions of Chapter 38, the Legislature notably did not specify where Sections 1 to 6 and 14 to 20 will be codified.

Nor does the record establish that the Legislature treated banning abortion and restricting gender-affirming care as falling within a single subject of "public health and welfare." As an initial matter, neither the abortion ban nor the gender-affirming care bill, as initially introduced, proposed to codify *any* of their provisions in Chapter 71 of the Nebraska Revised Statutes, entitled "Public Health and Welfare." And although L.B. 574 referred to "public health and welfare" when first introduced, *see* L.B. 574, Introduced, Neb. Leg., 108th Leg., Reg. Sess. (Neb. Jan. 17, 2023) (Pls.' Ex. 6), the abortion ban set out in L.B. 626 did not have that language. Instead, the latter

stated that it "relat[ed] to abortion." L.B. 626, Introduced, Neb. Leg., 108th Leg., Reg. Sess. (Neb. Jan. 17, 2023) (Pls.' Ex. 12). If anything, this record simply confirms that the Legislature accurately regards gender-affirming care and abortion as different legislative subjects.

Thus, L.B. 574 is not, in fact, a bill with a "broad subject matter." Defs.' SJ Br. 13. It is a bill with two different, narrow subjects that is now being handed a broad banner to carry during this litigation.

B. All other equitable factors favor injunctive relief.

1. Defendants contend that Plaintiffs have suffered no harm, much less irreparable harm, to support an injunction. But for all the reasons identified in Part I, *supra*, that argument must be rejected.

2. Defendants also argue that the Court cannot consider any harm that L.B. 574 is causing to patients because no patient plaintiff is named. As Plaintiffs have explained, however, the irreparable harm to them personally is by itself sufficient to justify entry of a temporary injunction.

In any event, Defendants concede that the Court should consider the public interest in weighing a temporary injunction, *see* Defs.' SJ Br. 23, and they provide no justification for ignoring in that analysis the interests of Nebraskans who have—for fifty years—relied on safe, legal access to abortion in their home state. Nor do they dispute that, in the absence of an injunction, Nebraskans will be forced either to carry a pregnancy to term and give birth, or to attempt to leave the state for health care. Pls.' TI Br. 18–20; Traxler Aff. ¶¶ 40–67; Defs.' SJ Br. 22 (admitting impact of injunction on abortion availability). A temporary injunction preserving this status quo while the Court resolves the Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment, filed June 9, 2023, is warranted.

III. Defendants' asserted grounds for dismissal are mistaken.

As part of their affirmative motion, Defendants argue that this lawsuit should be dismissed either on grounds of sovereign immunity or on the ground that it raises a nonjusticiable "political question." These arguments misapprehend the doctrines they invoke.

A. Defendants are not entitled to sovereign immunity.

Defendants do not dispute that because they are responsible for administering L.B. 574, and because Plaintiffs have sued them in their official capacities, Plaintiffs are entitled to prospective relief if L.B. 574 violates the single-subject rule. Defs.' SJ Br. 16. But the Defendants argue that *if* this Court determines that L.B. 574 satisfies the single-subject rule, and therefore rules against Plaintiffs on the merits, then the Court should *also* rule against the Plaintiffs on sovereign immunity grounds. *Id.* at 14–17.

That is not how sovereign immunity works. "A declaratory or other equitable action against a state officer or agent attacking the constitutionality of a statute . . . is not a suit against the state and is therefore not prohibited by principles governing sovereign immunity." *Logan v. Dep't of Corr. Servs.*, 254 Neb. 646, 653, 578 N.W.2d 44, 50 (1998). A court turns to the merits only *after* deciding whether sovereign immunity applies. *See, e.g.*, *Heist v. Neb. Dep't of Corr. Servs.*, 312 Neb. 480, 491, 979 N.W.2d 772, 782 (2022).

That is the situation here. Plaintiffs seek declaratory and injunctive relief "against a state officer or agent attacking the constitutionality of a statute." *Logan*, 254 Neb. at 653, 578 N.W.2d at 50. Unlike the case on which Defendants principally rely, Plaintiffs did not sue state agencies. *See* Defs.' SJ Br. 15–17 (discussing *Concerned Citizens of Kimball Cnty., Inc. v. Dep't of Env't Control of State*, 244 Neb. 152, 505 N.W.2d 654 (1993)). Therefore sovereign immunity does not apply, and any subsequent ruling against Plaintiffs on the merits will not reinstate the immunity hurdle that Plaintiffs have already cleared. *Heist*, 312 Neb. at 491, 979 N.W.2d at 782.

In *Heist*, for example, the plaintiff alleged that state officials had improperly withheld good time credit. The Supreme Court of Nebraska held that this allegation was not barred by sovereign immunity, and that the Court therefore "ha[d] jurisdiction to consider the merits of Heist's UDJA claim." *Heist*, 312 Neb. at 491, 979 N.W.2d at 782. On the merits, the Court agreed with the district court that the government officials had done nothing illegal. *Id.* But the Court did not, at that point, return to sovereign immunity and resolve the case

on that basis. Indeed, the Defendants point to no case in Nebraska courts where that has ever happened.

Thus, because Plaintiffs seek declaratory and injunctive relief against state officials based on their allegation that L.B. 574 is unconstitutional, those officials are not entitled to sovereign immunity. And that will remain true no matter this Court's ruling on the merits.

B. This case is justiciable.

After describing cases in which Nebraska courts have adjudicated single-subject challenges to legislative enactments, Defendants argue that such challenges actually cannot be adjudicated because they involve "political questions." *Compare* Defs.' SJ Br. 12–13, *with* Defs.' SJ Br. 17–20. This argument lacks merit.

1. Defendants' argument is foreclosed by precedent. In cases spanning more than a century, the Supreme Court of Nebraska has repeatedly decided cases, like this one, brought by plaintiffs alleging that a legislative enactment violated one of the Nebraska Constitution's single-subject rules. *See, e.g., Weis*, 59 Neb. 494, 81 N.W. 318; *Van Horn*, 46 Neb. 62, 64 N.W. 365; *Anderson*, 182 Neb. 393, 155 N.W.2d 322; *Loontjer*, 288 Neb. 973N.W.2d 494; *see also* Defs.' SJ Br. 12–13 (collecting cases that Nebraska courts have adjudicated). To be sure, the plaintiffs in these cases have not always prevailed. But their cases were *adjudicated*.

The case on which Defendants rely, *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 540, 731 N.W.2d 164, 172–73 (2007), does not overrule any of these many cases in which Nebraska courts have heard and decided single-subject challenges to legislative enactments.

Nebraska Coalition held that a constitutional challenge to Nebraska's education funding system was a nonjusticiable political question. The plaintiffs had relied on the "free instruction" clause appearing in article VII, § 1, of the Nebraska Constitution, which states that the "Legislature shall provide for the free instruction" of people aged five to twenty-one. In concluding that it could not adjudicate the challenge, the Nebraska Supreme Court pointed to

several concerns, including: "that the free instruction 'provision is clearly directed to the Legislature'" and is not self-executing; that the courts lacked "judicially discoverable or manageable standards" by which to judge whether the Legislature's education funding was constitutionally adequate; that "[f]iscal policy issues" were best left to the Legislature; and that the judicial branch could not second-guess those fiscal decisions without "deciding what spending issues have priority." *Id.* at 549–57, 731 N.W.2d at 178–83; *see also id.* at 545–46, 731 N.W.2d at 176 (emphasizing that courts do "not sit as a superlegislature to review the wisdom of legislative acts" (quoting *Gourley ex rel. Gourley v. Neb. Methodist Health Sys.*, 265 Neb. 918, 943, 663 N.W.2d 43, 68 (2003))).

None of those concerns is present here. The single-subject rule of article III, § 14, is a limitation on Legislative authority, and is appropriate for courts to enforce. *Weis*, 59 Neb. 494, 81 N.W. at 319 (legislation enacted in violation of single-subject command is "null"). Nebraska courts have extensive experience developing standards for deciding whether a provision contains multiple subjects. *See, e.g.*, *Wagner*, 307 Neb. at 145 & n.35, 948 N.W.2d at 250 n.35; *Loontjer*, 288 Neb. 973, 853 N.W.2d 494; *Anderson*, 182 Neb. at 408–99, 155 N.W.2d at 332; *Van Horn*, 46 Neb. at 64, 64 N.W. at 369. And contrary to the Defendants' suggestion, Defs.' SJ Br. 18, consulting legislative history during a single-subject case would not amount to an assessment of the "integrity" of the legislative process; it would merely be an assessment of whether a bill contains more than one subject. Nebraska courts regularly consult legislative history, with no apparent harm to the Legislature. *See, e.g.*, *Omaha Pub. Power Dist. v. Neb. Dep't of Revenue*, 248 Neb. 518, 526, 537 N.W.2d 312, 317 (1995); *Lancaster, Cnty. of v. Maser*, 224 Neb. 566, 573, 400 N.W.2d 238, 243 (1987).

Finally, far from replacing the Legislature's fiscal policies with its own priorities, adjudicating single-subject-rule cases never—not ever—involves second-guessing the wisdom of any policy endorsed by the Legislature. It involves counting the number of subjects in a bill. Indeed, the single-subject violation would have been just as clear, and the correct result in this case would be no different, if the Legislature had presented the Governor with a bill lifting an abortion ban or

easing government regulation of gender-affirming care. It is sufficient to decide whether banning abortion bans and regulating gender-affirming care are different subjects. They are.

2. Beyond being foreclosed by case law, the government's political question argument is contrary to its own practice. For many years, including as recently as 2021, the Attorney General's Office has written Legislators to express its views about whether bills complied with the single-subject rule. These opinions all acknowledge that Nebraska courts have adjudicated single-subject challenges. But issuing these opinions would have made little sense if, as the Attorney General's Office now claims, no other branch of government has any role to play in ensuring the Legislature's compliance with the single-subject rule. *See*, *e.g.*, Does LB 528, as Amended, Violate the Single Subject Requirement in Neb. Const. art. Ill, § 14?, Op. Neb. Att'y. Gen. No. 21003, 2021 WL 1182447 at *2 (March 26, 2021) (concluding that while the bill at issue "might be said to relate to the broad subject of 'education,'" the Attorney General's Office "ha[d] some concerns regarding the constitutionality of the legislation"); Whether LB 571 is Unconstitutional by Virtue of Containing Two Subjects, Op. Neb. Att'y Gen. No. 90023, 1990 WL 485354, at *2 (Mar. 22, 1990); Constitutionality of Two-Part Amendment to LB 850, the State Claims Bill, Which Amendment Would Bypass the State Claims Board and State Courts and Appropriate $30,000,000 for Payment to Commonwealth Depositors and Amend the State Tort Claims Act to Authorize Such Bypass, Op. Neb. Att'y Gen, No. 91042, 1991 WL 496712, at *1 (May 20, 1991).

3. Finally, precisely because Nebraska courts carefully adjudicate single-subject cases, Defendants are incorrect to claim that adjudicating this case would necessarily "call into doubt years of Nebraska legislation." Defs.' SJ Br. 20. In deciding this case, the Court could observe that L.B. 574 reflects a peculiarly egregious violation of the single-subject rule, both on its face and given its history.

As enacted, L.B. 574 is two bills, with separate titles, purposes, and implementation dates, all combined into one. *See* Pls.' TI Br. 5-7. The two acts regulate different private conduct and different sets of

people. *Id.* They rely on distinct enforcement mechanisms. *Id.* And the gender-affirming care provisions establish a rulemaking regime that does not apply to the abortion ban. *Id.* Nor are the two acts, set forth in Section 1 to 6 and 14 to 20 of LB 574, required to be codified anywhere near each other or even in the same chapter. *See* L.B. 574 Slip Law (Pls.' Ex. 5); Pls.' Statement of Disputed Facts ¶ 7.

In addition, the bills were combined under circumstances that suggest logrolling: L.B. 574 contained only a restriction on gender-affirming care when it advanced to the final stage of debate on April 14, 2023, but after the abortion ban in L.B. 626 stalled on April 27, the Legislature took the unusual step of returning L.B. 574 to select file so that an abortion ban resembling L.B. 626 could be added to it via an amendment. *Ban on gender-altering procedures expanded to include abortion restrictions, returned to final reading*, Unicameral Update (May, 18 2023), http://update.legislature.ne.gov/?p=34361 (Pls.' Ex. 23). *See also, e.g.*, Erin Bamer, *Delays could mean temporary ban on puberty blockers, hormone therapy for Nebraska youths*, Omaha World-Herald (May 31, 2023) (Pls.' Ex. 35).

Plaintiffs are aware of no other piece of legislation, and Defendants cite none, where two bills were combined in this fashion. And for that reason, there is no reason to believe that a ruling for PPH and Dr. Traxler in this case would imperil any other legislative enactments, let alone "years" of them.

CONCLUSION

For the foregoing reasons, and those provided in Plaintiffs' temporary-injunction brief, the Plaintiffs respectfully urge the Court to issue a temporary injunction and to deny the Defendants' Motion to Dismiss.

Dated this 11th day of June, 2023

Respectfully submitted,

PLANNED PARENTHOOD OF THE HEARTLAND, INC., and DR. SARAH TRAXLER, Plaintiffs.

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CERTIFICATE OF COMPLIANCE

Pursuant to Neb. Ct. R. § 6-1605(A) and Neb. Ct. R. App. P. §2-103(C)(4), this brief was prepared using Microsoft 365 in 12-point Century Schoolbook font, in compliance with said rules. Pursuant to Neb. Ct. R. § 6-1408(A) and Neb. Ct. R. App. § 2-103(A) and (C)(3), this brief contains 5,308 total words, excluding this certificate, according to Microsoft Word.

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