IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

PLANNED PARENTHOOD OF THE HEARTLAND, INC. and SARAH TRAXLER, M.D., Plaintiffs, v. MIKE HILGERS, in his official capacity as Attorney General for the State of Nebraska; 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.	)	Case No. CI 23-1820 **ORDER**

On July 19, 2023, this matter came before the Court for hearing on the following matters: (1) The Plaintiffs' Motion for a Temporary Injunction (Filing No. 1); (2) the Defendants' Motion to Dismiss (Filing No. 5); and (3) the Plaintiffs' Cross-Motion for Summary Judgment (Filing No. 15). The parties appeared through their counsel of record. Being fully advised on the premises, the Court sustains the Defendants' motion to dismiss and overrules the Plaintiffs' motions for a temporary injunction and summary judgment.

I. INTRODUCTION

There are two main issues before the Court: First, whether the Plaintiffs have standing. That is, are the Plaintiffs the right persons to bring these claims? The Court concludes that Planned Parenthood has standing because it will lose business from performing fewer abortions. But Planned Parenthood's medical director, Sarah Traxler, does not have standing because any injury that she will suffer from L.B. 574 is speculative.

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The second issue is whether L.B. 574 has "one subject" under article III, section 14 of the Nebraska Constitution. The Nebraska Supreme Court has said that a legislative bill must have "one general object, no matter how broad that object may be, and contain[] no matter not germane thereto . . . ." *Anderson v. Tiemann*, 182 Neb. 393, 408 (1967). Notably, this standard is more "liberal" than the single-subject rule for ballot initiatives. See *State ex rel. Loontjer*, 288 Neb. 973, 997 (2014). Applying this liberal standard, the Court concludes that the general object of L.B. 574 is health care and that all parts of L.B. 574 are relevant to health care.

Thus, the Court sustains the Defendants' motion to dismiss. The Plaintiffs' motions for summary judgment and a temporary injunction are moot. There is nothing left for this Court to decide.

A. Legislative background.

In this challenge to L.B. 574, the logical place to begin is the bill's history. As introduced, L.B. 574 proposed the "Let Them Grow Act." Generally, the Let Them Grow Act prohibited "gender-altering procedures" for persons younger than nineteen. The bill did not regulate abortion.

Instead, L.B. 626 proposed to regulate abortion by enacting the "Nebraska Heartbeat Act." The Nebraska Heartbeat Act would have generally prohibited a physician from aborting a fetus with a detectable heartbeat. L.B. 626 advanced from committee, but a motion to end floor debate failed.

Later, the "Preborn Child Protection Act" was added to L.B. 574 by A.M. 1658. The Preborn Child Protection Act was very similar to the Nebraska Heartbeat Act, with one significant difference: Instead of prohibiting abortions of fetuses with a detectable heartbeat, it prohibited abortions of fetuses with a gestational age of twelve or more weeks.

On May 19, 2023, the Legislature passed L.B. 574. The Governor approved the bill a few days later. As enacted, sections 1 to 6 of L.B. 574 create the Preborn Child Protection Act. Section 3(1)(a) defines "abortion" as the "prescription or use of any instrument, device, medicine, drug, or substance to or upon a woman known to be pregnant with the specific intent of terminating the life of her preborn child." Section 3(2) defines "gestational age" as the "age of a preborn child as calculated from the first day of the last menstrual period of the pregnant woman."

Section 4 requires a physician to determine and record the gestational age of a fetus before aborting it. It then prohibits a physician from aborting a fetus (1) before determining its gestational age, or (2) if the probable gestational age is twelve or more weeks. There are exceptions for medical emergencies, sexual assault, and incest.

Sections 14 to 20 enact the Let Them Grow Act. Section 17 generally prohibits a health care practitioner from performing gender-altering procedures on an individual younger than nineteen. Section 16(6)(a) defines "gender-altering procedures" as follows:

> Gender-altering procedures includes any medical or surgical service, including without limitation physician's services, inpatient and outpatient hospital services, or prescribed drugs related to gender alteration, that seeks to:
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> (i) Alter or remove physical or anatomical characteristics or features that are typical for the individual's biological sex; or
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> (ii) Instill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex . . . .

Section 18 makes an exception for "nonsurgical gender-altering procedures," e.g., puberty-blocking drugs. It requires the State's chief medical officer to promulgate regulations allowing individuals younger than nineteen to receive nonsurgical gender-altering procedures in certain circumstances.

Sections 7 to 13 amend various licensing laws to which health care providers are subject. The amendments provide that health care providers may be disciplined for violating the Preborn Child Protection Act or the Let Them Grow Act. Notably, license revocation is a mandatory penalty for physicians who perform an illegal abortion.

The sections of L.B. 574 that include the Preborn Child Protection Act passed with an emergency clause. Thus, they took effect after the Governor signed the bill. See Neb. Const. art. III, § 27. The remainder of L.B. 574, i.e., the Let Them Grow Act, will take effect on October 1, 2023.

B. Procedural background.

On May 30, 2023, the Plaintiffs filed this lawsuit. They allege that L.B. 574 violates Neb. Const. art. III, § 14 because it "includes two subjects: an abortion ban and restrictions on gender-affirming care for youth." Compl. ¶ 68. They ask the Court to declare that L.B. 574 is unconstitutional and to enjoin the Defendants—state officers sued in their official capacity—from enforcing the law.

The same day that they filed their Complaint, the Plaintiffs moved for a temporary restraining order and a temporary injunction. On June 1, the Court had a status conference with counsel. The Defendants' counsel said that they intended to move to dismiss the Complaint. The next day, on June 2, the Court filed an order overruling the Plaintiffs' motion for a temporary restraining order. The Court set the Plaintiffs' temporary injunction motion for hearing on June 12. The Court also said that the Defendants could notice their yet-to-be-filed motion to dismiss for the same date.

Thereafter, the case acquired a procedural complexity that belies its short time on the docket. This is largely due to the motion to dismiss that the Defendants filed on June 2. They moved to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim for relief under Neb. Ct. R. Pldg. § 6-1112(b)(1) and (6). But they also announced that they intended to convert their motion to dismiss into a motion for summary judgment:

> Pursuant to Neb. Ct. R. Pldg. § 6-1112(b), Defendants hereby place the Plaintiffs and this Court on notice that Defendants intend to offer evidence outside of the pleadings in support of its Motion to Dismiss. Defendants further notify the Plaintiff and this Court that it will offer evidence and follow the procedures set forth in Neb. Rev. Stat. §§ 25-1330 to 25-1336, inclusive, and Neb. Ct. R. Pldg. § 6-1526.

Rule 12(b) says that if a court receives evidence on a motion to dismiss for failure to state a claim, then the "motion shall be treated as one for summary judgment and disposed of as provided in §§ 25-1330 to 25-1336, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute."

On June 9, the Plaintiffs filed a Cross-Motion for Summary Judgment. Notably, under Neb. Rev. Stat. § 25-1330 (Reissue 2016), a plaintiff cannot move for summary judgment until (1) thirty days have passed from the service of process on the defendant, or (2) the defendant moves for summary judgment. Thirty days had not passed when the Plaintiffs filed their summary judgment motion. Thus, by filing their own summary judgment motion, the Plaintiffs effectively treated the Defendants' motion to dismiss as a motion for summary judgment.

Yet, three days later, about one hour before the hearing on the Plaintiffs' temporary injunction motion and the Defendants' motion-to-dismiss-*cum*-summary-judgment-motion, the Plaintiffs filed a "Motion to Strike Evidence in Support of Defendants' Motion to Dismiss/Motion for Summary Judgment Filed June 2, 2023." The Plaintiffs also filed an "Objection to Defendants' Introduction of Evidence in Support of Defendants' Motion for

Summary Judgment." The Plaintiffs argued that the Defendants should not be allowed to convert their motion to dismiss into a motion for summary judgment. They did not notice either their "Motion to Strike" or their "Objection" for hearing.

At the June 12 hearing, the Plaintiffs argued that the Defendants had not served their evidence far enough in advance of the hearing. So, the Court continued the matter to give the parties more time to prepare. On June 13, the Court entered a progression order on the Plaintiffs' temporary injunction motion, the Defendants' motion to dismiss, and the Plaintiffs' summary judgment motion. All three motions were set for hearing on July 19.

At the hearing on July 19, the Plaintiffs no longer objected to the Defendants' motion to dismiss on procedural grounds. The Court received evidence on the Defendants' motion to dismiss and the parties treated it as one for summary judgment. The Court will do the same. Although the motion practice in this case was unorthodox, "trial courts should have some discretion to adapt procedures to the needs of a particular case." *Humphrey v. Smith*, 311 Neb. 632, 643 (2022). The Plaintiffs can no longer argue that they were surprised or prejudiced by the form of the Defendants' motion. To the extent that a ruling is necessary, the Court overrules the Plaintiffs' "Motion to Strike Evidence in Support of Defendants' Motion to Dismiss/Motion for Summary Judgment Filed June 2, 2023" (Filing No. 16); and "Objection to Defendants' Introduction of Evidence in Support of Defendants' Motion for Summary Judgment" (Filing No. 17).

C. Factual background.

At the July 19, 2023 hearing, the Court took the parties' evidentiary objections under advisement. The Court now sustains the Defendants' foundation objections to the following paragraphs of Exhibit 1: 21–23, 29–35, 38–44, 49–50, 52, 54–59, 62, and 66. To the extent that paragraph 2 of Exhibit 2 incorporates the excluded paragraphs of Exhibit 1, those paragraphs are also excluded in Exhibit 2. The Court also sustains the Defendants' hearsay and relevance objections to Exhibits 17–24 and 29–35. The remainder of the parties' objections are overruled and the exhibits are received. The evidence now before the Court shows the following:

The Plaintiff Planned Parenthood of the Heartland, Inc. ("Planned Parenthood") operates health clinics in Omaha and Lincoln at which abortions are performed. E1 at ¶ 17. As of June 5, 2023, Planned Parenthood's website said that the clinics were operated by "Planned Parenthood North Central States." E63 at p. 1; E64 at p. 1; E65 at ¶¶ 3–4. This organization is the Plaintiff

Planned Parenthood's "Corporate Parent." E2 at ¶ 4. But the Certifications of Licensure issued by the State of Nebraska state that Planned Parenthood is the owner of the health clinics in Omaha and Lincoln. E3 at pp. 1–2. In response to the webpages, Planned Parenthood reiterated that it, in fact, is the entity that operates the clinics. E2 at ¶ 4.

Between May 2020 and May 2023, Planned Parenthood performed 4,631 abortions in Nebraska. E1 at ¶ 20. About 32 percent (1,464) of the aborted fetuses had a gestational age of twelve or more weeks. *Id.* Because of L.B. 574, Planned Parenthood has had to cancel appointments for abortions and turn away patients who are carrying fetuses with a gestational age of twelve or more weeks. *Id.* at ¶¶ 37, 67. Planned Parenthood alleges that it will therefore "suffer direct economic injury through the loss of business and goodwill . . . ." *Id.* at ¶ 67.

The Plaintiff Sarah Traxler, M.D. ("Traxler") is Planned Parenthood's medical director. E1 at ¶ 1. In that capacity, she "oversee[s]" all medical services provided by Planned Parenthood. *Id.* Although Traxler resides in Minnesota, she is licensed to practice medicine in Nebraska. E1 at ¶ 1; E2 at ¶ 5. She sometimes travels to Nebraska to perform abortions at Planned Parenthood's Omaha and Lincoln clinics. *Id.*

III. STANDARD

A party is entitled to a summary judgment if the pleadings and evidence show that there is no genuine issue of any material fact or the ultimate inferences drawn from those facts. *Waldron v. Roark*, 298 Neb. 26 (2017).

When a court holds an evidentiary hearing on standing, the plaintiff has the burden to show, with relevant evidence, that they have standing. See *North Star. Mut. Ins. Co. v. Stewart*, 311 Neb. 33 (2022); see also *SID. No. 67 v. Dep't of Roads*, 309 Neb. 600 (2021) (generally stating that plaintiffs have the burden to establish standing).

A court presumes that a statute is constitutional and resolves all reasonable doubts in favor of its constitutionality. *State ex rel. Peterson v. Shively*, 310 Neb. 1 (2021). "The party challenging the constitutionality of a statute bears the burden to clearly establish the unconstitutionality of a statutory provision. It is not the province of a court to annul a legislative act unless it clearly contravenes the constitution and no other resort remains." *Id.* at 10.

IV. ANALYSIS

A. Standing.

The Defendants argue that the Plaintiffs lack standing under Nebraska's common law standing doctrine. The basic rules of that doctrine are the following:

> To have standing, the plaintiff must have some legal or equitable right, title, or interest in the subject matter of the controversy. Generally, a party has standing only if he or she has suffered or will suffer an injury in fact. Such an injury must be concrete in both a qualitative and temporal sense, and it must be distinct and palpable, as opposed to merely abstract, and the alleged harm from such an injury must be actual or imminent, not conjectural or hypothetical. We have emphasized that to show standing, it is generally insufficient for a plaintiff to have merely a general interest common to all members of the public. And we have said that a person seeking to restrain the action of a governmental body must show some special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.
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> *Preserve the Sandhills, LLC v. Cherry County*, 313 Neb. 590, 597 (2023) (citations omitted).

The standing doctrine embraces several distinct issues, two of which are relevant here. First, do the Plaintiffs have an injury in fact? Second, are the Plaintiffs asserting their own rights? The above quote adequately describes the injury-in-fact requirement.

Elsewhere, the Supreme Court has explained that "standing requires that a plaintiff show his or her claim is premised on his or her own legal rights as opposed to rights of a third party." *Marcuzzo v. Bank of the West*, 290 Neb. 809, 819 (2015). There are some exceptions. For example, sometimes a nonparty to a contract can enforce the contract as a third-party beneficiary. See, e.g., *Equestrian Ridge Homeowners Ass'n v. Equestrian Ridge Estates II Homeowners Ass'n*, 308 Neb. 128 (2021); see also *State v. Monastero*, 228 Neb. 818 (1988) ("We are mindful of the U.S. Supreme Court's recognition of third-party standing in certain cases . . . ."); *State v. Champoux*, 5 Neb. App. 68 (1996), affirmed by 252 Neb. 769 (1997), citing *Craig v. Boren*, 429 U.S. 190 (1976) (adopting the U.S. Supreme Court's third-party standing rule).

(1) Planned Parenthood has standing.

Here, Planned Parenthood has produced evidence that it will suffer a direct economic injury through the loss of business. Before L.B. 574, about one third of the fetuses aborted by Planned Parenthood were at least twelve weeks old. E1 at ¶ 20. Because of L.B. 574, Planned Parenthood has had to cancel abortions and turn away patients. *Id.* at ¶¶ 37, 67. As a result, Planned Parenthood will lose business. *Id.* at ¶ 67.

This loss of business is an injury in fact. Indeed, financial harm is a paradigmatic example of injury fact. See, e.g., *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969 (8th Cir. 2014). This rule applies no less when the plaintiff who suffers financial harm is an abortion provider. See, e.g., *Planned Parenthood Ass'n v. Miller*, 934 F.2d 1462, 1465 n.2 (11th Cir. 1991) ("when the legislation inflicts direct economic harm on the physician, he suffers concrete injury.").

The Court also concludes that Planned Parenthood is asserting its own rights. Importantly, Planned Parenthood is ***not*** asserting a pregnant woman's right to an abortion. Instead, Planned Parenthood argues that L.B. 574 violates the single-subject rule in Neb. Const. art. III, § 14. Thus, Planned Parenthood alleges that L.B. 574 "deprives Plaintiffs of their right to be subjected only to laws adopted in conformity with § 14's constitutional safeguards." Compl. ¶ 69.

The Court agrees with how Planned Parenthood has characterized the right at stake. If the force of Nebraska's laws is brought to bear against a person, then that person has the right to demand that the law be valid under art. III, sec. 14. The Defendants have not explained why this right would belong any less to a health clinic harmed by the law than a pregnant woman. That Planned Parenthood is incorporated under Iowa's laws is irrelevant. The evidence shows that it owns and operates two health clinics in Nebraska and that these clinics will lose business because of L.B. 574. Neither the text nor the caselaw interpreting art. III, § 14 suggests that only Nebraska residents can assert the single-subject rule. While the Supreme Court might have the prerogative to create that rule, this Court does not.

(2) Traxler does not have standing.

Traxler's best injury-in-fact argument is that her medical license will be automatically revoked if she performs an abortion made illegal by L.B. 574. Under L.B. 574, the State ***must*** revoke a physician's medical license if they perform an illegal abortion. There is nothing speculative about the consequences of performing an illegal abortion. Other courts have held that abortion providers suffer an injury in fact if there are non-speculative criminal or disciplinary consequences for performing an illegal abortion. See, e.g., *Planned Parenthood v. Farmer*, 220 F.3d 127 (3d Cir. 2000) (a law restricting abortions "occasion[ed] an imminent 'injury in fact' upon [physicians] because, as written, it threatens them with severe civil penalties, namely, license revocation and a $ 25,000 fine"); see also *Wollschlaeger v. Governor*, 848 F.3d 1293

(11th Cir. 2017) ("the Board of Medicine's recent regulations provide that certain disciplinary sanctions 'shall' be imposed for violations of [Florida's Firearms Owners' Privacy Act], and that is enough to show a credible threat of enforcement").

Surprisingly, the Defendants argue that a physician is not harmed when their medical license is revoked. They cite the following rule: "There exists no vested right to practice medicine; rather, it is a conditional right subordinate to the police power of the State to protect and preserve the public health." *Dep't of Health v. Hinze*, 232 Neb. 550, 555 (1989). But that case had nothing to do with standing. It does not matter whether the right to practice medicine is "conditional," or even if it is a mere privilege. The license, once granted, gives the holder access to a profession that can be very remunerative (among other things). The loss of that right or privilege is an injury for standing purposes. Were it otherwise, physicians could not even appeal the revocation of their license under the Administrative Procedure Act because that Act incorporates the common law standing doctrine. See Neb. Rev. Stat. § 38-1,102 (Reissue 2016) (disciplinary proceedings under the Uniform Credentialing Act can be appealed under the Administrative Procedure Act); Neb. Rev. Stat. § 84-917(1) (Cum. Supp. 2022) (a "person aggrieved" can seek judicial review under the Administrative Procedure Act); *Cent. Neb. Pub. Power & Irrigation Dist. v. N. Platte Nat. Res. Dist.*, 280 Neb. 533 (2010) (explaining that the aggrieved-party requirement refers to the common law standing doctrine).

Nor would a physician necessarily have to wait until their license is revoked to challenge L.B. 574. Federal courts hold that a threatened enforcement action is an "imminent" injury if the plaintiff alleges an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted). A plaintiff does not have to "expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). The declaratory judgment statutes exist to resolve this very dilemma. *Id.*; see *Hauseran v. Stadler*, 251 Neb. 106 (1996) ("A declaratory judgment is by definition forward-looking, for it provides preemptive justice designed to relieve a party of uncertainty before the wrong has actually been committed

or the damage suffered."); see also *Stewart v. Heineman*, 296 Neb. 262 (2017) (whether an injury is too contingent or remote can be a question of ripeness, rather than standing).[1]

Thus, if a physician swore that, before L.B. 574 took effect, they regularly aborted fetuses with a gestational age of twelve or more weeks and, but for L.B. 574, they would continue doing so, then that physician might have standing. But Traxler has not shown that she is that physician. In her supplemental affidavit, Traxler says that she travels from Minnesota to Nebraska to perform abortions. E2 at ¶ 2. But she does not say how often she performs abortions in Nebraska or, critically, whether she aborted fetuses with a gestational age of twelve or more weeks before L.B. 574 took effect. Continuing, Traxler states: "But for LB 574, [Planned Parenthood] and its ***staff*** would return to scheduling appointments for and actually providing abortion in Nebraska through 16 weeks, 6 days of pregnancy, as we did before LB 574 took effect." E2 at ¶ 9 (emphasis added). But it is unclear whether Traxler, who is Planned Parenthood's medical director, included herself in the word "staff." The Court cannot speculate that the affidavits are merely imprecise and that Traxler did, in fact, regularly abort fetuses who were at least twelve weeks old and would, in fact, continue doing so but for L.B. 574. See *U.S. Specialty Ins. Co. v. D S Avionics Unlimited LLC*, 301 Neb. 388 (2018) ("Nor is a declaratory judgment action to be used to adjudicate hypothetical or speculative situations which may never come to pass."). In sum, on this record, Traxler does not have an injury in fact.

B. Sovereign immunity.

Generally, sovereign immunity does not bar suits against public officers in their official capacity for relief from an invalid act or an abuse of authority. See, e.g., *Heist v. Neb. Dep't of Corr. Servs.*, 312 Neb. 480 (2022). The Defendants seem to accept that Planned Parenthood sues them (in their official capacity) for relief from an ***alleged*** invalid act or abuse of authority. But they argue that L.B. 574 is constitutional as a matter of law and, therefore, enforcing L.B. 574 would not be an invalid act or abuse of authority.

In this sense, the Defendants argue that the merits and sovereign immunity are "coextensive" or "inextricably intertwined." They explain:

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[1] The Defendants do not argue that a revocation proceeding is an equally serviceable remedy. Indeed, given the Defendants' stated interest in protecting preborn human life, it would be very strange for them to argue that a physician should challenge the constitutionality of L.B. 574 after their license is revoked. After all, a physician's license is not revoked until ***after they perform an illegal abortion***.

> [F]or this Court to acquire subject matter jurisdiction . . . the Court has to hold that L.B. 574 violates the single subject rule. Otherwise, the officials are not acting outside of their legal authority. Therefore, if the Court determines that the law is constitutional, then the Plaintiffs have no right under Nebraska's equivalent of *Ex parte Young* to sue the Defendants. Accordingly, this case can be dismissed on sovereign immunity.
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> Defendants' Brief in Support of Rule 12(b)-Converted Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Temporary Injunction at 17 (filed June 8, 2023).

This issue might seem esoteric, but it could have practical consequences. Sovereign immunity is a rule of subject matter jurisdiction. See, e.g., *Angel v. Neb. Dep't of Nat. Res.*, 314 Neb. 1 (2023). Thus, if this Court would deprive itself of jurisdiction by concluding that L.B. 574 is constitutional, then its decision might not be binding on Planned Parenthood and the Defendants. See *Schaeffer v. Frakes*, 313 Neb. 337 (2023) (stating that claim preclusion applies if, among other things, the former court had jurisdiction and its decision was on the merits). Beyond this case, treating the merits and jurisdiction as the same thing in official-capacity suits could increase the number of interlocutory appeals filed by public officers. See Neb. Rev. Stat. § 25-1902(1)(d) (Reissue 2016) (defining "final order" to include orders overruling summary judgment motions "based on the assertion of sovereign immunity").

The Court thinks that this issue can be reduced to the following questions: Does the exception to sovereign immunity for official-capacity suits apply when a plaintiff ***alleges*** that the public officer has acted invalidly or abused their authority? Or does the exception only apply if the public officer has, as a matter of law or fact, indeed acted invalidly or abused their authority? Luckily, the Supreme Court has already answered this question. In the foundational case for official-capacity suits, the Supreme Court explained:

> Generally, the applicable rule is that an action against state officers, ***attacking*** the constitutionality of a statute of the state and ***seeking*** to enjoin its enforcement by such officers, or otherwise obtain relief from an ***alleged*** invalid act or abuse of authority by them is not ordinarily a suit against the state, and is not prohibited as such under the general principles governing the immunity of the state from suit.
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> *Rein v. Johnson*, 149 Neb. 67, 69 (1947) (emphasis added).

The holdings in *Rein* illustrate this point. The Supreme Court held that (1) a taxpayer's suit against state officers to enjoin allegedly unlawful transfers of state funds was not barred by sovereign immunity, but (2) the transfers were lawful, so the taxpayer's claims failed on the merits.

After *Rein*, the Supreme Court has often dropped the word "alleged" from its rule statement. But it has continued to treat jurisdiction and the merits as distinct. For example, in *Johnson v. Clarke*, the district court was "correct in finding that it had subject matter jurisdiction," but the lawsuit failed on the merits because the state officers had correctly interpreted the law. 258 Neb. 316, 322 (1999). Recently, in *Heist v. Nebraska Department of Correctional Services*, the Supreme Court held that an inmate's claim that prison officials were misinterpreting the good time and parole eligibility statutes was not barred by sovereign immunity, but the claim was meritless because the officials were correctly applying those statutes. 312 Neb. 480 (2022). But see *Martin v. Curry*, 13 Neb. App. 171 (2004) (stating that because the state officers' actions were "not invalid acts or abuses of authority," the officers were "protected by sovereign immunity").

A different rule applies when the plaintiff seeks to compel "affirmative action" from a public officer. See *Zawaideh v. Neb. Dep't of Health & Human Servs.*, 285 Neb. 48 (2013) (discussing the "legally required" element of the "modified 'affirmative action' test"). But this lawsuit does not seek to compel affirmative action. In sum, because Planned Parenthood sues the Defendants for relief from an ***alleged*** invalid act or abuse of authority, the Defendants cannot claim the State's sovereign immunity.

C. Single-subject rule.

(1) The legislative single-subject rule is broadly construed.

The Court now turns to the merits. Planned Parenthood argues that L.B. 574 violates the single-subject rule for legislative bills. See Neb. Const. art. III, § 14. The single-subject rule is one rule among many concerning the legislative process in art. III, § 14. For context, that section provides in full:

> Every bill and resolution shall be read by title when introduced, and a printed copy thereof provided for the use of each member. The bill and all amendments thereto shall be printed and presented before the vote is taken upon its final passage and shall be read at large unless three-fifths of all the members elected to the Legislature vote not to read the bill and all amendments at large. No vote upon the final passage of any bill shall be taken until five legislative days after its introduction nor until it has been on file for final reading and passage for at least one legislative day. ***No bill shall contain more than one subject***, and the subject shall be clearly expressed in the title. No law shall be amended unless the new act contains the section or sections as amended and the section or sections so amended shall be repealed. The Lieutenant Governor, or the Speaker if acting as

presiding officer, shall sign, in the presence of the Legislature while it is in session and capable of transacting business, all bills and resolutions passed by the Legislature. (emphasis added).

The single-subject rule has been part of Nebraska's fundamental law since statehood. The Constitution of 1866 included a single-subject rule for legislative bills in art. 11, § 19.[2] The Constitution of 1875 included the rule in art. III, § 11. Later, it was moved to its current location in art. III, § 14.

For the first 75 years of statehood, the legislative-process rules now found in art. III, § 14 were remarkably fertile ground for litigation. *State ex rel. Graham v. Tibbets*, 52 Neb. 28 (1897) ("The eleventh section of article 3 of the state constitution has been often before the court for consideration . . . ."). Hundreds of cases cite art. III, § 14 or its predecessors. And sometimes the lawsuits succeeded, usually under the subject-in-title rule. See, e.g., *Touzalin v. City of Omaha*, 25 Neb. 817 (1889).

But during living memory, the Supreme Court has been much more circumspect about acting as a super-parliamentarian. Two cases illustrate this point. In the first, *Anderson v. Tiemann*, the Supreme Court considered a bill that enacted the Revenue Act of 1967. 182 Neb. 393 (1967). That bill, L.B. 377 (1967), contained three general subdivisions: (1) sales and use tax, (2) income tax, and (3) general provisions. The plaintiffs argued these were more than one subject. The Supreme Court applied the following standard to their single-subject challenge: "If an act has but ***one general object, no matter how broad that object may be***, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution." *Id.* at 408–409 (emphasis added). Under this standard, the Supreme Court concluded that "the provisions of L.B. 377 contain but one general subject, taxation, and that it does not violate the Constitution of Nebraska." *Id.* at 409.

The second single-subject case from the modern era is *Jaksha v. State*, 241 Neb. 106 (1992). At issue in *Jaksha* was a 40-section bill passed as L.B. 829 (1991). The title said that it was an act "relating to revenue and taxation." The topics affected by L.B. 829 included:

- The valuation of property for property tax purposes. *Id.* at § 1.

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[2] The Constitution of 1866 did not take effect until March 1, 1867. See *Plattsmouth Bridge Co. v. Turner*, 128 Neb. 738 (1935). Thus, the Constitution of 1866 is sometimes referred to as the Constitution of 1867. See, e.g., *B. & M. R. R. Co. v. Bd. of Cnty. Comm'rs*, 9 Neb. 507 (1880).

- Statutes of limitation for claims related to property taxes. *Id.* at §§ 2–4.
- The definition of "real property" as applied to mobile homes. *Id.* at § 5.
- The method of appealing orders of the State Board of Equalization and Assessment. *Id.* at § 8.
- Property tax refunds. *Id.* at §§ 9, 13, 14, 17, 18.
- The availability of injunctions and replevin in actions involving tax collection. *Id.* at § 11.
- The retroactivity of judgments involving real or personal property taxes. *Id.* at § 14.
- Procedures for applying for a property tax refund. *Id.* at § 15.
- The rate of sales tax. *Id.* at § 21.
- Exemptions from sales and use tax. *Id.* at § 22.
- A surcharge on corporate income taxpayers. *Id.* at § 24.
- Fees for corporations subject to the occupation tax. *Id.* at § 25.
- Compensation for counties that experienced reduced property tax revenue because of changes in the bill. *Id.* at § 26.
- Expenditures by school districts. *Id.* at § 33.

But, notably, L.B. 829 ***was not*** a comprehensive taxation bill. It did not change the laws concerning the individual income tax or excise taxes. And although it made many changes to the property tax laws and some changes to the corporate income tax and sales and use tax laws, it did not change ***all*** those laws.

The Plaintiff in *Jaksha* argued that L.B. 829 violated the single-subject rule for the following reasons:

> The plaintiff points out that the act includes provisions relating to property taxes, which exist as a revenue source for political subdivisions only, as well as provisions regarding the sales and use tax and the corporate income tax, which exist as revenue sources for the State. The plaintiff also notes the inclusion of provisions governing such diverse topics as the procedure for obtaining a tax refund and the retroactive application of judicial decisions declaring a tax or penalty unconstitutional.
>
> *Id.* at 131 (citation omitted).

The Supreme Court quoted the one-general-object-no-matter-how-broad standard from *Anderson*. Then, applying that standard, *Jaksha* held: "All of the provisions in the bill relate and are germane to the general subject of taxation." *Id.*, 241 Neb. at 131–32.

The breadth of these cases might be somewhat striking compared to the Supreme Court's recent decisions interpreting the single-subject rule for ballot initiatives in Neb. Const. art. III, § 2. See *State ex rel. Wagner v. Evnen*, 307 Neb. 142 (2020); *State ex rel. McNally v. Evnen*, 307 Neb. 103 (2020). But the Supreme Court has explained that the stricter standard for initiatives does not apply to legislative bills. See *State ex rel. Loontjer v. Gale*, 288 Neb. 973 (2014). The *Loontjer* case involved the "separate-vote provision" for constitutional amendments proposed by the Legislature under Neb. Const. art. XVI, § 1. The Supreme Court held that the separate-vote provision imposed the same requirements as the single-subject rule for ballot initiatives. That is, all parts of a proposed constitutional amendment must have a "natural and necessary connection with each other, and, together, [have] one general subject . . . ." *Id.* at 999 (citation omitted).

But *Loontjer* "conclude[d] that the single subject rule for legislative enactments has no application here." *Id.* at 995. The Supreme Court said that a "stricter standard should apply when considering the validity of a constitutional amendment, as distinguished from a legislative bill to enact or amend a statute." *Id.* at 996. While statutes can always be changed at the next legislative session, a "constitutional provision is intended to be a much more fixed and permeant thing." *Id.*, quoting *State ex rel. Hall v. Cline*, 118 Neb. 150 (1929). Thus, "[b]ecause constitutional amendments are difficult to change once enacted, [the Supreme Court held] that ***the liberal single subject standard that applies to legislative bills under article III, § 14 does not apply to proposed constitutional amendments***." *Loontjer*, 288 Neb. at 997 (emphasis added).

In addition to the relative ease of amending statutes, there are other reasons to construe the legislative single-subject rule more broadly than the rule for ballot initiatives. For example:

- **The legislative process is more deliberative**: Senators have more time to consider and debate bills than voters have to decide which box to mark while standing in their carrel.
- **The legislative process is a give-and-take, not a take-it-or-leave-it**: Initiatives are presented to voters as a take-it-or-leave-it proposition. Legislative bills are the product of compromise. Although some senators might not like every part of the bill, the result might better reflect the will of the public as a whole.
- **The legislature is a coequal branch of government**: The right of voters to change their fundamental law by initiative is important. But it does not raise the same separation-of-powers concerns as when courts rule on points of legislative procedure.

Having summarized the law, the Court now turns to its application.

(2) L.B. 574 does not violate the legislative single-subject rule.

The rule, again, for legislative bills is that they must have "one general object, no matter how broad," and they must not include any matter that is not relevant to that general object. *Anderson, supra*, 182 Neb. at 408–409. Applying that standard here, the Court concludes that L.B. 574 has the general object of health care and that all parts of the bill relate to health care. Planned Parenthood does not dispute that abortion and gender-altering procedures are health care. They are both medical treatments involving surgery or pharmaceuticals. L.B. 574 also regulates the conduct of licensed healthcare workers who provide abortion or gender-altering care unlawfully. These licensing regulations are obviously relevant to health care generally and to these medical services in particular.

It does not matter that the exact phrase "health care" does not appear in the title. The subject of a bill is determined by its contents, not its title. See *Mehrens v. Bauman*, 120 Neb. 110 (1930) ("Whether or not a bill contains more than one subject is to be determined by examining the substance of the bill. Apparent duplicity in the title alone does not invalidate the act."). At any rate, Planned Parenthood only challenges L.B. 574 under art. III, § 14's single-subject rule, not its subject-in-title rule. And even if Planned Parenthood had challenged L.B. 574 under the subject-in-title rule, that challenge would not have been successful. While the title cannot be narrower than the body of the bill, see, e.g., *Touzalin v. City of Omaha*, 25 Neb. 817 (1889), it can be broader. See *State ex rel. Kaspar v. Lehmkuhl*, 127 Neb. 812 (1934) ("It is well-settled law that the title of a legislative bill may be broader than the body of the act without making the legislation unconstitutional."). The title of L.B. 574 says that it relates to "public health," which obviously embraces health care. The title also clearly says that the bill enacts the Preborn Child Protection Act and the Let Them Grow Act while amending the Uniform Credentialing Act and other statutes that regulate credentialed health care providers. Thus, L.B. 574's title is adequate. See *State ex rel. Loseke v. Fricke*, 126 Neb. 736 (1934) (holding that the title adequately expressed the bill's subject—"the waters of [Nebraska's] streams and rivers"—even though that exact phrase did not appear in the title); *Gauchat v. School District*, 101 Neb. 377 (1917) (holding that the title expressed subject of "rural schools and rural school districts" even though that phrase did not appear in the title).

To repeat: The Plaintiffs do not dispute that abortion and gender-altering procedures are both health care. Instead, they argue that the Legislature cannot make law on two different medical services in the same bill unless that bill comprehensively regulates ***all*** medical services.

Their argument is largely based on dicta in *Van Horn v. State*, 46 Neb. 62 (1895). The bill in *Van Horn* changed the law regarding counties under township organization. The changes included fixing number of supervisors, dividing counties into districts, and choosing supervisors. The bill was challenged on the ground that it "relates to both township and county government, two entirely separate and distinct subjects . . . ." *Id.* at 69. The Supreme Court instead held that the bill had "but one main and general subject, to-wit, the organization of townships and the government thereof." *Id.* at 71.

After announcing its holding, explaining its reasoning, and saying "we might dismiss this branch of the case here," the Supreme Court nevertheless decided to elaborate further because of the "elaborate argument" made by counsel. *Id.* at 72. It was in this context that the Supreme Court posed the following hypothetical:

> We conceive the rule to be that the constitutional provision does not restrict the legislature in the scope of legislation. It does not prohibit comprehensive acts, and no matter how wide the field of legislation the subject is single so long as the act has but a single main purpose and object. Thus, we would have no doubt of the power of the legislature by a single act to provide a new and complete Code of Civil Procedure, but if the legislature should undertake in an act whose main purpose should be, for instance, to provide for supersedeas bonds, to also provide for the issuing of original summonses, or the effect of a demurrer, we would have no hesitation in saying that such an act contained more than one subject.
>
> *Id.* at 74.

Planned Parenthood cites *Van Horn* for the rule that a bill cannot legislate on one general object unless it legislates on ***everything*** within that general object. But this understanding is inconsistent with later cases, especially *Jaksha*. Again, the subject of the bill in *Jaksha* was "taxation," but the bill ***was not*** a comprehensive taxation bill. Still, the Supreme Court held that the bill satisfied the legislative single-subject rule.

The civil procedure hypothetical in *Van Horn* is also non-binding dicta. "A case is not authority for any point not necessary to be passed on to decide the case . . . ." *Heist v. Neb. Dep't of Corr. Servs.*, 312 Neb. 480, 496 (2022). The comment in *Van Horn* about a nonexistent civil procedure bill is a good example of a point not necessary to decide a case. In fact, "digressions speculating on how similar hypothetical cases might be resolved" is literally a textbook example of dicta. See Bryan Garner et al., The Law of Judicial Precedent 44 (2016).

Next, Planned Parenthood argues that the Supreme Court implicitly overruled the liberal single-subject rule for legislative bills in *State ex rel. Wagner v. Evnen*, 307 Neb. 142 (2020). As noted above, *Wagner* involved the single-subject rule for ballot initiatives in Neb. Const. art. III, § 2, not the legislative single-subject rule in art. III, § 14. But Planned Parenthood argues that the stricter standard for ballot initiatives now applies to legislative bills because the *Wagner* majority cited two legislative single-subject cases from other jurisdictions. *Id.* at 153 n.35, citing *Gregory v. Shurtleff*, 2013 UT 18, 299 P.3d 1098, 1112 (Utah 2013) (quoting *Wirtz v. Quinn*, 2011 IL 111903, 953 N.E.2d 899, 352 Ill. Dec. 218 (2011)). This is a very slender reed on which to base the overruling of precedent. This Court believes that *Anderson*, *Jaksha*, and *Loontjer* remain good law.

Finally, Planned Parenthood argues that L.B. 574 violates the legislative single-subject rule because the legislative history shows that logrolling did, in fact, occur. One purpose of the single-subject rule is to prevent the friends of several bills from combining them for passage when the bills, if considered separately, would not have passed. See *K. C. & O. R. Co. v. Frey*, 30 Neb. 790 (1890). This practice is called "logrolling." See *Loontjer*, *supra*, 288 Neb. at 995. But the Court disagrees with Planned Parenthood for two reasons. First, whether a bill has more than one subject depends on its substance, not the legislative history. See *Mehrens v. Bauman*, 120 Neb. 110 (1930). Second, it is speculative that logrolling in fact occurred. Planned Parenthood argues that logrolling must have happened because the Legislature did not pass the standalone abortion bill introduced as L.B. 626. But L.B. 626 banned abortions after a detectable fetal heartbeat, which (according to Planned Parenthood) usually occurs around six weeks. Thus, it is just as possible that L.B. 574 succeeded where L.B. 626 failed because legal abortions were effectively extended by six weeks.

(3) Whether a bill violates the single-subject rule is not a political question.

Alternatively, the Defendants argue that whether a legislative bill violates the single-subject rule is a nonjusticiable political question. The Supreme Court raised this issue in the very first case interpreting the legislative single-subject rule. See *People v. McCallum*, 1 Neb. 182 (1871). The Supreme Court left the question open:

> Whether this requirement of the constitution is designed as a rule for the government of the legislature, an observance of which is enjoined by a sense of duty and the official oath

> of each member, and not subject to any supervisory power of the courts, it is unnecessary to stop to inquire.
>
> *Id.* at 194 (citation omitted).

So far as this Court can tell, the Supreme Court never expressly answered that question. But it has effectively decided the matter by assuming the power to enforce art. III, § 14.

It is true that courts should be careful not to unduly interfere in the legislative process. It might also be true that if one asks how many "subjects" a bill has, the answer will say more about the person who responds than about the bill itself. The difficulty of this inquiry is, perhaps, indicated by the Supreme Court's less-than-unanimous decisions in *State ex rel. Wagner v. Evnen*, 307 Neb. 142 (2020) and *State ex rel. McNally v. Evnen*, 307 Neb. 103 (2020). A similar level of scrutiny for legislative bills would be truly disruptive. But the Supreme Court has effectively responded to these concerns by liberally construing the single-subject rule in the legislative context. In other words, the solution is judicial humility, not abdication.[3]

V. CONCLUSION

In sum, the Court sustains the Defendants' Motion to Dismiss (Filing No. 5). The Plaintiffs' motions are now moot, so the Court overrules their Motion for a Temporary Injunction (Filing No. 1) and Cross-Motion for Summary Judgment (Filing No. 15).

There is one final matter: On July 12, 2023, the Plaintiff filed a Request for Court to State its Findings (Filing No. 18). The Plaintiff cites Neb. Rev. Stat. § 25-1127 (Reissue 2016), which requires that a court, if asked, state its "conclusions of fact" and "conclusions of law" after a "trial." The Court questions to what extent this statute applies to motions for summary judgment. Generally, courts do not conclude what the facts are on a motion for summary judgment. They only decide whether the facts are disputed.

But courts can make findings of fact on motions challenging subject matter jurisdiction if the parties offer evidence outside the pleadings. See *Jacobs Eng'g Grp. Inc. v. ConAgra Foods, Inc.*, 301 Neb. 38 (2018). Regarding subject matter jurisdiction, the Court has made the following findings of fact:

- Planned Parenthood owns and operates the health clinics in Omaha and Lincoln;

[3] If there be any doubt on that point, the Court notes that other jurisdictions have rejected similar political-question arguments. See *League of Women Voters of Honolulu & Common Cause v. State*, 499 P.3d 382 (Haw. 2021); *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015).

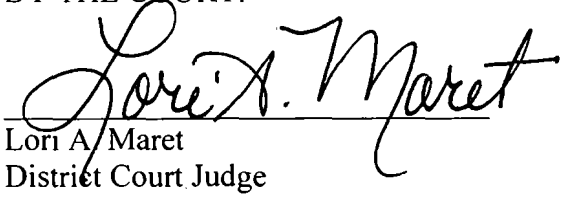
- Planned Parenthood performs at least 30 percent fewer abortions because of L.B. 574;
- Planned Parenthood will suffer an economic loss from performing fewer abortions;
- Traxler is licensed to practice medicine in Nebraska;
- Traxler performed abortions in Nebraska before L.B. 574 took effect, but she has not shown how often or at what stage of pregnancy; and
- Planned Parenthood's staff would continue aborting fetuses with a gestational age of twelve or more weeks but for L.B. 574, but Traxler has not shown whether she is among those staff members.

The Court has also made three conclusions of law: (1) Planned Parenthood has standing, (2) Traxler does not have standing, and (3) L.B. 574 does not violate the single-subject rule in Neb. Const. art. III, § 14.

SO ORDERED.

DATED this 11th day of August, 2023.

BY THE COURT:



Lori A. Maret
District Court Judge