APPEAL NO. 23-644

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

PLANNED PARENTHOOD OF THE HEARTLAND, INC.
and SARAH TRAXLER, M.D.,
Plaintiffs/Appellants,

v.

MIKE HILGERS in his official capacity as Attorney General for the State of Nebraska; JIM PILLEN, in his official capacity as Governor of the State of Nebraska; DANNETTE SMITH, in her official capacity as Chief Executive Officer of the Nebraska Department of Health and Human Services; CHARITY MENEFEE, in her official capacity as the Director of the Nebraska Department of Health and Human Services Division of Public Health; and TIMOTHY TESMER, in his official capacity as Chief Medical Officer of the Nebraska Department of Health and Human Services,
Defendants/Appellees.

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY

District Court Case No. 23-1820
Honorable Lori Maret

APPELLANTS' REPLY BRIEF AND ANSWER TO BRIEF ON CROSS-APPEAL

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JURISDICTIONAL STATEMENT, STATEMENT OF THE CASE, PROPOSITIONS OF LAW, AND STATEMENT OF FACTS

Plaintiffs adopt the entirety of the following sections of their opening brief: Jurisdictional Statement, Statement of the Case, Propositions of Law, and Statement of Facts. Appellants' Br. 1–9.

SUMMARY OF THE ARGUMENT

Plaintiffs' opening brief gave three core reasons why L.B. 574 violates the single-subject rule in article III, § 14, of the Nebraska Constitution. First, as a matter of plain text, L.B. 574 impermissibly "contain[s] more than one subject" because it contains both restrictions on gender-affirming care and a twelve-week abortion ban. Second, under this Court's case law, L.B. 574's subject must be identified at a meaningful level of specificity, which means it cannot be salvaged by conjuring some broad category encompassing its two subjects. Third, given the anti-logrolling purposes of article III, § 14, L.B. 574 is unconstitutional because its abortion ban was added after another abortion ban failed as a stand-alone bill.

The defendants largely accept the plaintiffs' description of L.B. 574. Appellees' Br. 15–17. They acknowledge that L.B. 574's two halves have different titles, enforcement mechanisms, and operative dates, and they were codified into multiple Chapters of the Nebraska Revised Statutes. *Id.* at 17. They concede that the Legislature attached the twelve-week abortion ban to L.B. 574 only after a six-week ban failed as a separate bill. *Id.* at 22. And they do not even argue that a layperson could meaningfully understand L.B. 574 without knowing of *both* its gender-affirming care restrictions *and* its altogether separate abortion ban.

Yet the defendants insist that L.B. 574 contains but one subject, and that the subject is "public health and welfare." *Id.* at 11. But they are constrained to argue that this Court should deem L.B. 574 a "public health and welfare" bill as a matter of law—even though no one describes it that way as a matter of fact—because the four-word phrase

"public health and welfare" appears among the seventy-seven words of L.B. 574's title. *Id.*; (T991).

For three reasons, this title-based approach has never been, and should not become, the law in Nebraska. First, the plain text of article III, § 14, makes clear that determining whether a bill contains more than one subject, and determining whether the title clearly expresses that subject, are distinct inquiries. Second, this Court's cases require identifying a bill's subject at a meaningful level of specificity. The defendants' contrary argument relies, incorrectly, on this Court's test for resolving *clear-title* challenges, not single-subject challenges.

Third, L.B. 574's peculiar legislative history supplies a narrow basis to strike it down consistent with the purposes of article III, § 14, which include preventing logrolling and preserving the Governor's veto authority.

ARGUMENT

Though styled as an appellate brief, the defendants' submission is, in effect, a proposed constitutional amendment. It seeks a holding that, so long as the Legislature adorns a title of a bill with some sweeping string of words—like "public health and welfare"—this Court must say that the bill contains one subject. If this argument prevails, the Nebraska Constitution will still, technically, command that "[n]o bill shall contain more than one subject." Neb. Const. art. III, § 14. But those words will be decorative, incapable of guaranteeing to the public, or to future governors, that legislation will be evaluated, and then signed or vetoed, one subject at a time. The Court should reject defendants' attempt to nullify the Constitution in this way.

I. The constitution's plain text does not support the claim that L.B. 574 is a "public health and welfare" bill.

The defendants' claim that L.B. 574 complies with the single-subject requirement rests on the bill's seventy-seven-word title, which contains the phrase "public health and welfare." Appellees' Br. 11; (T991). But the constitutional text does not support the defendants'

unceasing focus on those four words.

Article III, § 14, plainly states: "No bill shall contain more than one subject, and the subject shall be clearly expressed in the title." The provision thus contains a single-subject rule and a clear-title rule, and it distinguishes these requirements through use of the word "and." The mere fact that a bill's title expresses what is in the bill—i.e., complies with the clear-title rule—does not mean that the bill contains only one subject. In addition, the text's use of the word "contain" means that assessing the number of subjects in a bill involves looking beyond its title; instead, "[w]hether or not a bill contains more than one subject is to be determined by examining the substance of the bill." *Mehrens v. Bauman*, 120 Neb. 110, 113 (1930).

The defendants are also wrong to chastise the opening brief for "canvass[ing]" news articles, Unicameral Updates, and other descriptions of L.B. 574. Appellees' Br. 16. As this Court has explained, clear constitutional provisions should be interpreted consistent with how laypeople understand them. *Adams v. State Bd. of Parole*, 293 Neb. 612, 618 (2016). In assessing how laypeople would understand whether L.B. 574 "contain[s] more than one subject," it is relevant that plaintiffs have been unable to identify, and the defendants apparently have not located, *any* disinterested Nebraskan who has described L.B. 574 by mentioning only one subject.

Instead, when people look at L.B. 574, they see what the Governor saw: "two things." (T1501). As the Governor's office put it:

> Today, Governor Jim Pillen, joined by over 30 senators, signed LB574 into law. The bill includes a 12-week abortion ban, which takes effect immediately, and includes regulation of puberty blockers for minors and a ban on gender-altering surgeries for minors, which both take effect on October 1.

Press Release, Office of the Governor, *Governor Pillen Signs LB574 Into Law, Abortion Ban Takes Effect Immediately*, available at: https://governor.nebraska.gov/press/governor-pillen-signs-lb574-law-

abortion-ban-takes-effect-immediately (last visited December 27, 2023).

II. This Court's cases do not support the claim that L.B. 574 is a "public health and welfare" bill.

Much rides on the level of generality a court uses to identify a bill's main subject or subjects. That is why, as plaintiffs have shown, this Court's single-subject cases proceed in two separate steps. Appellants' Op. Br. 16–21. The first step identifies a legislative enactment's "single main purpose," and the second assesses whether each provision is "naturally connected with and incidental to that main purpose." *Midwest Popcorn Co. v. Johnson*, 152 Neb. 867, 872 (1950).

Defendants agree that this two-step process applies. Appellees' Br. 12–14. But they gloss over the first step, grasping onto L.B. 574's title while ignoring this Court's repeated instruction, most recently in *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 153 (2021), that the subject must be identified at a meaning level of specificity. Appellees' Br. 13–16. That flaw is fatal to their defense.

A. Defendants largely ignore *Wagner*. They do not deny *Wagner* warned against "selecting a [general subject] so broad that the rule is evaded as a meaningful constitutional check," for which it cited cases on the single-subject rule for legislative enactments. 307 Neb. at 153 (quoting *Gregory v. Shurtleff*, 299 P.3d 1098, 1112 (Utah 2013), and *Wirtz v. Quinn*, 953 N.E.2d 899, 905 (Ill. 2011)). Nor do they acknowledge *Wagner*'s reference to *public safety* as an example of an overly broad general subject. *Id.* at 153 & n.34 (quoting Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1637 (2019)).

In addition, defendants fail to acknowledge that the key legal propositions in *Wagner* date to "the rule" first articulated in *Van Horn v. State*, 46 Neb. 62 (1895), for single-subject challenges to legislative enactments. In *Van Horn*, the Court said that the Legislature cannot skirt the single-subject rule by cobbling together two pieces of some broader subject. 46 Neb. at 74.

That rule is not, as defendants suggest, somehow dicta. Appellees' Br. 19–20. Defendants themselves rely on *Van Horn*'s progeny, which in turn cite *Van Horn* for the rules they apply. Appellees' Br. 18 (citing *Midwest Popcorn*, 152 Neb. at 871–72 (citing *Van Horn*, 46 Neb. at 72–74)). The simple truth is that the defendants like the part of the *Van Horn* rule which says that a legislative enactment may be upheld "no matter how comprehensive," but they very much dislike the part of the *Van Horn* rule which says that an act is *not* comprehensive in that sense, and thus lacks a broad main purpose, if it just stitches together two provisions that arguably fall under some broad category. *Van Horn*, 46 Neb. at 72–74.

This rule is well-settled. "[The single-subject] rule obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare,'" which is exactly what the defendants urge here. *Harbor v. Deukmejian*, 742 P.2d 1290, 1303 (Cal. 1987).

And the rule applies here. Under any meaningful level of specificity, L.B. 574 began as a bill restricting gender-affirming care (one subject), but it became a bill restricting gender-affirming care (one subject) and banning abortion (another subject). Appellants' Br. 7–9. Combining "[t]wo very narrow bills" in this way is "a classic case of a single subject violation." Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 115 (2001) (citing *Hammerschmidt v. Boone Cnty.*, 877 S.W.2d 98, 102 (Mo. 1994) (en banc)).

Defendants' contention that L.B. 574's title "identifies [public health and welfare] as its single subject" cannot be reconciled with this precedent, nor has it ever been conceded by plaintiffs. *Contra* Appellees' Br. 13. It is not even clear the Legislature regards "public health and welfare" as the main subject of L.B. 574.

Instead, as the defendants note, that language in L.B. 574's title predates the addition of the abortion amendment; when L.B. 574 (the gender-affirming care restriction), and L.B. 626 (the six-week abortion

ban) were first introduced, the former bill mentioned "public health and welfare," but the latter did not. Appellees' Br. 8; (*Compare* T998 *with* T1041). And plaintiffs are unaware of any Senator uttering the phrase "public health and welfare" even once during debate on L.B. 574. (T425–517, 520–585). Regardless, a legislature's belief in a law's constitutionality is never sufficient; otherwise, judicial review would not exist.

B. Instead of attempting to identify L.B. 574's main purpose at a meaningful level of specificity, the defendants invoke what they call "the *Jaksha* rule" to insist that this Court identify the subject of a legislative enactment by plucking words from its title. Appellees' Br. 11–13. Nothing in this Court's cases, including *Jaksha v. State*, 241 Neb. 106 (1992), supports such a rule.

The defendants' proposed "*Jaksha* rule" relies largely on out-of-context quotes in which this Court was addressing *clear-title claims*. Sometimes the defendants rely on the clear-title portion of opinions where challengers also advanced single-subject claims. *See* Appellees' Br. 12–14 (quoting *Midwest Popcorn*, 152 Neb. at 872; *Jaksha*, 241 Neb. at 131–32). Sometimes the defendants rely on opinions where challengers apparently raised clear-title claims but *not* single-subject claims. *Id.* at 11–13 (citing *Blackledge v. Richards*, 194 Neb. 188, 192 (1975); *State v. Ream*, 16 Neb. 681, 683 (1884); *People v. McCallum*, 1 Neb. 182, 194 (1871)). At no time do the defendants disclose their repeated reliance on cases discussing clear-title claims—claims that are simply inapplicable to the single-subject claim presented here.

These irrelevant citations do not disturb this Court's longstanding practice of "look[ing] to the bill itself, to ascertain whether or not it contains more than one subject; and, having ascertained that it contains but one, then we look to the title, to see if that subject is clearly expressed therein." *Van Horn*, 46 Neb. at 72. Far from assuming that an enactment's subject is as broad as the broadest phrase appearing in its title, this practice acknowledges that the "title of the act" may be "much more comprehensive than the act itself." *State v. Heldenbrand*, 62 Neb. 136, 142 (1901).

It is therefore unsurprising that *Jaksha* itself defeats the defendants' proposed "*Jaksha* rule." In rejecting both single-subject and clear-title challenges, *Jaksha* made clear a legislative enactment must both "ha[ve] one general object" *and* have a title that "fairly expresses" that subject. 241 Neb. at 131. The enactment at issue in *Jaksha* passed the clear-title test as an act "relating to revenue and taxation," and survived single-subject review because it was in fact, as the defendants put it, "a wide-ranging tax law" with a variety of tax provisions. Appellees' Br. 12. In contrast, L.B. 574 is not "a wide-ranging public health and welfare law" that just happens to contain provisions restricting gender-affirming care and banning abortion.

C. The defendants concede that, at the second step of the single-subject analysis, L.B. 574 can be upheld only if each of its provisions is "naturally connected with and incidental to" its main purpose. Appellees' Br. 18. However, they claim that plaintiffs misapply this test by analyzing whether the two halves of L.B. 574 are "naturally connected and incidental to *each other*." *Id.* This accusation simply reprises the mistaken claim that L.B. 574's main purpose is not restricting gender-affirming care, or banning abortion, but rather "public health and welfare." As plaintiffs have shown, this is wrong.

The second step looks to whether banning abortion is naturally connected with and incidental to the subject of restricting gender-affirming care, and vice versa. Defendants make a last-ditch attempt to demonstrate this connection by claiming that both halves of L.B. 574 regulate healthcare practitioners. Appellees' Br. 18. But, once again, this argument rests on the defendants' belief that they can salvage

L.B. 574 by reverse-engineering broad categories that arguably encompass both of its halves. This does not make banning abortion *incidental* to restricting gender-affirming care, or vice versa.

III. The defendants ignore the purposes of the single-subject rule.

The defendants insist that it is somehow improper to consider the single-subject rule's purposes when deciding single-subject cases.

Appellees' Br. 21–24. It is not. Those purposes have guided this Court in the past and should also do so here.

A. The defendants' approach would render the single-subject rule utterly incapable of serving as a check on the legislative process, and thus undermine the rule's core purposes. Although the defendants never say what they think "public health and welfare" is, they do not deny that it encompasses the Legislature's police power. This directly implicates this Court's concern in *Wagner*, as well as the concerns expressed by other courts, that deploying broad subjects like "public safety" risks eliminating the single-subject rule in practice. *Wagner*, 307 Neb. at 153 & n. 34.; *accord Johnson v. Edgar*, 680 N.E.2d 1372,1380–81 (Ill. 1997); *Harbor*, 742 P.2d at 1303 (rejecting "public welfare" as a subject).

Thus, while the defendants correctly state that it is "absurd" to compare gender-affirming care and trampoline-related injuries, Appellees' Br. 21, they fail to understand that their proposed rule is responsible for the absurdity. It would permit a bill combining any regulations for those two distinct areas, or even a narrower bill regulating medical professional in the treatment they offer in those two distinct areas, and the Legislature would have no obligation to show it is legislating comprehensively.

B. The defendants' logrolling argument fares no better. Contrary to their claims, this Court need not make any finding about the subjective reasons why the abortion ban was added to L.B. 574 in order to reach the logical conclusion that it created a substantial risk of logrolling. Looking to see whether a provision was belatedly "tacked on" to a bill is a common consideration in single-subject cases. *Wirtz*, 953 N.E.2d at 911; *see also Bd. of Trs. of N.D. Pub. Emps. Ret. Sys. v. N.D. Legis. Assembly,* 996 N.W.2d 873, 888 (N.D. 2023) (invalidating a bill with tacked-on provisions); *Washington v. Dep't of Pub. Welfare of Commw.*, 188 A.3d 1135, 1139–42 (Pa. 2018) (same).

C. Finally, the defendants' arguments about deferring to the Legislature are shortsighted. "Single-subject limits also seek to protect the integrity of the governor's veto power," because, except for

appropriations bills, "[t]he governor may not veto part of a legislative measure." Williams and Friedman, *The Law of American State Constitutions* 293 (2d ed. 2023). Abandoning judicial enforcement of the single-subject rule would empower the legislative branch at the expense of the executive branch.

To be sure, Governor Pillen was all too happy to sign L.B. 574. But a future bill could expand access to gender-affirming care while further restricting abortion, or vice versa. The defendants' arguments in this case, if accepted, would allow the Legislature to force a future Governor into an all-or-nothing choice.

IV. Enforcing the single-subject rule would not jeopardize "a large number of laws."

Precisely because L.B. 574's violation of the single-subject rule is so egregious, striking it down would not "jeopardize a large number of laws," as defendants contend. Appellees' Br. 20. The defendants have not pointed to a single legislative enactment in the history of this Court's single-subject jurisprudence, or indeed the history of this state, in which the legislature responded to the failure of one bill by re-packaging it, attaching it to another bill, and then passing a combined bill with two distinct halves containing different purposes, titles, effective dates, and enforcement mechanisms. That unusual legislative record supplies a narrow basis to strike down L.B. 574.

But even assuming the existence of other bills like L.B. 574, striking down L.B. 574 would not cause the sky to fall. As an initial matter, bills that do not visit economic or other harm upon individuals may not generate any plaintiffs with the interest, let alone the legal standing, to challenge them. And even if challenges were to arise, "[c]ourts in other jurisdictions have . . . relied on laches to reject belated claims that statutes were enacted in violation of constitutional procedural requirements." *Cole v. State ex rel. Brown*, 42 P.3d 760, 764 (Mont. 2002); *Sernovitz v. Dershaw*, 127 A.3d 783, 789–94 (Pa. 2015).

But plaintiffs' claim in this case is not belated, and the defendants' attempt to assert "reliance interests" on behalf of the Legislature is misplaced. Appellees' Br. 15. Plaintiffs filed this lawsuit

immediately following L.B. 574's enactment and have sought both expedited review and injunctive relief, over the defendants' objections. (T14). Having successfully opposed both expedition and injunctions that could have paused L.B. 574 while courts considered its constitutionality, the defendants are in no position to claim that the delays they secured now operate to prevent this Court from *ever* assessing L.B. 574's constitutionality.

This Court is perfectly capable of declaring that L.B. 574 is unconstitutional, and providing meaningful guidance to the Legislature going forward, without wreaking havoc on prior legislation. Plaintiffs respectfully submit that it should do so.

CONCLUSION

The district court's order should be reversed, and this case should be remanded with instructions to grant plaintiffs' motion for summary judgment.

ANSWER TO BRIEF ON CROSS-APPEAL

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PROPOSITIONS OF LAW

1. It is emphatically the province and duty of the judicial department to say what the law is. *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 273 Neb. 531, 546 (2007).

2. The Nebraska Constitution empowers this Court to determine the constitutionality of "legislative act[s]." Neb. Const. art. V, § 2.

3. This Court has developed judicially manageable standards governing the single-subject rule for legislative enactments. *State ex rel. Miller v. Bd. of Comm'rs of Lancaster Cnty.*, 17 Neb. 85, 86–87 (1885); *Trumble v. Trumble*, 37 Neb. 340, 344–45, 347–48 (1893); *Van Horn v. State*, 46 Neb. 62, 73–74 (1895).

4. Four state supreme courts have expressly held that single-subject challenges do not present nonjusticiable political questions; none have held otherwise. *Magee v. Boyd*, 175 So.3d 79, 101–06 (Ala. 2015); *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 501 P.3d 731, 737–38 (Ariz. 2022); *League of Women Voters of Honolulu v. State*, 499 P.3d 382, 391–93 (Haw. 2021); *Gregory v. Shurtleff*, 299 P.3d 1098, 1110 (Utah 2013).

SUMMARY OF ARGUMENT

The district court correctly concluded that constitutional claims under the single-subject rule for legislative enactments are justiciable. (T1766–67). Because single-subject cases involve counting subjects, rather than evaluating policies, they do not implicate any ground for invoking the political question doctrine. The defendants cite no case in

Nebraska—or anywhere—deeming a single-subject case nonjusticiable on political question grounds. This case should not be the first.

ARGUMENT

The political question doctrine allows courts to decline adjudicating cases on questions that the Constitution entrusts to another branch of government. *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 273 Neb. 531, 545 (2007) ("*Nebraska Coalition*"). This Court has held that the doctrine may be invoked where one of the six factors articulated in *Baker v. Carr*, 369 U.S. 186 (1962), is "inextricable from the case at bar." *Neb. Coal.*, 273 Neb. at 548.

Those factors are entirely absent from single-subject challenges to legislative enactments. This Court has a constitutional obligation to say what the law is. Neb. Const. art. V, § 1. And as plaintiffs have demonstrated, this Court has adjudicated single-subject challenges to legislative enactments for more than a century, making clear that those challenges are resolvable through judicially manageable standards. Appellants' Br. 12–13.

In response, the defendants do not deny the long line of this Court's single-subject cases. Instead, they suggest that the Court simply assumed, without deciding, that single-subject challenges are justiciable. And they contend that *Nebraska Coalition* requires this Court to stay its hand in single-subject challenges. The district court correctly rejected these arguments, (T1766–67), and for good reason: they fundamentally misapprehend the law and the role of this Court.

I. The justiciability of single-subject cases is well-settled in Nebraska and around the country.

The defendants argue that this Court has repeatedly adjudicated legislative single-subject cases, including by striking down legislation, without establishing as a matter of law that those cases are

justiciable. Appellees' Br. 45. Parties are certainly allowed to ask a court to overrule cases spanning more than a century and announce a new rule that no state supreme court in the history of the United States has ever announced. But, to be clear, that *is* what the defendants are asking this Court to do here.

To argue otherwise, defendants point to *Nebraska Coalition*, which held that claims under the Nebraska Constitution's free-instruction and religious-freedom clauses presented nonjusticiable political questions. In doing so, *Nebraska Coalition* held that this Court's prior *rejection* of a funding-adequacy claim, in *Gould v. Orr*, 244 Neb. 163 (1993), had not "implicitly conclude[d] that the claim was justiciable." 273 Neb. at 544.

Nebraska Coalition and *Gould* are distinguishable. As this Court explained in *Nebraska Coalition*, the Court in *Gould* had merely exercised subject-matter jurisdiction, which is distinct from the question of justiciability under the political question doctrine. *Neb. Coal.*, 273 Neb. at 544–45. *Gould* never recognized "a cause of action for inadequate school funding," and it concluded that the challengers could not possibly remedy defects in their complaint. *Id.*

In contrast, this Court *has* recognized a cause of action for violating the legislative single-subject rule, and the Court has awarded relief to plaintiffs bringing that cause of action. *See, e.g., State ex rel. Miller v. Bd. of Comm'rs of Lancaster Cnty.*, 17 Neb. 85, 86–87 (1885); *Trumble v. Trumble*, 37 Neb. 340, 344–45, 347–48 (1893); Appellants' Br. 17–18. These cases establish as a matter of law that single-subject challenges are justiciable. And, as recently as 2021, the Attorney General recognized this Court's role in adjudicating them. *See* Att'y Gen. Op. No. 21003, at 2 (Mar. 26, 2021).

The Court is in good company. Four state supreme courts have expressly held that the political question doctrine does not apply to single-subject challenges because "[t]he authority to determine adherence to the Constitution is with the judiciary." *Magee v. Boyd*, 175 So.3d 79, 106 (Ala. 2015); *accord Ariz. Sch. Bds. Ass'n, Inc., v. State*, 501 P.3d 731, 738 (Ariz. 2022); *League of Women Voters of*

Honolulu v. State, 499 P.3d 382, 392–93 (Haw. 2021); *Gregory v. Shurtleff*, 299 P.3d 1098, 1110 (Utah 2013). Plaintiffs are aware of no case—and defendants cite none—concluding otherwise.

II. All grounds for applying the political question doctrine are absent here.

The defendants argue that several of the political question formulations identified in *Baker*, and discussed in *Nebraska Coalition*, are present here. Appellees' Br. 37–43. However, dismissal on political question grounds is unwarranted "[u]nless one of these formulations is *inextricable* from the case at bar." *Baker*, 369 U.S. at 217 (emphasis added). That standard is not remotely met here.

A. The Nebraska Constitution commits to this Court, not to the Legislature, review of compliance with the single-subject rule for legislative enactments. Unlike Article III of the U.S. Constitution, which has no express provision empowering federal courts to invalidate legislation, the Nebraska Constitution expressly provides that a "legislative act shall be held unconstitutional" upon "the concurrence of five judges." Neb. Const. art. V, § 2. And unlike Article I of the U.S. Constitution, which generally grants power to Congress that it would otherwise not possess, the Nebraska Constitution places "specific restrictions on the legislative authority." *Dwyer v. Omaha-Douglas Pub. Bldg. Comm'n*, 188 Neb. 30, 35 (1972). Many such restrictions, including the single-subject rule at issue here, are found in Article III of the Nebraska Constitution.

This case is therefore unlike *Nebraska Coalition*, which concerned the positive right to education assigned to the Legislature in article VII of the constitution. Nor is it like federal cases involving foreign policy and national security, which courts have deemed to be textually committed to the political branches. *See, e.g.*, *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Instead, this challenge invokes an express procedural *constraint* on legislative authority, which appears within an article of the Nebraska Constitution that itself primarily *restricts* legislative authority. To avoid that conclusion, the defendants claim that article III, § 14,

applies only to "bill[s]" still under legislative consideration, and this Court's review is limited to "legislative acts" after adoption. Appellees' Br. 38–40. This argument lacks merit.

A bill acquires "act" status, and thus becomes subject to judicial review, when it is enacted into law. *See* Neb. Const. art. V, § 2. But that does not mean it *ceases to be a bill. See, e.g.,* Jaksha, 241 Neb. at 131–32 (using the term "bill" to refer to the enactment at issue); *Midwest Popcorn Co. v. Johnson*, 152 Neb. 867 at 873 (1950) (same). And because a bill enacted into law is still a bill, it is also still subject to the command that "[n]o bill shall contain more than one subject." Neb. Const. art. III, § 14.

A contrary rule would yield absurd results. For starters, some of the Nebraska Constitution's most important commands, including that "[n]o bill shall be passed . . . unless by the assent of a majority," Neb. Const. art. III, § 13, would become immune from judicial enforcement. *See Ctr. Bank v. Dep't of Banking & Fin. of State*, 210 Neb. 227, 228 (1981) (deciding case under art. III, § 13); *see also, e.g.*, Neb. Const. art. III, § 11 (requiring recording of yeas and nays to "advance or to indefinitely postpone any bill"); Neb. Const. art. IV, § 15 (providing for bill presentment to Governor). What is more, if the defendants were right that constitutional commands relating to "bills" simply evaporate when those bills are enacted into "laws," then the Legislature would have no need to "police . . . itself." Appellees' Br. 39. To the contrary, the Legislature could simply cure every unconstitutional multi-subject "bill" by enacting it into—presto!—a perfectly constitutional multi-subject "law."

Finally, the defendants claim that their distinction between bills and laws draws strength from a "contrast" between the Nebraska Constitution and the constitutions of other states. Appellees' Br. 39. It does not. Single-subject rules in 19 state constitutions use the word "bill," and courts in *all 19* of those states have adjudicated single-subject challenges. This includes the Utah Supreme Court, which has expressly held that the political question doctrine does not bar judicial review of single-subject claims. *See Shurtleff*, 299 P.3d at 1113–14; *see*

also, e.g., *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 482–84 (Alaska 2020); *Evans v. State*, 872 A.2d 539, 550 (Del. 2005); *Dev. Auth. of DeKalb Cnty. v. State*, 684 S.E.2d 856, 860 (Ga. 2009); *People v. Reedy*, 708 N.E.2d 1114, 1119 (Ill. 1999); *Rizzo v. State*, 189 S.W.3d 576, 580-81 (Mo. 2006); *see generally* Alaska Const. art. 2, § 13; Colo. Const. art. V, § 21; Del. Const. art. 2, § 16; Ga. Const. art. III, § V, ¶ III; Ill. Const. art. IV, § 8(d); Kan. Const. art. II, § 16; La. Const. Ann. art. III, § 15(A); Mo. Const. art. III, § 23; Mont. Const. art. V, § 11(3); Neb. Const. art. III, § 14; N.M. Const. art. IV, § 16; N.Y. Const. art. III, § 15; Ohio Const. art. II, § 15(D); Pa. Const. art. III, § 3; Tex. Const. art. III, § 35(a); Utah Const. art. VI, § 22; Wash. Const. art. II, § 19; Wis. Const. art. IV, § 18; Wyo. Const. art. III, § 24.

B. Nor does *Baker*'s concern about courts becoming enmeshed in policy determinations, or embarrassing or disrespecting another branch of government, apply here. *Contra* Appellees' Br. 41–42. The plaintiffs' claims do not turn on whether the Legislature should have banned abortion or not, or restricted gender-affirming care or not. "The issue here is not *what* the Legislature decided but *how* it decided what it did." *Ariz. Sch. Bds. Ass'n*, 501 P.3d at 738 (emphasis in original); *see also Magee*, 175 So.3d at 105–16 ("Simply because the plaintiffs and the State defendants disagree on whether the legislature's actions met the procedural requirements of enactment does not require 'an initial policy determination of a kind clearly for nonjudicial discretion.'" quoting *Baker*, 369 U.S. at 217). And although defendants argue that "whether [a] bill legislates on the bill's subject" is itself a policy determination immune from review, Appellees' Br. 41, the plaintiffs are unaware of any case supporting this virtually limitless definition of "policy."

Similarly, legislative single-subject challenges do not trigger *Baker*'s concern about "embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217. The relevant risk of embarrassment, for purposes of the political question doctrine, is not whether the court disagrees with the Legislature as to whether the Constitution has been violated. *See, e.g.*,

Zivotofsky v. Kerry, 566 U.S. 189, 196 (2012) (concluding that the political question doctrine did not apply because the case did not ask the courts to supplant a foreign policy decision of the political branches, but rather to decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional, which was a familiar judicial exercise).

And that remains true even if the Legislature has adopted internal rules that are informed by its constitutional obligations. Another branch's attempt to abide by the Constitution cannot compel this Court to abandon its own independent obligation to enforce the Constitution. *Compare* Leg. Rule 5, § 9 (citing the reading requirement in Neb. Const. art. III, § 14), *with DeCamp v. State*, 256 Neb. 892, 895–96 (1999) (evaluating a bill's constitutionality under the constitutional reading requirement). After all, if the Legislature's belief in the constitutionality of a statute were itself a reason to invoke the political question doctrine, then the political doctrine would swallow judicial review in its entirety.

Finally, Nebraska courts can enforce the legislative single-subject rule without disrespecting the Legislature, and for 147 years they have done so. Precisely because the single-subject rule is procedural, adjudicating single-subject cases does not risk disagreement with the Legislature on any policy issue. In *Jaksha*, for example, while the Court rejected the plaintiff's single-subject and clear-title challenges, it struck down sections of a major tax bill under the uniformity clause and the separation of powers doctrine. 241 Neb. at 131, 133; Neb. Const. art. VIII, § 1. Going far beyond counting subjects, the Court's application of the uniformity clause involved assessing the relative "unfair[ness]" of different taxation schemes. 241 Neb. at 126. Yet this Court carried out its duty of judicial review, just as it should here.

If anything, declining to adjudicate legislative single-subject rule challenges would disrespect the *executive branch* by undermining the Governor's authority to sign or veto legislation on one subject at time. *See* Appellants' Reply Br., *supra*, § III-C.

III. The defendants' argument would drastically limit this Court's authority, including in ballot initiative challenges.

Perhaps reflecting unease with their own positions, the defendants insist that while the political question doctrine governs single-subject challenges to legislative enactments, the doctrine need not govern single-subject challenges to ballot initiatives. Appellees' Br. on Cross-Appeal 44. There is no principled basis for this distinction.

The defendants argue that ballot initiatives are committed to "the people," and thus cannot adjudicating single-subject challenges to ballot initiatives cannot disrespect "a coordinate department" of government. Appellees' Br. 44. But surely the people's authority to create laws is worthy of at least the same respect as the Legislature's. After all, "the Legislature and the electorate are concurrently equal in rank as sources of legislation." *State ex rel. Lemon v. Gale*, 272 Neb. 295, 304 (2006); *see* Neb. Const. art. III, § 1.

Moreover, while the defendants observe that this Court may review ballot initiatives before the people vote on them, Appellees' Br. 44, whereas the Legislature's bills are reviewed post-enactment, that is a distinction without a difference. There is no reason to believe that citizen-ballot initiative decisions involve any less delicacy than this Court's single-subject cases on legislative enactments, or that the Legislature has any more of a reliance interest than citizens do in proposing a ballot initiative.

Indeed, the impediments to returning to the proverbial drawing board—following an adverse decision by this Court—are far greater for ballot initiatives than for legislative enactments. For example, in the wake of this Court's 2021 decision in *State ex rel. Wagner v. Evnen*, 307 Neb. 142 (2021), invalidating a ballot proposal because it strayed beyond the specific subject of "enshrining in our constitution a right of certain persons to produce and medicinally use cannabis," *id.* at 164, voters still have not had an opportunity to consider an updated version of that proposal. *See* Zach Wendling, *Nebraska Medical Marijuana Advocates Confident Third Time Is the Charm*, Neb. Exam'r (Sept. 13,

2023 11:15 PM), https://nebraskaexaminer.com/2023/09/13/nebraska-medical-marijuana-advocates-confident-third-time-is-the-charm/ (last visited December 27, 2023).

At bottom, the defendants invite this Court to maintain a limitation on the voters' legislative power while allowing "elected representatives [to] flout constitutional violations with impunity." *Thompson v. Heineman*, 289 Neb. 798, 823 (2015). The Court should reject that invitation.

CONCLUSION

The Court should affirm the district court's ruling that this case does not present a nonjusticiable political question, reverse the district court's order on merits, and remand this case with instructions to grant plaintiffs' motion for summary judgment.

Dated this 28th day of December, 2023.

RESPECTFULLY SUBMITTED,

Planned Parenthood of the Heartland, Inc., and Sarah Traxler, M.D., Appellants.

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CERTIFICATE OF COMPLIANCE

I, Rose Godinez, state that I prepared this document using Microsoft 365 and the Reply Brief and the Answer to Brief on Cross-Appeal comply with the typeface requirement of Neb. Ct. R. App. P. § 2-103, and contains 7,442 words not including this certificate.

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Certificate of Service

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