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.

On Appeal from the District Court of Lancaster County (Maret, J.)

BRIEF FOR AMICUS CURIAE LEAGUE OF WOMEN VOTERS OF NEBRASKA IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF AMICUS CURIAE

The League of Women Voters of Nebraska ("LWVNE") is a nonpartisan, grassroots civic organization that works to encourage informed and active participation in government, increase public understanding of major policy issues, and create a more open and transparent democracy through education and advocacy. Based on its expertise and experience, the LWVNE believes the single subject rule in Article III, section 14 of the Nebraska Constitution serves important democratic purposes that were failed in the case of L.B. 574, Neb. Leg., 108th Leg., Reg. Sess. (Neb. 2023). The LWVNE therefore urges the Court to vacate the trial court's judgment, reaffirm the single subject rule's significance, and invalidate L.B. 574, the dual-subject act at issue.

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

Amicus adopts appellants' statement of the case, propositions of law, and statement of facts.

ARGUMENT

L.B. 574 IS UNCONSTITUTIONAL

This case presents an important constitutional question for the State of Nebraska: Does the single subject rule in Article III, section 14 of the Nebraska Constitution still serve to check legislative misdeeds and safeguard political transparency? Does it, in other words, still have teeth? According to the Attorney General, the answer is 'no.' In his view, so long as a bill's provisions, however discordant, can be linked to a particular "subject," then no matter how tenuous the connection or general that subject, the bill survives art. III, § 14 scrutiny. But that approach cannot be reconciled with the democratic objectives of the single subject rule, this Court's precedent, or the basic precept that "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).

Although a stricter standard governs the single subject rule in the ballot initiative context, *see State ex rel. Loontjer v. Gale*, 288 Neb. 973, 996 (2014), this Court has long recognized that the parallel rule in Article III, section 14 serves similar, critical objectives, *see, e.g.*, *Van Horn v. State*, 46 Neb. 62, 72-76 (1895). This Court should reaffirm that principle and make clear that the legislature—like the electorate—must heed its "'self-imposed limitations' on [legislative] power." *State ex. Rel. Wagner v. Evnen*, 307 Neb. 142, 163 (2020) (affirming this principle in the initiative context). "Here, that means giving meaningful effect to the single subject rule in Neb. Const. art. III, § [14]," *id.*, and invalidating L.B. 574, the dual-subject Act at issue.

A. The Legislative Single Subject Rule Serves Vital Democratic Objectives That Were Failed In This Case

From the time Nebraska was admitted to the Union in 1867, its Constitution has directed that "No bill shall contain more than one subject, and the subject shall be clearly expressed in the title." Neb. Const. art. III, § 14. Recognized as a critical means of enhancing political transparency and limiting legislative misdeeds, similar single subject rules were enshrined in the constitutions of forty-three states by the mid-Twentieth Century. M. Gilbert, Single Subject Rules and the Legislative Process, 67 U. PITT. L. REV. 803, 812 (2006). Such rules were designed to achieve two principle objectives: First, this Court has recognized, the rule seeks to "'prevent hodge-podge or log-rolling legislation,'" wherein separate proposals—with one or more garnering only minority support—are combined to gain majority support. *Weis v. Ashley*, 59 Neb. 494, 497 (1899); *see also* J. Marshfield, The Single-Subject Rule and the Politics of Constitutional Amendment in Initiative States, 101 NEB. L. REV. 71, 83 (2022) (summarizing historical development of legislative single subject rules). In other

words, this Court has explained, "it was intended that a proposed measure should stand upon its own merits." *Van Horn*, 46 Neb. at 75.

The second object of the rule is to facilitate political transparency for both citizens and legislators. *See Weis*, 59 Neb. at 497; M. Ruud, No Law Shall Embrace More Than One Subject, 42 MINN. L. REV. 389, 391 (1958); M. Gilbert, Single Subject Rules at 808, 816-17. In the case of legislators, the rule allows them to better understand the proposal and clearly register a policy position when casting their vote. In the case of citizens, it enables them also to better apprehend proposed legislation, to "'have opportunity of being heard thereon by petition or otherwise,'" *Weis*, 59 Neb. at 497, and to hold legislators accountable for their policy choices at the ballot box.

These concerns remain relevant today—as L.B. 574 well illustrates. Of the two separate measures combined to create the final L.B. 574, "both … nearly failed as free-standing bills." A. Sanderford and Z. Wendling, *Nebraska merges abortion, gender-affirming care measures into single bill*, Nebraska Examiner (May 17, 2023). Only when "tweaked and combined" did "backers gain[] the critical 33rd vote needed to overcome [the] filibuster[]." *Id.* An earlier iteration of the anti-abortion component—which would have barred abortion, with few exceptions, at approximately six weeks gestation—failed to pass in the Nebraska Legislature. Dist. Ct. Op. 2, 18. And the proposal to limit gender-affirming care for transgender youth (the original L.B. 574) survived two rounds of debate by a single vote. *See* M. Hennessy-Fiske and C. Itkowitz, *Nebraska Ban on Gender-Affirming Care and Abortion Heads to Final Vote,* The Wash. Post (May 16, 2023). A senator who had helped sink the earlier abortion bill, Senator Riepe, agreed to support the late-breaking 12-week version tacked onto L.B. 574, but not without reservations concerning the separate issue to which the abortion ban was now tied. *Id.* The senator had "mixed feelings about the transgender measure," but he wished "'to get 12 weeks'" on the abortion bill. *Id.* So "'[w]hen it [came] down to the nay-and-yea vote,'" he "'just ha[d] to do it.'" *Id.*; *see also supra* A. Sanderford and Z.

Wendling, Nebraska Examiner (May 17, 2023) (quoting Senator Riepe lamenting the legislature's "'unfortunate'" decision to "'put two controversial bills together,'" stating that they are "'like nitroglycerin and something else'").

Neither proposal, in other words, "st[oo]d upon its own merits." *Van Horn*, 46 Neb. at 75. The single subject rule is designed to prevent such democratically dubious tactics. And under this Court's precedent, the resulting law cannot stand.

B. L.B. 574 is Invalid Under This Court's Precedent

"Whether 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) (internal quotation marks omitted). The subject may be broad so long as it is, in fact, a single subject. The idea, after all, "'was not to embarrass legislation by making laws unnecessarily restrictive in their scope and operation.'" *Van Horn*, 46 Neb. at 75. As this Court recognized in *Anderson v. Tiemann* and the Attorney General is wont to repeat, "[i]f an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto … it does not violate Article III, section 14, of the Constitution." 182 Neb. 393, 408-09 (1967). The District Court and Attorney General, however, largely overlook the essential conditions of this principle—namely, that the bill's provisions must present "but *one* general object" and "contain[] *no matter not germane* thereto." *Id.* at 408. (emphases added). The key question, then, is how to determine what constitutes one "object" (i.e., subject) within the meaning of Article III, Section 14. But the Court need not answer that question here, for it has done so repeatedly and consistently in the past.

An act "is valid as containing but one subject," this Court has instructed, if it has "a single main purpose" and "nothing is included within it except that which is *naturally connected with and incidental to* that main purpose." *Midwest Popcorn v. Johnson*, 152 Neb. 867, 872

(1950) (emphasis added); *accord Van Horn*, 46 Neb. at 74 (an act is valid if it encompasses only what is "naturally connected with and incidental to" a "single main purpose"). *That* is the standard a law must satisfy under the single subject rule. The so-called "standard" favored by the Attorney General and District Court—*Anderson*'s "one-general-object-no-matter-how-broad standard," Dist. Court Op. 14—provides important guidance, to be sure. But it is not the standard by which this Court assesses a law's validity under Article III, Section 14—nor could it be, as it provides no measure of what constitutes "one general object" (i.e., a single subject). *Anderson*, 182 Neb. at 408.

Contrary to the District Court's conclusion (and Attorney General's repeated suggestion), then, the reason for which this Court upheld the law at issue in *Anderson* was not because it identified, *post hoc*, a broad theme to which the Court could somehow link all the act's provisions. Rather, it was because the "various taxes provided for" in the act were "closely related and germane to each other." *Anderson*, 182 Neb. at 409; *see also Jaksha v. State*, 241 Neb. 106, 131-32 (1992) (upholding similar tax law under *Anderson*); *Midwest Popcorn*, 152 Neb. at 871 (rejecting single-subject challenge to yet another tax law because all "provisions of the act [were] incidental and germane"); *Wirtz v. Quinn*, 953 N.E.2d 899, 905 (Ill. 2011) (explaining that the dispositive question is "whether the provisions in the act have a 'natural and logical connection'").

Here, however, the District Court did not find that L.B. 574's transgender-care and abortion-related measures are "closely related and germane to each other," *Anderson*, 182 Neb. at 409, or "naturally connected with and incidental to" a shared object, *Midwest Popcorn*, 152 Neb. at 872. The Attorney General has not even attempted to argue as much for obvious reason. Instead, the Attorney General has argued (and the District Court accepted) that L.B. 574 is valid because its provisions can be said to relate to the nebulous notion of "public health and welfare"—or, according to the District Court's *sua sponte* characterization, "healthcare." But that does not suffice under this

Court's precedents. Were that sufficient, "the single subject requirement [could] be circumvented by selecting a topic so broad that the rule is evaded as a meaningful constitutional check on the legislature's actions." *Wirtz*, 953 N.E.2d at 905 (internal quotation marks omitted); *accord Wagner*, 307 Neb. at 153 (quoting *Wirtz* in ballot initiative context).

It is true that the standard here is more liberal than that governing the single subject inquiry in the context of constitutional amendments like ballot initiatives. *See Loontjer*, 288 Neb. at 996. To pass muster, all provisions of a proposed constitutional measure must have a "natural and *necessary* connection with each other." *Wagner*, 307 Neb. at 165 (quoting *Christensen v. Gale*, 301 Neb. 19, 32 (2018)) (emphasis added). Because constitutional amendments are more "difficult to change once enacted," this Court has held that a "stricter standard" should apply. *Loontjer*, 288 Neb. at 996-97; *see also* Dist. Court Op. 15. But the legislative single subject rule is not a hollow command that may be discarded whenever inconvenient to a bill's supporters. It, too, must be "giv[en] meaningful effect," *Wagner*, 307 Neb. at 163, including careful consideration of whether its provisions are "naturally connected" and "incidental to" one another. *See supra* pp. 8-9. That is not the case here.

C. Invalidating L.B. 574 Would Improve, Not Harm, the Legislative Process

In addition to the Attorney General's misguided legal argument—that the legislative single subject rule has no teeth—he tries a practical one: namely, that invalidating L.B. 574 would sound the death knell for other Nebraska laws. He points to six recent acts, asserting that it "would pull the rug out from under" them were this Court to strike down L.B. 574. Defendants' Brief and Opp. at 13, 19-20; *see also* State's Response to Appeal at 8. This argument is both unfounded and off base.

As an initial matter, it is not clear that the acts cited by the Attorney General in fact concern distinct subjects under Article III, section 14. *See e.g.,* L.B. 432, Neb. Leg., 107th Leg., Reg. Sess. (Neb. 2021) (addressing tax rates, tax credits, and tax savings plans.) Nor does any of them raise the same logrolling concerns at issue here. Not one features a component (or earlier iteration thereof) that previously failed to pass the legislature. The same cannot said of L.B. 574, whose eleventh-hour anti-abortion amendment largely mirrors an earlier, standalone act that failed to garner the necessary votes to reach cloture. *See supra* p. 7; Dist. Court Op. 2. What is more, none of the acts cited by the Attorney General restricts basic individual rights like L.B. 574 and, perhaps for this reason, none has been challenged.

More fundamentally, the Attorney General's argument misses the point. To the extent the Legislature is indeed flouting Article III, section 14's single subject requirement, this Court should put an end to it. The legislative single subject rule serves critical democratic objectives. *See supra* pp. 6-7. And until the legislature (or citizenry) amends the Nebraska Constitution to eliminate the rule, the legislature must heed it its requirements—and so must courts reviewing the legislature's work.

Yet the most recent legislative session suggests that state lawmakers increasingly disregard this mandate. The session saw a significant increase in the enactment of so-called "Christmas tree bills," meaning legislation containing numerous measures combined to create a single bill. *See, e.g.*, T. Von Kampen, *'Christmas tree' decorating key to bills getting passed in 2023 Legislature*, Star Herald (June 3, 2023); (explaining that "state senators crammed nearly 300 bills into just over one-tenth as many enacted measures"); M. Stoddard and E. Bamer, *Nebraska lawmakers pass "Christmas tree" bills on broadband, hydrogen energy*, Omaha World-Herald (May 23, 2023) (reporting that two bills enacted in May "contain[ed] 17 measures that address everything from scrap tire grants to the expansion of broadband coverage across Nebraska"); E. Bamer, *Nebraska*

lawmakers advance 17 bills folded into insurance package, Omaha World-Herald (April 18, 2023).

According to the Attorney General, "[t]hat is [the legislature's] choice," and "[a]ny challenge[] to this practice" should be rejected. Defendants' Brief and Opp. at 19. But the Nebraska Constitution says otherwise. If the provisions in these bills are not all "naturally connected with and incidental to" a "single main purpose," *Midwest Popcorn*, 152 Neb. at 872, the bills violate Article III, section 14. And there is reason to believe some indeed fail this test, beyond just the sheer number of bills cobbled together. One state senator, for example, related that legislators were "loose" with "the germaneness rule just for the goal of getting something passed." C. Dunker, *To move legislation with limited time left, senators turn to combining bills into one*, Lincoln Journal Star (April 5, 2023). This is not a mere technicality. Several senators "admitted that bills absorbed into other measures didn't get the same kind of floor scrutiny they would have had separately." *Supra* T. Von Kampen, Star Herald (June 3, 2023). Another agreed that the legislature had insufficient time to debate these massive bills, stating that "21 bills as a committee amendment is wildly inappropriate and disrespectful to the body and the state." *Supra* C. Dunker, Lincoln Journal Star (April 5, 2023). Such tactics, in other words, led to exactly the harms Article III, section 14 is designed to prevent. *See supra* pp. 6-7.

Amicus (and the citizenry of Nebraska) has a strong interest in seeing the Court curb these unlawful practices. The single subject rule serves interests at the heart of the state's political process, including transparency, openness, and accountability. An opinion from this Court that invalidates L.B. 574 and reaffirms the significance of the rule would thus improve, not harm, Nebraska's legislative process.

CONCLUSION

For the reasons given, the Court should vacate the trial court's judgment and invalidate L.B. 574.

Dated this 4th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Neb. Ct. R. App. P. § 2103, this brief was prepared using Microsoft Word 365 in 12-point Century Schoolbook font, in compliance of said rules. This brief contains 3,273 total words, excluding this certificate.

/s/ Beth Neitzel
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Certificate of Service

I hereby certify that on Monday, December 04, 2023 I provided a true and correct copy of this *Proposed Amicus Brf League of Women* to the following:

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