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-_____ **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION**

INTRODUCTION

There is a right way and a wrong way to pass legislation in Nebraska. This case is about legislation that was passed the wrong way.

Nebraska's first constitution, adopted in 1866, "was replaced in 1875 by one that strictly limited state government power." *Nebraska 2020-21 Blue Book* 53 (55th ed. 2021). Those limits included the express and unequivocal command that "[n]o bill shall contain more than one subject." Neb. Const., art. III, § 14 (originally appearing at art. III, § 11). Courts have long recognized that the single-subject rule serves important purposes. It prevents logrolling, whereby measures that cannot gain enactment as individual bills are forced together into a compound bill that secures passage. The single-subject rule also promotes transparency, because when a bill has just one subject, no senator can credibly claim that a vote for (or against) that bill was meant to support (or oppose) only part of it.

The Nebraska Legislature violated the single-subject limitation when it passed Legislative Bill ("L.B.") 574 in May 2023. L.B. 574 combined two wholly separate sets of provisions: one banning abortion ban and another restricting gender-affirming care for individuals under 19 years of age. This was as egregious a violation of Nebraska's single-subject rule as has ever been litigated.

That is because lawmakers initially proposed the two components of L.B. 574—the abortion ban and the gender-affirming care restriction—as two distinct bills, with two distinct purposes, and two distinct operational mechanisms. After these distinct, single-subject bills stalled, senators hastily combined them into the compound L.B. 574 in order to secure their passage. This is exactly the kind of logrolling that results in the enactment of provisions that, left to their own merits, would not become law. It is exactly the kind of maneuver that obscures from the public which policies senators actually support. And it is exactly the kind of compound bill that the Nebraska Constitution forbids.

In short, L.B. 574 walks like a two-subject bill, and talks like a two-subject bill, because it *is* a two-subject bill. As a result, it violates the Nebraska Constitution's single-subject command.

To prevent further ongoing irreparable harm, and as explained below, Plaintiffs Planned Parenthood of the Heartland ("PPH") and Dr. Sarah Traxler, who are abortion providers regulated by this unconstitutional law, respectfully request the Court issue a temporary restraining order by this Thursday, June 1.

BACKGROUND

I. The Evolution and Passage of a Compound L.B. 574

On the same day in January 2023, two distinct bills—L.B. 626, involving an abortion ban, and L.B. 574, involving gender-affirming care—were introduced separately in the Nebraska Legislature. They had distinct titles, purposes, and provisions. They were later combined (with certain modifications) in May 2023, yielding the legislation challenged in this case. *See* L.B. 574, Slip Law, Neb. Leg., 108th Legis., Reg. Sess. (Neb. May 22, 2023) (hereinafter, "L.B. 574 Slip Law"), attached as Ex. 1.

A. L.B. 626: The "Adopt the Nebraska Heartbeat Act"

The original abortion bill, L.B. 626, was introduced on January 17, 2023, and entitled the "Adopt the Nebraska Heartbeat Act." L.B. 626, Introduced, Neb. Leg., 108th Leg., Reg. Sess. (Neb. Jan. 17, 2023), attached as Ex. 2.

The purpose of L.B. 626, according to a February 2023 Statement of Intent by the Legislature's Health and Human Services Committee, was to "prohibit[] a physician from the prescription or performance of abortion" if the fetus had "a detectable fetal heartbeat unless a medical emergency exist[ed] or the pregnancy "was the result of sexual assault or incest," and to make any physician who violated the act "subject to licensing revocation under the Nebraska Uniform Credentialing Act." L.B. 626 Comm. Statement (Corrected) at 3, Comm. on Health & Hum. Servs., Neb. Leg., 108th Leg., Reg. Sess. (Neb. Feb. 1, 2023), attached as Ex. 3. L.B. 626 was introduced by Senator Joni Albrecht, who said its purpose was "to save the lives of unborn children," "[t]o encourage greater respect for human life in society, and to preserve the integrity of Nebraska's medical profession." L.B. 626 Introducer's Statement of Intent at 1, Neb. Leg., 108th Leg., Reg. Sess. (Neb. Feb. 1, 2023), attached as Ex. 4.

L.B. 626 defined fetal heartbeat such that the bill's prohibition would apply from approximately six weeks in pregnancy, as measured from the date of a patient's last menstrual period ("LMP"). *See* Ex. 2, at § 3. L.B. 626's text provided for professional discipline, including by mandating license revocation under Nebraska's Uniform Credentialing Act ("UCA") for any abortion performed in violation of L.B. 626. In addition, because § 7 of L.B. 626 would have made any "[v]iolation of the Nebraska Heartbeat Act" grounds for disciplinary action under the UCA, *see* Neb. Rev. Stat. § 38-178, it also would have subjected physicians to potential civil fines of up to $20,000. *Id.* §§ 38-196(4), 38-198.[1]

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[1] In April 2023, Attorney General Hilgers issued a formal opinion stating that a violation of the six-week abortion ban proposed in LB 626 would not trigger felony liability under Neb. Rev. Stat. § 28-336, which provides that "[t]he performing of an abortion by using anything other than accepted medical procedures is a Class IV felony." The Attorney General explained that the abortion ban, which would have applied based on the gestational age of a fetus, did not "expand[] or limit[] the categories of 'medical procedures' that are accepted" in the state. Neb.

On April 27, 2023, L.B. 626 failed to advance in the Legislature when it fell short of the votes necessary to overcome a filibuster. Among those who did not vote for cloture was a bill cosponsor who—despite previously supporting the bill—expressed reservations that it would lead to public "backlash." Chris Dunker, "*Speaker: Abortion bill won't return to Nebraska Legislature's agenda this year*," Longview J. Star (Apr. 28, 2023), https://tinyurl.com/yyk5xz5v. After L.B. 626 failed, the Speaker of the Legislature, Senator John Arch, assured the public that he would follow the established practice of not rescheduling bills that failed to overcome a filibuster. *Id.*

B. The Original L.B. 574: "The Let Them Grow Act"

The gender-affirming care bill, L.B. 574, was originally introduced on January 17, 2023, and entitled the "Let Them Grow Act." L.B. 574, Introduced, Neb. Leg., 108th Leg., Reg. Sess. (Neb. Jan. 17, 2023), attached as Ex. 5. As initially introduced, the gender-affirming care bill was wholly separate from, and shared no stated purposes with, the abortion bill filed as L.B. 626.

Instead, L.B. 574's purpose, according to a February 2023 Health and Human Services Committee Statement, was to make it so that the performance of "gender altering procedures on people under 19," including "gender-altering" surgery and hormone therapy or other medications, "would be considered unprofessional conduct within the [UCA]." L.B. 574 Comm. Statement (Corrected) at 3, Comm. on Health & Hum. Servs., Neb. Leg., 108th Leg., Reg. Sess. (Neb. Feb. 8, 2023), attached as Ex. 6. The bill was introduced by Senator Kathleen Kauth, whose Statement of Intent provided that the "reasons" and "purposes" for L.B. 574 were to "prohibit the performance of gender altering procedures for individuals under the age of 19, provide for definition of terminology and allow for civil action to be brought against violators of

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Op. Att'y Gen. No. 23005, 2023 WL 3151229, at *2 (Apr. 25, 2023). Although his opinion did not discuss a separate UCA provision that imposes misdemeanor liability on "[a]ny person violating [the UCA]," that provision will not apply to the abortion ban's substantive restriction so long as it is not ultimately codified within the UCA.

the act." L.B. 574 Introducer's Statement of Intent at 1, Neb. Leg., 108th Leg., Reg. Sess. (Neb. Feb. 8, 2023), attached as Ex. 7.

L.B. 574 was debated on the legislative floor on March 23, 2023, and during a second round on April 13, 2023. During each of the first two rounds of debate, L.B. 574 received the minimum thirty-three "yes" votes, the narrowest possible margin, to invoke cloture and overcome a filibuster to advance toward passage into law. L.B. 574 exposed providers who provide care covered by the bill to private civil lawsuits and referral for discretionary discipline and state-imposed civil fines based on unprofessional conduct.

C. The Compound Version of L.B. 574

Following filibusters aimed at L.B. 574, an amendment was introduced to the original L.B. 574. *See* Amendment 1658 to L.B. 574, Neb. Leg., 108th Leg., Reg. Sess. (Neb. May 7, 2023) ("the Amendment"), attached as Ex. 8. The Amendment inserted six abortion-related sections and specified that those sections would "be known and may be cited as the Preborn Child Protection Act." *Id.* § 1. The "Preborn Child Protection Act" inserted into L.B. 574 resembled the previously defeated abortion ban of L.B. 626, except that the "Preborn Child Protection Act" proposed to ban abortion at 12 weeks, rather than 6 weeks, LMP. *Id.* § 4(2)(b).

The Amendment specified that the sections of L.B. 574 restricting gender-affirming care, in contrast, would "be known and may be cited as the Let them Grow Act." *Id.* § 14.

The compound version of L.B. 574 passed the final round of debate by a 33-to-15 vote. *See* Recorded Vote on L.B. 574, Neb. Leg., 108th Leg., Reg. Sess. (Neb. May 19, 2023), attached as Ex. 9. The abortion ban—which the Legislature deemed an "emergency" to circumvent the typical three-month delay between session adjournment and a law's effective date, *see* Neb. Const. art. III, § 27—took effect on May 23, 2023, within hours of the Governor's signature. In contrast, the Legislature provided that the restrictions on gender-affirming care would not become operative until October 2023. *See* L.B. 574 Slip Law §§ 8(16), 21.

1. The abortion ban. The abortion ban makes it unlawful for any physician in Nebraska to provide an abortion without first

determining the gestational age of a patient's pregnancy and recording that information, along with the method used to estimate gestational age, in the patient's medical record. L.B. 574, Slip Law §§ 1–2. Moreover, if the probable gestational age of a pregnancy is 12 weeks LMP or more, the ban forbids the physician from providing abortion services to the patient. *Id.* § 2.

As was true of L.B. 626, the exceptions to the abortion ban in L.B. 574 are very narrow. A physician cannot legally provide an abortion after 12 weeks of pregnancy unless a medical emergency exists, or the physician determines that narrow circumstances involving sexual assault or incest apply. *Id.* § 4(3). The law limits medical emergencies to instances in which abortion is necessary to avert the patient's "death or for which a delay in terminating [the] pregnancy will create a serious risk of substantial and irreversible physical impairment of a major bodily function." *Id.* § 3(3)(a). The law expressly excludes from a medical emergency any diagnosis based on a patient's suicidality or other risk of self-harm in the absence of abortion. *Id.* § 3(3)(b).

As in L.B. 626, the abortion ban in L.B. 574 creates new professional penalties for physicians who violate its terms, providing that the Department of Health and Human Services *must* revoke offending physicians' licenses to practice medicine. *Id.* § 9 (adding Neb. Rev. Stat. § 38-192(3)); *id.* § 11 (adding Neb. Rev. Stat. § 38-196(2)). And just like L.B. 626, the abortion ban in L.B. 574 subjects physicians to potential civil fines of up to $20,000, all for a *single* abortion. *See* Neb. Rev. Stat. §§ 38-1,118, 38-196(4), 38-198.

2. Restrictions on gender-affirming care. L.B. 574's provisions involving gender-affirming care are wholly distinct from those involving abortion. For example:

- The gender-affirming care provisions include their own title and definitional section, which do not overlap with the title and definitions applicable to the abortion ban. *Compare* L.B. 574 Slip Law § 3, *with id.* § 16.
- The gender-affirming care provisions include their own statement of findings not made applicable to the abortion ban. *See id.* § 15.

- The gender-affirming care provisions regulate different private conduct than the abortion ban. Specifically, the gender-affirming care provisions bar the performance of "gender-altering procedures" on individuals under 19 years of age, with the exception of certain non-surgical procedures that may later be permitted by regulation. *Id.* § 17. Those procedures may involve not only a person's reproductive organs, but also include, for example, voice surgery and the reduction of thyroid cartilage (i.e., "Adam's apple"). *Id.* § 16(10).
- Although the gender-affirming care prohibition and abortion ban both regulate physicians, the former in fact applies to all "health care practitioners," defined to mean "any person licensed or certified under the Uniform Credentialing Act." *Id.* § 16(8). Accordingly, the gender-affirming care provisions could apply to nurses, physician's assistants, pharmacists, psychologists, and seemingly even electrologists involved in hair removal. *See* Neb. Rev. Stat. § 38-121.
- The gender-affirming care provisions create enforcement mechanisms distinct from those in the abortion ban. In particular, L.B. 574 creates a civil cause of action for any individual under 19—or that person's parent or guardian—to sue a "health care practitioner" for performing a forbidden "gender-altering procedure" for them. L.B. 574 Slip Law § 20.
- The gender-affirming care provisions establish a complex and highly unusual rulemaking regime involving the state's Chief Medical Officer, but that regime does not apply to the abortion ban. *See id.* § 18; *see also* Neb. Rev. Stat. §§ 81-112, -3115, -3117(7) (making clear that the Chief Medical Officer does not have authority to adopt binding regulations).

Thus, even though both the abortion ban and the restrictions on gender-affirming care were placed into L.B. 574, the bill gave them different names and treated them differently.

II. The Impact of the Abortion Ban on Plaintiffs, Their Patients, and Staff

Plaintiff PPH is a not-for-profit health care provider dedicated to ensuring Nebraskans' access to affordable, quality sexual and reproductive health care and education. PPH has health centers in Lincoln and Omaha, both of which provide a wide range of reproductive and sexual health services to patients, including cancer screenings, birth control counseling, human papillomavirus (HPV) vaccines, annual gynecological exams, contraception, adoption referral, and miscarriage management. Aff. of Dr. Sarah A. Traxler ("Traxler Aff.") ¶ 17, attached hereto.

Until the abortion ban took effect, PPH—through plaintiff Dr. Sarah Traxler and other physicians licensed to practice medicine in Nebraska—offered abortion services in the state through 16 weeks, 6 days LMP. *Id.* ¶ 18. For context, a typical pregnancy is 40 weeks long, and the first trimester of pregnancy lasts 14 weeks. *Id.* ¶ 11.

In the past three years, roughly one-third of PPH's abortion patients in Nebraska have received care at or after 12 weeks of pregnancy. *Id.* ¶ 36. Yet, when the abortion ban took effect on May 23, PPH and its staff were forced to immediately stop providing abortions at or after 12 weeks of pregnancy unless one of the ban's limited exceptions applies. *Id.* ¶ 12. PPH has already cancelled appointments for numerous patients beyond 12 weeks of pregnancy in Nebraska, *id.* ¶ 37, and has instead turned to helping these patients access abortion out of state.

The next scheduled day on which PPH will have an abortion provider available in Nebraska is Monday, June 5. *Id.* ¶ 70. Patients seeking to obtain an abortion on that day will need to receive certain state-mandated information no later than this Friday, June 2. *Id.*

As discussed in greater detail below, if the abortion ban remains in effect, it will continue to cause irreparable harm to PPH, its patients, and staff. As an initial matter, abortion providers facing civil sanctions

under L.B. 574 have a constitutional right to be regulated by validly enacted legislation, consistent with the single-subject rule's safeguards, which are designed to limit government overreach. Every day that L.B. 574 remains in effect, those rights are violated. In addition, by preventing the plaintiffs from offering safe and effective access to abortion that has been legal in Nebraska for roughly fifty years, L.B. 574 is damaging their reputations and reducing community goodwill for their services. Additionally, L.B. 574 will gravely harm PPH's patients. Those Nebraskans deprived of abortion services will be forced to carry their pregnancies to term, with all the attendant risks that entails; attempt to travel out of state for care, at great cost to themselves and their families; or self-manage their abortions outside the U.S. medical system, in some cases using methods that may be unsafe or that may subject them to criminal investigation and prosecution.

ARGUMENT

Preliminary injunctive relief is preventative in nature and serves to "preserve the status quo of the parties." *State ex rel. Beck v. Assocs. Disc. Corp.*, 161 Neb. 410, 415–16, 73 N.W.2d 673, 676–77 (1955); *accord Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 239, 720 N.W.2d 886, 903 (2006). A court may issue a temporary injunction when "it appears by the complaint that the plaintiff is entitled to the relief demanded," and in the absence of an injunction, the act to be restrained would either "produce great or irreparable injury" or "render the judgment ineffectual." Neb. Rev. Stat. § 1063; *see also id.* § 1062 (permitting injunctions as a provisional remedy). In applying Nebraska's preliminary injunction standard, courts generally consider four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff will suffer irreparable harm without an injunction; (3) the balance of the hardships; and (4) the public interest. *See generally* 5 Neb. Prac., Civil Procedure § 18:2, Requirements for interlocutory injunctions (collecting cases).

As set forth below, PPH and Dr. Traxler more than satisfy this test.

I. Plaintiffs are likely to succeed on the merits because L.B. 574 violates the Nebraska Constitution's single-subject rule.

The Nebraska Constitution expressly limits legislation to "one subject." Yet L.B. 574 plainly addresses two distinct subjects: abortion and gender-affirming care. Plaintiffs are therefore likely to succeed on the merits of their claim that L.B. 574 is unconstitutional.

A. The Nebraska Constitution prohibits legislation that has more than one subject.

Article III, Section 14, of the Constitution of the State of Nebraska provides: "No bill shall contain more than one subject, and the subject shall be clearly expressed in the title." Legislation enacted in violation of this command is "null." *Weis v. Ashley*, 59 Neb. 494, 81 N.W. 318, 319 (1899) (discussing Neb. Const. art. III, § 11 (1875)); *cf. Chicago, R.I. & P. Ry. Co. v. Streepy*, 224 N.W. 41, 43 (Iowa 1924) (stating, in the context of a single-subject challenge, that "we must not hesitate to proclaim the supremacy of the Constitution").

And for good reason. As one commentator put it, "[t]he primary and universally recognized purpose of the single subject rule is to prevent log-rolling," namely, creating a bill that gains the votes necessary for enactment by combining proposals that might not have passed on their own. Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 Minn. L. Rev. 389, 391 (1958); *see, e.g.*, *People v. Olender*, 854 N.E.2d 593, 599 (Ill. 2005) ("The single subject rule is designed to prevent the passage of legislation that, if standing alone, could not muster the necessary votes for enactment."). The single subject rule "ensures that the legislature addresses the difficult decisions it faces directly and subject to public scrutiny, rather than passing unpopular measures on the backs of popular ones." *Johnson v. Edgar*, 680 N.E.2d 1372, 1379 (Ill. 1997).[2] In contrast, when logrolling is

[2] The Supreme Court of Nebraska has looked to decisions in other states with constitutional provisions similar to those appearing in the Nebraska Constitution. *See, e.g.*, *State ex rel. Norfolk Beet-Sugar Co. v.*

permitted to occur, public scrutiny is thwarted because a lawmaker's vote does not necessarily reveal which part of a bill they liked or disliked. Instead, "each provision theoretically serves as the inducement for someone's vote," which "taints the entire act." Marth 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, 161 (2001).

The Supreme Court of Nebraska long ago recognized that these same concerns animate the Nebraska Constitution's single-subject rule. In an 1899 decision declaring a bill "null," the Court explained that concerns about the "prevent[ion] [of] hodgepodge or logrolling legislation," among other factors, explained why Nebraska and many other states had adopted constitutional provisions limiting bills to one subject. *Weis*, 59 Neb. 494, 81 N.W. at 319 (quoting Cooley, Const. Lim. (6th Ed.) p. 172) (internal quotation marks omitted). Likewise, the Court has cautioned that "[i]n construing [art. III, § 14], it is always proper to keep in view the mischief which is sought to be prevented," including "to prevent 'log-rolling.'" *Conservative Sav. & Loan Ass'n of Omaha v. Anderson*, 116 Neb. 627, 218 N.W. 423, 423 (1928); *cf. State ex rel. McNally v. Evnen*, 307 Neb. 103, 118–19, 948 N.W.2d 463, 476 (Neb. 2020) (observing that one purpose of the single-subject rule in art. III, § 2, concerning ballot initiatives, is "to avoid logrolling").

Under those principles, if lawmakers wish to legislate in a broad field, they must do so by legislating comprehensively, with that entire field serving as their one subject. In *Van Horn v. State*, the Court explained that the Legislature is perfectly free to pass "comprehensive acts . . . so long as the act has but a single main purpose and object." 46 Neb. 62, 64 N.W. 365, 369 (1895). For example, the Legislature could, "by a single act," create a "complete code of civil procedure." *Id.* But if a

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Moore, 50 Neb. 88, 69 N.W. 373, 377 (Neb. 1896) (interpreting appropriations provision and discussing precedent in Illinois, Montana, South Dakota, and Kansas); *State ex rel. Abbott v. Bd. of Cnty. Comm'rs of Dodge Cnty.*, 8 Neb. 124, 127–28 (Neb. 1879) ("An examination of the constitutions of other states and the adjudication of their courts thereon may throw some light upon this question.").

bill were to include just two aspects of civil procedure rather than a complete code—"for instance, to provide for supersedeas bonds, to also provide for the issuing of original summonses, or the effect of a demurrer"—the Court "would have no hesitation in saying that such an act contained more than one subject." *Id.* That is because when the Legislature "join[s] two or more bills together," instead of legislating either narrowly or comprehensively, it allows "the friends of the several bills [to] combine and pass them." *Id.* (quoting *Kan. City & O.R. Co. v. Frey*, 30 Neb. 790, 47 N.W. 87, 87–88 (1890)). This type of combined legislation undermines the integrity of the legislative process and is forbidden by the single subject rule.

Over the years, in a series of challenges to bills involving taxation, the Court's decisions have been consistent with *Van Horn*'s conclusion that a chimeric two-subject bill is unconstitutional even if a broad comprehensive bill might have been fine. *See, e.g.*, *Anderson v. Tiemann*, 182 Neb. 393, 408–409, 155 N.W.2d 322, 332 (1967). The Court's determination whether a bill contains "one subject" within the meaning of Section 14 has turned on whether it has one "general object," *id.*, or "single main purpose." *Midwest Popcorn Co. v. Johnson*, 152 Neb. 867, 872, 43 N.W.2d 174, 178 (1950). The legislation will survive Section 14 review only if "nothing is included within it except that which is naturally connected with and incidental to that main purpose." *Id.*

In *Midwest Popcorn*, for example, the Court held that the Tax Appraisal Board Act, which contained various provisions relating to the taxation of property and the establishment of a tax appraisal committee, did not violate the single-subject rule because all the provisions were "incidental to the single main purpose of the act." *Id.* at 179. In *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), the Court upheld the Nebraska Revenue Act of 1967, because the various tax provisions in the act were all "components of the tax structure of this state." *Id.* at 332. Similarly, in *Jaksha v. State*, 241 Neb. 106, 486 N.W. 2d 858 (1992), the Court upheld legislation containing provisions relating to several different taxes, tax refund procedures, and the retroactive application of judicial decisions finding tax provisions to be unconstitutional. In all three of these cases, the bills' various provisions, though numerous, related to a single main purpose of tax structure.

But, as the Office of the Nebraska Attorney General has warned, the Court's decisions upholding multi-pronged, but single-purposed tax bills do not undermine the vitality of the Constitution's single subject rule.

For example, in 1990 the Attorney General considered a bill containing provisions making anabolic steroids a controlled substance, as well as an amendment requiring financial institutions to maintain and file records of transactions in excess of $10,000. Neb. Op. Att'y Gen. No. 90023, 1990 WL 485354, at *2 (Mar. 22, 1990). Although each provision related to crime—i.e., the steroid provisions defined crimes and prescribed punishments, while the records provisions facilitated the investigation of crimes—the Attorney General nevertheless concluded that the bill was "constitutionally suspect." *Id.* While acknowledging uncertainty around how the courts would resolve a constitutional challenge, the Attorney General's stance was unequivocal: "[I]t is the belief of this office that LB 571 as amended violates Article III, Section 14, of the Constitution of the State of Nebraska." *Id.* Although the Legislature appears to have pressed forward and enacted the bill despite the Attorney General's warning, to plaintiffs' knowledge it was not challenged in court. *See* Laws 1990, L.B. 571 (Neb. Apr. 7, 1990), https://nebraskalegislature.gov/FloorDocs/91/PDF/Slip/LB571.pdf.

Similarly, in 1991, the Attorney General considered a bill that appropriated money for, and made substantive changes to, the State Tort Claims Act. Although both aspects of the bill related to a specific piece of legislation—the State Tort Claims Act—the Attorney General once again concluded that passing the bill "would probably be unconstitutional." Neb. Op. Att'y Gen. No. 91042, 1991 WL 496712, at *1 (May 20, 1991). The Attorney General reasoned that "substantive language may not be placed in a legislative bill together with appropriations language." *Id.*

Read together, the Nebraska Constitution, as interpreted by the Supreme Court and the Nebraska Attorney General's Office, provides that while a bill may be said to cover one subject where it seeks comprehensively to accomplish a "single main purpose," a bill cannot be

said to cover only one subject where it joins two or more discrete issues without legislating comprehensively.

B. L.B. 574 violates the Nebraska Constitution's single-subject rule because it has two distinct subjects with two distinct purposes and two distinct sets of operational provisions.

For at least four reasons, an abortion ban and a restriction on gender-affirming care are not "one subject" within the meaning of Article III, § 14.

First, combining an abortion ban and gender-affirming care provisions in a single bill violates the plain text of Section 14's single subject command. To state the obvious, abortion and gender-affirming care are not the same thing: one concerns the termination of pregnancy. The other concerns care that takes a range of forms and that is provided to individuals irrespective of their ability to become pregnant. These subjects are by no means "naturally connected with and incidental to [some] main purpose." *Midwest Popcorn*, 152 Neb. 867, 43 N.W.2d at 872. Instead, they are wholly different procedures involving wholly different circumstances and wholly different bodies of literature and law. Indeed, other state supreme courts have applied nearly identical single subject provisions to invalidate legislation comparable to L.B. 574, and even legislation that *only* addressed abortion. *See Burns v. Cline*, 382 P.3d 1048, 1053 (Okla. 2016) ("Although each section relates in some way to abortion, the broad sweep of each section does not cure the single subject defects in this bill.").[3]

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[3] *See also, e.g.*, *Hunsucker v. Fallin*, 408 P.3d 599, 610, *as modified* (Okla. 2017) (holding that "license seizure and destruction upon arrest" and "criminal liability for a breath test refusal" were separate subjects from "administrative monitoring" of "impaired driving"); *Leach v. Com.*, 141 A.3d 426, 434 (Pa. 2016) (invalidating law that create "a civil cause of action for persons affected by local gun regulations" and defined new criminal "offenses relating to the theft of secondary metal"); *Fent v. State ex rel. Okla. Capitol Improvement Auth.*, 214 P.3d 799, 807 (Okla. 2009) (invalidating law with bond issuance

Second, the Legislature's own actions demonstrate that it does not regard the two components of L.B. 574—the abortion ban and the gender-affirming care provisions—as one subject. Each component was first introduced as a separate bill, which reflects a legislative judgment that they concerned different subjects. Even when the abortion ban was injected later into L.B. 574, the Legislature just added its separate title—"The Preborn Child Protection Act" to the existing title of the gender-affirming care restrictions, ultimately enacting a bill that transparently admits to "adopt[ing] the Preborn Child Protection Act and the Let Them Grow Act" together. L.B. 574, Slip Law 1. Yet "[t]he rule is well settled that where the title to an act actually indicates, and the act itself actually includes, two distinct objects where the Constitution declares it shall embrace but one, the whole act must be treated as void." *State v. Women's & Childs.' Hosp.*, 173 N.W. 402, 402 (Minn. 1919).

What is more, lawmakers have acknowledged that each component of the compound L.B. 574 has a separate purpose: the core purpose of the abortion ban, as originally stated in L.B. 626, was to limit "the prescription or performance of abortion," whereas the purpose of the restriction on gender-affirming care, as originally stated in L.B. 574, was to "prohibit the performance of gender altering procedures for individuals under the age of 19." *Compare* Ex. 3, L.B. 626 Comm. Statement (Corrected), *with* Ex. 7, L.B. 574 Introducer's Statement of Intent.

And each component has distinct operational mechanisms. The Legislature put the abortion ban into immediate effect and made the performance of unlawful abortions subject to *mandatory* license revocation, along with civil penalties under the Uniform Credentialing

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measures that financed three separate projects); *Hammerschmidt v. Boone Cnty.*, 877 S.W.2d 98, 103 (Mo. 1994) (en banc) (holding that "amendment authorizing a county to adopt a county constitution does not fairly relate to elections, nor does it have a natural connection to that subject"); *State v. Hailey*, 505 S.W.2d 712, 715 (Tenn. 1974) (invalidating a law providing for more severe punishments for different crimes).

Act. *See supra* pp. 5–6. In contrast, it set the operative date of the gender-affirming care restrictions for October 1, 2023, and it made the performance of unlawful gender-affirming care subject to *discretionary* professional discipline and state-imposed civil fines, while also creating a freestanding civil cause of action against health care practitioners who violate the prohibition. *Id.*

Third, even if there were some comprehensive legislative subject encompassing both an abortion ban and restrictions on gender-affirming care—though there is not—the Legislature did not enact the two components of L.B. 574 as part of some broader, comprehensive legislation. L.B. 574 does not resemble a sweeping revenue act, *see Anderson*, 182 Neb. 393, 155 N.W.2d at 332, or a "complete code of civil procedure," *Van Horn*, 46 Neb. 62, 64 N.W. at 369. It instead includes, and is limited to, two discrete stand-alone bills combined into one. As the Supreme Court of Nebraska has said, in that circumstance a court should "have no hesitation in saying that such an act contain[s] more than one subject." *Id.*

Fourth, the legislative record reveals that a core concern animating the single subject rule—the prevention of logrolling—is acutely present here. *See Weis*, 59 Neb. 494, 81 N.W. at 319. The abortion ban, originally in L.B. 626, was combined with the gender-affirming care restrictions in L.B. 574 only after both provisions failed to secure passage on their own. There is substantial evidence that L.B. 574 was enacted only because these disparate provisions were combined, in violation of the single subject rule. What is more, this is not a bill in which logrolling was used to expand benefits; it was deployed, instead, to extinguish rights previously enjoyed by Nebraska residents. There is all the more reason to enforce the single subject rule where, as with L.B. 574, logrolling has deposited countless Nebraskans squarely underneath the logs.

The two distinct subjects cannot count as one simply because, in the eyes of some, banning abortion and restricting gender-affirming care are means of protecting "human beings." Protecting Nebraskans is arguably the aim of every bill enacted by the Legislature. But that does not mean that all bills in Nebraska are part of one enormous, single

subject for purposes of Section 14. For example, the single-subject rule would bar lawmakers from combining a bill that expands health care for older Nebraskans with a statewide mask mandate, even if proponents of the mandate were to argue that the entire bill sought to protect older Nebraskans from COVID-19. Here, too, if lawmakers had passed a single bill restricting abortion and oxycodone, or abortion and fireworks, or abortion and trampolines, the broader aim of protecting both "preborn" and "actually born" children would not make abortion, oxycodone, fireworks, and trampolines one subject for purposes of the Nebraska Constitution.

II. All other equitable factors, including grave and ongoing harm to PPH and its patients, support entry of emergency relief.

The other equitable considerations relevant to issuance of temporary injunctive relief also support plaintiffs' request for a temporary restraining order, followed by a temporary injunction. 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." *Cent. Neb. Broad. Co. v. Heartland Radio, Inc.*, 251 Neb. 929, 933, 560 N.W.2d 770, 772 (1997); *see also World Realty Co. v. City of Omaha,* 113 Neb. 396, 404, 203 N.W. 574, 577 (1925) ("Irreparable injury, as used in the law of injunction, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great . . . . " (cleaned up)). The injury to PPH, its staff, and patients easily meet that standard.

A. The abortion ban is causing ongoing, grave harm to PPH and its staff.

PPH and its physicians and staff will be irreparably injured from the abortion ban. As an initial matter, it bears emphasis that a violation of L.B. 574 could lead to severe penalties for abortion providers, *see supra* pp. 5–6, and as a result has already forced them to change their care for patients. Particularly under these circumstances, plaintiffs are entitled to be regulated by a validly adopted law, consistent with constitutional safeguards designed to prevent precisely the type of legislation embodied in L.B. 574. When a constitutional right "is

involved, most courts hold that no further showing of irreparable injury is necessary." *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (internal quotation marks omitted); *e.g.*, *Johnson v. Minneapolis Park & Recreation Bd.*, 729 F.3d 1094, 1101 (8th Cir. 2013).

In addition, the abortion ban will force PPH and its staff to turn away patients in need of care that they are trained to and capable of providing, in conflict with their medical ethical obligations. Traxler Aff. ¶ 67. Moreover, the ban will impose reputational harm to PPH, both by forcing it to narrow the scope of its health care services—and thus, in the view of some patients, become less reliable for the care they depend on—and by threatening PPH with penalties for any violation of the new law. *Id.* These harms also cannot be undone after judgment. *See, e.g.*, *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) (holding that "[l]oss of intangible assets such as reputation and goodwill can constitute irreparable injury"); *State ex rel. Beck*, 161 Neb. at 418 (holding that preliminary injunctive relief is appropriate where necessary "to conserve [corporate] property for the protection of the state" and "debtors of [a] defendant corporation").

B. Nebraskans will suffer irreparable harm from forced pregnancy and parenting.

Without an injunction, the abortion ban will deny PPH's patients—roughly one-third of whom are at least 12 weeks pregnant at the time of an abortion—access to medical care that is time-sensitive. Traxler Aff. ¶¶ 20, 36. Many of these individuals will be forced to carry their pregnancies to term and bear children. For these patients, who will suffer a range of physical, mental, and economic consequences, *see id.* ¶¶ 45–63, there is no effective monetary remedy after judgment for the impact of forced pregnancy on health and bodily autonomy.

Even an uncomplicated pregnancy can bring a wide range of physiological challenges. Individuals experience a dramatic increase in blood volume, a faster heart rate, breathing changes, digestive complications, and a growing uterus. *Id.* ¶ 45. These and other changes put pregnant patients at greater risk of blood clots, nausea, hypertensive disorders, and anemia, among other complications. *Id.* Pregnancy can also aggravate preexisting health conditions, including

hypertension, diabetes, kidney disease, and autoimmune disorders. *Id.* ¶ 47. It can lead to the development of new and serious health conditions as well, such as preeclampsia and deep vein thrombosis. *Id.* Many people seek emergency care at least once during a pregnancy, *id.* ¶ 46, and people with comorbidities (either preexisting or those that develop as a result of their pregnancy) are significantly more likely to seek emergency care, *id.* Pregnancy can also induce or exacerbate mental health conditions. *Id.* ¶ 48.

Labor and childbirth are also significant medical events with many risks. *Id.* ¶ 50. The risk of mortality from pregnancy and childbirth is more than 12 times greater than for legal abortion before the point of fetal viability. *Id.* Complications during labor occur at a rate of over 500 per 1,000 hospital stays. *Id.* ¶ 51. Even a normal pregnancy with no comorbidities or complications can suddenly become life-threatening during labor and delivery. *Id.* ¶¶ 50–51. Potential adverse events include hemorrhage, transfusion, ruptured uterus or liver, stroke, unexpected hysterectomy (the surgical removal of the uterus), and perineal laceration (the tearing of the tissue around the vagina and rectum). *Id.* at ¶ 51. In Nebraska, nearly 29% percent of deliveries also occur by cesarean section ("C-section"). *Id.* ¶ 52. A C-section is an open abdominal surgery that requires hospitalization for at least a few days and carries risks of hemorrhage, infection, blood clots, and injury to internal organs. *Id.*

In addition to these physical and mental injuries, L.B. 574 also imposes irreparable harm on PPH's patients by impinging on one of the most personal and consequential decisions a person will make in a lifetime: whether to become or remain pregnant. In this way, the Act will have an impact on a person's existing family that cannot be compensated by future monetary damages. *See id.* ¶¶ 22, 31, 42, 58, 65. Many Nebraskans decide that adding a child to their family is well worth the risks and consequences of pregnancy and childbirth. At the same time, together with their partners and with the support of other loved ones and trusted individuals, more than 2,000 Nebraskans each year determine that abortion is the right decision for them. Neb. Dep't of Health & Human Servs., Nebraska 2021 Statistical Report of Abortions 2, tbl. 2 (May 2022), https://tinyurl.com/4urwkz75. Roughly

60 percent of abortion patients in Nebraska have already given birth to one or more children. Traxler Aff. ¶ 22. If the abortion ban remains in effect, it will dramatically impair the ability of Nebraska families to determine their own composition, free from state interference.

The economic impact of forced pregnancy, childbirth, and parenting will also have dramatic, negative effects on Nebraska families' financial stability. *Id.* ¶¶ 31, 42, 54–56. Some side effects of pregnancy render patients unable to work, or unable to work the same number of hours as they otherwise would, resulting in job loss, especially for people who work jobs without predictable schedules, paid sick or disability leave, or other forms of job security. *Id.* ¶¶ 42, 54, 56. Nebraska does not require employers to provide paid family leave, meaning that for many pregnant Nebraskans, time taken to recover from pregnancy and childbirth or to care for a newborn is unpaid. *Id.* ¶ 54.

In sum, pregnancy and parenting is hugely consequential in Nebraskans' lives, and being denied an abortion may have permanent, negative effects on individuals' physical and mental health, economic stability, and the wellbeing of their families, including existing children.

C. The abortion ban will harm Nebraskans forced to travel out of state and even those patients who satisfy the law's exceptions.

Although some Nebraskans forced to remain pregnant may eventually be able to obtain abortions out of state, they, too, will suffer irreparable injury if the abortion ban remains in effect. They will be forced to remain pregnant against their will until they can obtain that care, likely later in pregnancy than if they had had abortion access in Nebraska. *Id.* ¶ 43; *see Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004) (irreparable harm where individuals would experience complications and other adverse effects due to delayed medical treatment). And these patients will lose the availability of "medical treatment from the qualified providers of their choice." *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018).

Nebraskans forced to travel out of state will also suffer the costs and burdens of substantial travel. Traxler Aff. ¶ 40. At this time, the nearest clinics providing abortion beyond 12 weeks outside of Nebraska are in Des Moines, Iowa (122 miles from Omaha and 169 miles from Lincoln, each way), and Overland Park, Kansas (174 miles from Omaha and 170 miles from Lincoln, each way). *Id.* The closest clinics in Minnesota, where there is no mandatory delay period before a patient can have an abortion, are more than 250 miles away from Omaha, and more than 300 miles away from Lincoln, each way. *Id.* at ¶ 41. To undertake this travel, some of PPH's patients will also be forced to compromise the confidentiality of their decision to have an abortion in order to obtain transportation or childcare. *Id.* ¶ 42.

Even patients who might fit into the ban's limited exceptions will suffer irreparable harm in accessing needed care. Nebraskans with rapidly worsening medical conditions—who, before the abortion ban, could have obtained an abortion without explanation—will now be forced to wait for care until their conditions become deadly or threaten permanent impairment so as to meet the ban's death and permanent injury exception. *Id.* ¶ 61. Sexual assault survivors in Nebraska will likewise have to choose between abortion services and maintaining their privacy in deciding whether to come forward about the assault. *Id.* ¶¶ 15, 35.

D. The harm to PPH, its staff, and Nebraskans in need of abortion far outweighs any interest the State has in enforcing L.B. 574.

PPH and its patients will face far greater harm if the abortion ban is allowed to remain in effect than the State will face if the Court enters an injunction preserving the status quo. The public has a substantial interest in an injunction blocking a law that fundamentally upsets the longstanding status quo on which Nebraskans and their families have relied for the past five decades, particularly where that law violates constitutional guardrails designed to protect them from undue assertions of government power. *See Pennfield Oil Co.*, 272 Neb. 219, 720 N.W.2d at 903 (2006) (emphasizing that "preserv[ation] of the status quo" is the central consideration in issuing a temporary injunction).

The State's interest, if any, is marginal by comparison. It "does not have an interest in enforcing a law that is likely constitutionally infirm." *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010). And Nebraska already bans nearly all abortions after 22 weeks LMP (or 20 weeks post-fertilization). Neb. Rev. Stat. § 28-3,106; *id.* § 28-329 (post-viability ban). An injunction would prevent Nebraska only from enforcing its abortion ban before that time. The balance of equities and public interest thus tilt decisively in PPH's favor.

IV. An injunction should be issued without posting of a bond.

The Court has wide discretion in the matter of requiring security as a condition for a temporary restraining order or preliminary injunction. *See Exch. Bank v. Mid-Neb. Comput. Servs., Inc.*, 188 Neb. 673, 676, 199 N.W.2d 5, 7 (1972) (appeal bond would not be overturned without showing of "manifest abuse of discretion or [where] injustice has resulted"). The Court should use its discretion here either to waive the security requirement or to set a nominal bond since the relief sought by plaintiffs will result in no "damages" to defendants. Nev. Rev. Stat. § 25-1067; *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016). And the injunction is necessary to protect the constitutional rights of PPH, its staff, and its patients, further counseling in favor of waiving bond. *Richland/Wilkin*, 826 F.3d at 1043 (holding it was "permissible for [a] district court to waive the bond requirement based on its evaluation of public interest in [a] specific case").

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court enter a temporary restraining order, followed by a temporary injunction, that enjoins and restrains defendants and their officers, employees, servants, agents, appointees, or successors from administering and enforcing L.B. 574, including in any future enforcement actions for conduct that occurs during the pendency of this injunction, and that such an injunction issue without posting of security.

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Respectfully submitted,

BY: /s/ _____

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* *Motion for admission pro hac vice forthcoming*