IN THE NEBRASKA SUPREME COURT

CASE NO. S-24-658

STATE OF NEBRASKA ex rel. LATASHA COLLAR,
Relator,

v.

ROBERT B. EVNEN, Nebraska Secretary of State,
Respondent,

and

JENNI BENSON, PAUL SCHULTE, TIM ROYERS and SUPPORT OUR SCHOOLS – NEBRASKA,
Intervenors.

BRIEF OF JENNI BENSON, PAUL SCHULTE, TIM ROYERS and SUPPORT OUR SCHOOLS – NEBRASKA

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STATEMENT OF JURISDICTION

Intervenors dispute jurisdiction over this appeal. On September 6, 2024, the Court granted Relator leave to commence this original action and docketed the case accordingly. Also on that date, the Court issued an Order to Show Cause—as opposed to an Alternative Writ of Mandamus—compelling Relator to show cause why the Verified Petition for Writ of Mandamus should not be denied on the grounds that it is legally insufficient. The show cause order prohibits Relator from offering additional evidence.

The record currently before the Court is insufficient to confer subject matter jurisdiction. In particular, Relator's Verified Petition for Writ of Mandamus, which was notarized in Nebraska but subscribed and sworn before a Texas notary, is not supported by an affidavit or positively verified petition. *See* Neb. Rev. Stat. § 25-2160; *State v. Haase*, 247 Neb. 817, 819–20, 530 N.W.2d 617, 618–19 (1995) (affidavit signed in Nebraska by Iowa notary is void). Accordingly, the Verified Writ of Mandamus should be dismissed.

STATEMENT OF THE CASE

Intervenors Jenni Benson, Paul Schulte, Tim Royers, and Support Our Schools – Nebraska are the sponsors of the Private Education Scholarship Partial Referendum ("Referendum"), which seeks a partial repeal of LB 1402, a bill passed by the 108th Nebraska Legislature. Specifically, the Referendum seeks to repeal Section 1 of LB 1402, which creates an experimental, first-of-its-kind grant-in-aid program with the stated intent to spend $10 million of public money annually to provide education scholarships to eligible students attending nongovernmental, privately operated K–12 schools in Nebraska.

Nebraska law requires the Secretary of State to determine the legal sufficiency of ballot measures in the first instance before certification for the general election ballot. Neb. Rev. Stat. § 32-

1409(3). Although it is not in the record before this Court, Secretary of State Robert B. Evnen determined that the Referendum complied with all statutory and constitutional requirements under Nebraska law, and he certified the measure for the ballot. In doing so, Secretary Evnen necessarily concluded that the sole exception to the referendum power—*i.e.*, the people may not repeal legislative acts "making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act"—is inapplicable to the Referendum. Neb. Const. art. III, § 3.

Relator asks this Court to overrule Secretary Evnen and issue a peremptory writ of mandamus requiring him to withhold the Referendum from the ballot, or, in the alternative, abstain from certifying the election results. Relator argues that the Referendum is legally deficient because it seeks to repeal an act that makes appropriations for the expense of state government or a state institution existing at the time of the passage of the act. No court has sustained a challenge on this ground in the 112-year history of Nebraska's referendum power.

The primary issue before the Court is whether Secretary Evnen erred in determining that the Referendum complies with the requirements of Article III, Section 3, of the Nebraska Constitution such that the measure should appear before voters. The deadline for certifying the Referendum for the ballot is September 13, 2024.

PROPOSITIONS OF LAW

1. The people of Nebraska reserve for themselves the power at their own option to approve or reject at the polls "any act, item, section or part of any act passed by the Legislature, which power shall be called the power of referendum." Neb. Const. art. I, § 1.

2. The referendum power is "precious to the people," and the courts are "zealous to preserve" the precious power "to the fullest tenable measure of spirit as well as letter." *Hargesheimer v. Gale*, 294

Neb. 123, 134, 881 N.W.2d 589, 597 (2016). By the same token, the referendum power "must be liberally construed to promote the democratic process" and "construed in such a manner that the legislative power reserved in the people is effectual." *Id.*

3. There is only a single, narrow exception to the referendum power in Nebraska: The People cannot repeal any act of the Legislature that makes "appropriations for the expense of the state government or a state institution existing at the time of the passage of such act." Neb. Const. art. III, § 3.

4. This single exception is meant to protect the state government and existing state institutions from the "crippl[ing] . . . uncertainty and delay which would surely result if appropriations for their expense should be submitted to a referendum vote." *Bartling v. Wait*, 96 Neb. 532, 537, 148 N.W. 507, 509 (1914)

5. "It is fundamental that such an exception with respect to appropriations should be given a strict construction in light of the fundamental purpose of the referendum provision to give the people the right to vote on specific legislation." *Lawrence v. Beermann*, 192 Neb. 507, 508–09, 222 N.W.2d 809, 810 (1974). Only ballot measures that would "destroy the operation of the fundamental functions of state government or existing state institutions" are non-referable. *Id.*

6. To qualify as an appropriation, a legislative enactment must "set apart from the public revenue a certain sum of money" for a specified object. *Lawrence*, 192 Neb. at 508, 222 N.W.2d at 810.

7. Each legislature shall make appropriations for the expenses of the government. *See* Neb. Const. art. III, § 22. Indefinite appropriations are unconstitutional. *Rein v. Johnson*, 149 Neb. 67, 76–78, 30 N.W.2d 548, 554–56 (1947).

8. This Court defines the term "expense" in the referendum exception narrowly to mean "the ordinary running expenses of the state government and existing state institutions," such as "necessary

upkeep, improvement, repair, and maintenance of existing public buildings." *Bartling*, 96 Neb. at 538, 148 N.W. at 509.

9. Local school districts are not part of state government, nor are they state institutions. *State ex rel. W. Tech. Cmty. Coll. Area v. Tallon*, 196 Neb. 603, 607, 244 N.W.2d 183, 186 (1976); *Campbell v. Area Vocational Tech. Sch. No. 2*, 183 Neb. 318, 323, 159 N.W.2d 817, 821 (1968); *Schulz v. Dixon Cnty.*, 134 Neb. 549, 279 N.W. 179, 183 (1938); *Lawrence*, 192 Neb. at 509–10, 222 N.W.2d at 811 (Newton, J., concurring).

10. The "mere granting of state aid does not render a school operation a state function." *Sarpy Cnty. Farm Bureau v. Learning Cmty. of Douglas & Sarpy Cntys.*, 283 Neb. 212, 242, 808 N.W.2d 598, 620 (2012) (quoting *Tallon*, 196 Neb. at 606, 244 N.W.2d at 186).

11. The State is prohibited from appropriating public funds "to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof." Neb. Const. art. VII, § 11.

12. The Nebraska Constitution prohibits the state from "levying a property tax for *state purposes*." Neb. Const. art. VIII, § 1A (emphasis added).

13. "It is a settled principle of constitutional law that the construction and interpretation of the Constitution is a judicial function[.]" *Planned Parenthood of the Heartland, Inc. v. Hilgers*, 317 Neb. 217, 224 (2024) (quoting *Jaksha v. State*, 241 Neb. 106, 133, 486 N.W.2d 858, 875 (1992)). "It is emphatically the province and duty of the judicial department to say what the law is." *Neb. Coal. for Educ. & Adequacy (Coal.) v. Heineman*, 273 Neb. 531, 546, 731 N.W.2d 164, 176 (2007) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

14. "[I]t is also clearly the duty of this court to give a statute an interpretation which meets constitutional requirements if it can

reasonably be done." *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 211, 602 N.W.2d 465, 475 (1999).

15. "A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless." *Dean v. State*, 288 Neb. 530, 537, 849 N.W.2d 138, 146 (2014).

16. The Secretary of State determines legal sufficiency of ballot measures in the first instance before certification for the general election ballot. Neb. Rev. Stat. § 32-1409(3).

17. Filing of a motion and affidavit or a verified petition is a jurisdictional requirement for issuing a writ of mandamus. *Baldonado-Bellamy*, 307 Neb. 549, 559, 950 N.W.2d 81, 87 (2020). An affidavit subscribed and sworn to before a person not authorized by law to administer oaths is void. *State v. Haase*, 247 Neb. 817, 530 N.W.2d 619 (1995). An affidavit notarized in Nebraska must be signed by a Nebraska notary public. *See In re Interest of Fedalina G.*, 272 Neb. 314, 317–18, 721 N.W.2d 638, 642 (2006).

STATEMENT OF FACTS

Legislative Bill 1402 is best understood in the context of a different legislative enactment: Legislative Bill 753.

In May 2023, the 108th Nebraska Legislature passed, and Governor Jim Pillen signed into law, LB 753. L.B. 753, 108th Leg., 1st Sess. (Neb. 2023). Known as the Opportunities Scholarship Act, LB 753 allowed taxpayers, including corporations, to designate up to half of their state income tax payment to an organization that provides scholarships to private schools. *Id.* The legislation was introduced by Senator Lou Ann Linehan. *Id.*

Intervenors immediately sought to repeal LB 753 via referendum and submitted all necessary paperwork to do so. Press Release, Secretary of State Robert B. Evnen, Signature Verifications and Certification Completed for Private Education Tax Credit

Referendum (Oct. 10, 2023), sos.nebraska.gov/news-releases. In October 2023, Secretary Evnen certified the referendum for the 2024 general election ballot. *Id.*

Before Nebraskans could vote on the measure, Senator Linehan introduced—and the Legislature passed—LB 1402, which repealed LB 753. Senator Linehan has expressly referred to LB 1402 as an "end run" around the referendum to repeal LB 753. Paul Hammel, *Passionate Battle Over School Choice Resumes in Nebraska Legislature*, Nebraska Examiner (Feb. 6, 2024, 8:35 PM), https://nebraskaexaminer.com/2024/02/06/passionate-battle-over-school-choice-resumes-in-nebraska-legislature/.

On April 24, 2024, Governor Pillen signed LB 1402 into law. L.B. 1402, 108th Leg., 2d Sess. (Neb. 2024). In place of the now-repealed Opportunities Scholarship Act, LB 1402 creates an experimental, first-of-its-kind grant-in-aid program with the stated intent to spend $10 million of public money annually to provide education scholarships to eligible students attending nongovernmental, privately operated K–12 schools in Nebraska. *Id.*

On May 7, 2024, Intervenors filed with Secretary Evnen the text of the proposed Private Education Scholarship Partial Referendum to repeal Section 1 of LB 1402. (Verified Pet. for Writ of Mandamus Ex. 1.) On July 17, 2024, Relators submitted over 86,000 signatures to Secretary Evnen—well over the signature threshold required by Nebraska law for placement of the Referendum on the general election ballot. Press Release, Secretary of State Robert B. Evnen, Private Education Scholarship Partial Referendum Petition Returned for Signature Verification (July 27, 2024), sos.nebraska.gov/news-releases.

On August 30, 2024, Secretary Evnen stated an intent to certify the Referendum for the general election ballot. (Verified. Pet. for Writ of Mandamus Ex. 3.) Although not in the record before the Court, on September 5, 2024, Secretary Evnen certified the Referendum for the general election ballot. In doing so, Secretary Evnen necessarily

concluded that the Referendum complies with all statutory and constitutional requirements under Nebraska law—and that the one, narrow exception to the referendum power is inapplicable. *See* Neb. Rev. Stat. § 32-1409(3).

Before Secretary Evnen certified the measure for the ballot, Relator filed an Application for Leave to Commence Original Action and Statement of Jurisdiction, along with a proposed Verified Writ of Mandamus. Accordingly, Relator's filing does not include Secretary Evnen's certification decision. Additionally, Relator's filing is notarized by a notary public of Texas, even though the document was notarized in Lancaster County, Nebraska. On September 6, 2024, this Court ordered Relator to show cause why the Verified Petition for Writ of Mandamus should not be denied because it is legally insufficient.

SUMMARY OF THE ARGUMENT

The Court lacks subject matter jurisdiction over this dispute because Relator's Verified Petition for Writ of Mandamus is not supported by an affidavit or positively verified petition. As discussed below, the Verified Petition was notarized in Nebraska but subscribed and sworn before a Texas notary. This is insufficient as a matter of law because out-of-state notaries are not authorized to administer oaths in Nebraska. The case should be dismissed.

Relator's arguments also fail on the merits. The people of Nebraska have reserved for themselves the broad power of referendum, which allows the people to approve or reject bills enacted by the Legislature. Neb. Const. art. I, § 1. Courts "zealously preserve" this "precious power." *Hargesheimer v. Gale*, 294 Neb. 123, 134, 881 N.W.2d 589, 597 (2016).

There is only one narrow exception to the referendum power: The people cannot repeal a bill that makes "appropriations for the expense of the state government" or an existing state institution. Neb. Const. art. III, § 3. This Court strictly construes the exception to

effectuate the people's broad referendum power. *Lawrence v. Beermann*, 192 Neb. 507, 508–09, 222 N.W.2d 809, 810 (1974). The single exception is meant to protect the state government from the crippling uncertainty and delay of putting certain appropriation measures before the voters. *Bartling v. Wait*, 96 Neb. 532, 537, 148 N.W. 507, 509 (1914). Accordingly, only ballot measures that would "destroy the operation of the fundamental functions of state government or existing state institutions" are non-referable. *Lawrence*, 192 Neb. at 508–09, 222 N.W.2d at 810.

The Court has never invalidated or withheld a statewide referendum from the ballot as a non-referable appropriation for the expense of state government or a state institution.

The Court should once again reject such a challenge. The Referendum seeks to repeal only Section 1 of LB 1402, which establishes a first-of-its-kind scholarship program for eligible students attending *nongovernmental*, *privately operated* K–12 schools. By its terms, Section 1 does not appropriate state funds. Rather, a separate bill—a bill not subject to referendum at the upcoming election—appropriates the money to fund LB 1402's experimental scholarship program. In any event, contrary to the Nebraska Constitution, Section 1 of LB 1402 takes the extraordinary step of creating a program to fund private schools with public money. By no stretch does this novel program constitute an "ordinary running expense," *Bartling*, 96 Neb. at 538, and it is certainly not an expense of the state government. By definition, private institutions are not state institutions.

In hopes of depriving the people of their constitutional referendum right, the Legislature—and by extension, Relator—attempt to characterize LB 1402 more broadly as funding K–12 education. But even considered more broadly, funding K–12 education is never a function of state government. *Campbell v. Area Vocational Tech. Sch. No. 2*, 183 Neb. 318, 323, 159 N.W.2d 817, 821 (1968); *Lawrence*, 192 Neb. at 509–10, 222 N.W.2d at 811 (Newton, J.,

concurring). Plus, the "mere granting of state aid does not render a school operation a state function." *Sarpy Cnty. Farm Bureau v. Learning Cmty. of Douglas & Sarpy Cntys.*, 283 Neb. 212, 242, 808 N.W.2d 598, 620 (2012) (quoting *Tallon*, 196 Neb. at 606, 244 N.W.2d at 186). In fact, although the Constitution prohibits the State "from levying a property tax for state purposes," Neb. Const. art. VIII, § 1A, K–12 education in Nebraska is heavily funded by property taxes. *See* Neb. Rev. Stat. §§ 79-1001–79-1033. If Relator is correct that funding K–12 education is a state purpose, then Nebraska's educational funding scheme is unconstitutional.

Secretary Evnen correctly determined that the Referendum complies with all statutory and constitutional requirements under Nebraska law and should appear before voters. The Court should reject Relator's request for a writ of mandamus.

ARGUMENT

I. Relator's Petition for Writ of Mandamus is not properly verified.

Relator failed to properly verify her petition for a Writ of Mandamus. A court does not have jurisdiction to issue a writ of mandamus unless relator submits an affidavit or a verified petition. *Baldonado-Bellamy*, 307 Neb. 549, 559, 950 N.W.2d 81, 87 (2020). An affidavit subscribed and sworn to before a person not authorized by law to administer oaths is void. *State v. Haase*, 247 Neb. 817, 530 N.W.2d 619 (1995). In this case, the verification states that the notarization (or "notarial act") occurred in Lancaster County, Nebraska. (Appl. for Leave 5; *id.* Ex. A, at 8); *see also* 433 Neb. Admin. Code § 6-002 ("The Notarial certificate or acknowledgement must be completed in its entirety including dates, state and county of notarial act."); Tex. Admin. Code § 87.41("For all notarial acts that require a notarial certificate, the online notary public shall attach an electronic notarial certificate that identifies . . . the state and county in which the notarization was performed."). The notary who signed the verification,

however, is a Texas notary. (Appl. for Leave 5; *id.* Ex. A, at 8). Therefore, the verification is void.

The power of a notary is limited to the jurisdiction in which their commission was issued. *Haase*, 247 Neb. at 819, 530 N.W.2d at 619. This means that an Iowa notary or a Texas notary cannot notarize a document signed in Nebraska. *Haase*, 247 Neb. at 819–20, 530 N.W.2d at 618–619; *see also* Tex. Gov't Code Ann. § 406.003 (providing that notaries have *statewide* jurisdiction). Rather, an affidavit notarized in Nebraska must be signed by a Nebraska notary public. *See In re Interest of Fedalina G.*, 272 Neb. 314, 317–18, 721 N.W.2d 638, 642 (2006); *Haase*, 247 Neb. at 819–20, 530 N.W.2d at 618–19 (affidavit signed in Nebraska by Iowa notary public is void).

The Electronic Notary Public Act does not change this result. The Act does not permit out-of-state notaries to notarize documents in Nebraska. Rather, to act as an electronic notary public within Nebraska, the notary must hold a valid commission as a notary in Nebraska. Neb. Rev. Stat. § 64-303.

Relator's verification states it was notarized in Nebraska, but it was not subscribed and sworn to a person authorized to administer oaths here. Accordingly, the verification is void. Relator's petition should be dismissed for lack of subject matter jurisdiction.

II. Section 1 of LB 1402 is subject to repeal.

Under the Nebraska Constitution, the people reserve for themselves the power at their own option to approve or reject at the polls "any act, item, section or part of any act passed by the Legislature, which power shall be called the power of referendum." Neb. Const. art. I, § 1. The power is "precious to the people," and the courts are "zealous to preserve" the precious power "to the fullest tenable measure of spirit as well as letter." *Hargesheimer v. Gale*, 294 Neb. 123, 134, 881 N.W.2d 589, 597 (2016). By the same token, the referendum power "must be liberally construed to promote the

democratic process" and "construed in such a manner that the legislative power reserved in the people is effectual." *Id*.

There is only a single, narrow exception to the referendum power in Nebraska: The people cannot repeal any act of the Legislature that makes "appropriations for the expense of the state government or a state institution existing at the time of the passage of such act." Neb. Const. art. III, § 3. This single exception is meant to protect the state government and existing state institutions from the "crippl[ing] . . . uncertainty and delay which would surely result if appropriations for their expense should be submitted to a referendum vote." *Bartling v. Wait*, 96 Neb. 532, 537, 148 N.W. 507, 509 (1914).

Under Nebraska law, the Secretary of State determines legal sufficiency of ballot measures in the first instance before certification for the general election ballot. Indeed, Neb. Rev. Stat. § 32-1409(3) directs the Secretary of State to total the valid petition signatures and "determine if constitutional and statutory requirements have been met." Neb. Rev. Stat. § 32-1409(3). Performing his ministerial duty here, Respondent determined that the Referendum collected sufficient signatures to appear on the general election ballot and complied with all statutory and constitutional requirements under Nebraska law.

Secretary Evnen's legal sufficiency determination is consistent with this Court's precedents and should be affirmed as a matter of law. As discussed below, the narrow referendum exception does not apply because **(1)** Section 1 of LB 1402 is not an "appropriation" within the meaning of Article III. Even if it were, however, Relator's objection would still fail because **(2)** scholarships for nongovernmental, privately run institutions are not an ordinary governmental "expense," and **(3)** funding of elementary and secondary education—let alone *private* education—is *never* an expense of "state government" in Nebraska. Accordingly, Secretary Evnen's legal sufficiency determination should be affirmed and the Relator's request for a writ of mandamus should be denied.

A. The people's referendum power is broad and subject to only one, narrow exception that is strictly construed.

The people of Nebraska have reserved for themselves broad legislative authority, including the "power at their own option to approve or reject at the polls *any* act, item, section, or part of any act passed by the Legislature." Neb. Const. art. III, § 1 (emphasis added). This Court generally construes the word "any" expansively to mean "all that fall within a particular category of whatever kind." *State v. Taylor*, 310 Neb. 376, 386, 966 N.W.2d 510, 518 (2021) (citation and quotation marks omitted); *see also Gimple v. Student Transp. of Am.*, 300 Neb. 708, 715, 915 N.W.2d 606, 612 (2018) ("The plain and ordinary meaning of 'any' is 'all' or 'every.'").

The Constitution provides only a single exception to the people's referendum right to repeal "any" act of the Legislature—namely, the people cannot repeal acts of the Legislature "making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act." Neb. Const. art. III, § 3.

Nebraska's referendum exception is particularly circumscribed, applying only to appropriations *for an expense of the state government or an existing state institution*. The exception does not apply to *all* appropriations, unlike exceptions found in other state constitutions. In Alaska, for example, the referendum "shall not be applied to dedications of revenue [or] to appropriations." Alaska Const. art. XI, § 7. In Montana, the people may "approve or reject by referendum any act of the legislature except an appropriation of money." Mont. Const. art. III, § 5(1). And in Wyoming, the referendum "shall not be applied to dedications of revenue [or] to appropriations." Wyo. Const. art. III, § 52(g). It is notable, then, that the Nebraska Constitution does not exclude *all* appropriations from the referendum power—only those that appropriate money *for the expense of the state government or an existing state institution*.

In addition to being narrow in scope, this Court strictly construes the exception to effectuate the people's precious right. "It is fundamental that such an exception with respect to appropriations should be given a strict construction in light of the fundamental purpose of the referendum provision to give the people the right to vote on specific legislation." *Lawrence v. Beermann*, 192 Neb. 507, 508–09, 222 N.W.2d 809, 810 (1974). Only ballot measures that would "destroy the operation of the fundamental functions of state government or existing state institutions" are non-referable. *Id*. The single exception is meant to protect the state government and existing state institutions from "crippl[ing] . . . uncertainty and delay which would surely result if appropriations for their expense should be submitted to a referendum vote." *Bartling*, 96 Neb. at 537, 148 N.W. at 509.

In light of the strict construction of an already narrow exception, it is hardly surprising that Nebraska courts have never invalidated or withheld a statewide referendum from the ballot as a non-referable appropriation for the expense of state government or a state institution. Instead, this Court has twice rejected attempts by citizen objectors to invalidate ballot measures in the manner attempted here. *Lawrence*, 192 Neb. at 507–09, 222 N.W.2d at 809–11; *Bartling*, 96 Neb. at 536–39, 148 N.W. at 508–09. These cases, coupled with the plain text of the Nebraska Constitution, impose a heavy burden of proving the exception applies. The Court relies on this heavy burden to carry out its zealous preservation of the people's reserved right of referendum.

As discussed below, Relator cannot satisfy this heavy burden here. Accordingly, Secretary Evnen's legal sufficiency determination should be affirmed.

B. Section 1 of LB 1402 is subject to the people's broad power of referendum.

The primary issue before this Court is whether Section 1 of LB 1402, which establishes a first-of-its-kind scholarship program for

eligible students attending nongovernmental, privately operated K–12 schools, constitutes an appropriation for the expense of the state government or an existing state institution. As Secretary Evnen concluded, the answer to this question is no.

To fall within the narrow exception to the referendum power, three requirements must be satisfied: the enactment must be

1. an "appropriation" measure,
2. for an "expense,"
3. of the "state government" or an existing state institution.

Neb. Const. art. III, § 3. The appropriation exception does not apply unless all three requirements are met. Otherwise, the Referendum must be placed before the voters.

Not one of the three conditions is satisfied here. At the outset, Section 1 of LB 1402, by its terms, does not appropriate state funds. Accordingly, the enactment is not an "appropriation" measure within the meaning of Article III, Section 3. The second condition is not satisfied because funding a novel scholarship program to cover the cost of attending a nongovernmental, privately operated school is not an ordinary governmental "expense." And the third requirement fails because elementary and secondary education, which the enactment purports to advance, is not an expense of the "state government." For any of these reasons, Relator's objection fails.

1. Section 1 of LB 1402 is not an "appropriation" measure.

Section 1 of LB 1402 is not an "appropriation" measure within the meaning of the sole exception to the referendum power. To qualify as an appropriation, a legislative enactment must "set apart from the public revenue a certain sum of money" for a specified object. *Lawrence*, 192 Neb. at 508, 222 N.W.2d at 810. "The purpose or design of an appropriation bill is to make provision for lawfully taking money

out of the state treasury[.]" *Rein v. Johnson*, 149 Neb. 67, 78, 30 N.W.2d 548, 556 (1947).

LB 1402 does not set apart funds from the public revenue. Instead, the enactment creates a first-of-its-kind grant-in-aid program for eligible students attending private elementary and secondary schools. It is an entirely different legislative enactment—LB 1402A—that funds the program for the next two fiscal years through a direct appropriation of "$10,000,00 from the General Fund . . . to aid in carrying out the provisions of Legislative Bill 1402." Thus, whereas LB 1402 creates the program for private K–12 school scholarships, LB 1402A funds it with a direct appropriation from the state treasury.

To be sure, Section 1 of LB 1402 evidences "the intent of the Legislature to appropriate ten million dollars from the General Fund for fiscal year 2024–25 and each fiscal year thereafter." L.B. 1402, 108th Leg., 2d Sess. (Neb. 2024). But expressing an *intent* to appropriate funds is not the same as actually doing it. In fact, if the "intent" language in Section 1 of LB 1402 was construed as an "appropriation," it would be an unconstitutional continuing appropriation. *See* Neb. Const. art. III, § 22 (requiring *each legislature* to make appropriations for the expenses of the government); *Rein*, 149 Neb. at 76–78, 30 N.W.2d at 554–56 (discussing constitutional prohibition of continuing appropriations that extend beyond legislative session). Stated another way, whereas setting aside $10 million for the next two fiscal years might constitute an appropriation, setting aside $10 million for eternity does not. *See Bartling*, 96 Neb. at 538, 148 N.W. at 509 (distinguishing "permanent investments" from appropriations for the expenses of state government and existing state institutions).

"[I]t is also clearly the duty of this court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done." *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 211, 602 N.W.2d 465, 475 (1999). Although Section 1 of LB 1402 states an

intent to fund the novel scholarship program indefinitely, the Court should construe this language as just that—a mere statement of intent. To interpret the language as an indefinite appropriation would render LB 1402 an unconstitutional continuing appropriation.

Interpreting LB 1402 to constitute an indefinite appropriation would also render LB 1402A—the actual appropriation bill—superfluous and meaningless. Why would the Legislature pass an appropriation bill to fund the novel scholarship program if LB 1402 already appropriates the money? The Court must give effect to both LB 1402 and LB 1402A. *See, e.g.*, *Dean v. State*, 288 Neb. 530, 537, 849 N.W.2d 138, 146 (2014) ("A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless."). LB 1402 creates the novel program, and LB 1402A appropriates money to fund it. LB 1402 is not an appropriation; LB 1402A is.

In sum, Section 1 of LB 1402 creates a novel, first-of-its-kind scholarship program. It does not appropriate any money to fund it and is therefore not an "appropriation" measure within the meaning of the exception. On this ground alone, the Court should reject Relator's position and affirm Secretary Evnen's decision to place the Referendum before the voters.

2. Private school scholarships are not an ordinary state expense.

Even if Section 1 of LB 1402 qualified as an appropriation measure within the meaning of the sole exception to the referendum power, the exception would still be inapplicable because private school scholarships are not an ordinary "expense" of the state government or an existing state institution.

To reiterate, Article III, Section 3 of the Nebraska Constitution exempts from referendum legislative enactments "making appropriations for the *expense* of the state government" or existing state institutions. Neb. Const. art III, § 3 (emphasis added). This Court

defines the term "expense" in the exception narrowly to mean "the ordinary running expenses of the state government and existing state institutions," such as "necessary upkeep, improvement, repair, and maintenance of existing public buildings." *Bartling*, 96 Neb. at 538, 148 N.W. at 509. This narrow construction gives broadest effect to the fundamental purpose of the reserved power—to give the people the right to vote on specific legislation. *Lawrence*, 192 Neb. at 508–09, 222 N.W.2d at 810.

The narrow construction of the term "expense" also gives proper effect to the referendum exception, which is designed to protect against the "crippl[ing] . . . uncertainty and delay" that "would surely result" if appropriations for the expense of the state government or existing state institutions were submitted to a referendum vote. *Bartling*, 96 Neb. at 537, 148 N.W. at 509. As this Court has held, the exception applies to referenda which, if successful, would "destroy the operation of the fundamental functions of state government or existing state institutions." *Lawrence*, 192 Neb. at 509, 222 N.W.2d at 811. Referring an appropriation bill that funds the ordinary running expenses of state government and existing state institutions presents the sort of crippling uncertainty and delay that the exception seeks to avoid. On the other hand, referring a bill that creates a novel program that funds scholarships to attend private institutions does not present the same issues.

Consider the Referendum at issue. The Referendum does not jeopardize vital state governmental functions or activities. Instead, if the Referendum is successful in November, "free instruction will continue as provided by the preexisting legislation and the taxation and revenue producing scheme under the previously existing law." *Id.* at 509, 222 N.W.2d at 810–11. A successful repeal will simply eliminate a scholarship program for private schools that has never before existed in Nebraska and has never been a part of the State's ordinary running expenses.

Additionally, Section 1 of LB 1402 places no limitations or prohibitions on how the public funds are to be spent. Thus, private institutions that receive the money can spend it however they see fit, including on the erection of new buildings, donations to other charitable organizations, or the purchase of non-educational materials, like religious texts. None of these purchases or investments—which are all permissible under LB 1402—are "ordinary running expenses" of the state government. *See Bartling*, 96 Neb. at 538, 148 N.W. at 509 (holding "the erection of new and permanent buildings" is not an "expense" within the meaning of the referendum exception).

Section 1 of LB 1402 does not fit within the narrow constitutional definition of "expense." Scholarship funds for private institutions are not an *ordinary* running expense of the state government—especially in Nebraska, where public funds have never gone to third-party vendors or private schools for K–12 education. Indeed, the State is prohibited from appropriating public funds "to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof." Neb. Const. art. VII, § 11. In other words, it is *unconstitutional* to appropriate public funds to nongovernmental, privately operated schools. To the extent LB 1402 funds K–12 education, it does so by funding nongovernmental, privately operated schools—which is unconstitutional.

Simply put, there is nothing "ordinary" about an experimental, first-of-its-kind scholarship program that is available only to certain privately educated students to cover the cost of their privately operated schools. On this ground alone, the Court should reject Relator's position and affirm Secretary Evnen's decision to place the Referendum before the voters.

3. Funding nongovernmental, privately owned schools is not an expense of the state government.

Even if LB 1402 were an appropriation, and even if it appropriated funds for "ordinary running expenses," those expenses

would not be for the "state government" or existing "state institutions." For this additional reason, the referendum exception does not apply.

Clearly, LB 1402 has nothing to do with existing state institutions. The scholarship program at issue was *created* by LB 1402 and cannot be considered an "existing" state institution. And of course, nongovernmental, privately operated K–12 schools are not state institutions at all. Rather, the issue for the Court is whether LB 1402 constitutes an "expense of the state government."

If the purported expense is properly framed, the answer is clear: the cost of attending nongovernmental, privately owned schools is not an expense of the state government. By its terms, Section 1 of LB 1402 applies only to students attending "[p]rivately operated" elementary and secondary schools in Nebraska. It is axiomatic that private institutions are not the "state government," regardless of the context. And as discussed, it is unconstitutional to appropriate public funds for private schools. Neb. Const. art. VII, § 11.

This should be the end of the matter: LB 1402 is not an expense of the state government or an existing state institution. However, Relator attempts to evade this conclusion by reframing the purported expense as one "for the education of Nebraska students in kindergarten through twelfth grade." (Verified Pet. for Writ of Mandamus ¶ 11.) In other words, Relator frames Section 1 of LB 1402 at the highest possible level of generality—*i.e.*, "education"—and then argues that "education" is an expense of "state government."

Such a broad framing of the purported expense is inconsistent with this Court's precedents, as discussed more fully in Section III of this brief below. But even if the purported expense is viewed this broadly, it is still not an expense of the *state government* or an existing state institution. As this Court has repeatedly held, elementary and secondary education—which LB 1402 purports to advance—are units of local self-government, not a function of the State. The State's entire educational funding structure relies on this conclusion, as the

Constitution expressly forbids the state from "levying a property tax for *state* purposes." Neb. Const. art. VIII, § 1A (emphasis added). Thus, Relator's arguments are not only legally wrong, they jeopardize the funding structure on which K–12 education relies.

i. Elementary and secondary education is never a function of state government in Nebraska, and simply funding education does not alter this fact.

Elementary and secondary education is *never* a function of state government in Nebraska, regardless of how it is administered. The simple fact that the State provides some funding "does not render a school operation a state function." *Sarpy Cnty. Farm Bureau v. Learning Cmty. of Douglas & Sarpy Cntys.*, 283 Neb. 212, 242, 808 N.W.2d 598, 620 (2012) (quoting *State ex rel. W. Tech. Cmty. Coll. Area v. Tallon*, 196 Neb. 603, 606, 244 N.W.2d 183, 186 (1976)). For this reason, this Court has repeatedly rejected attempts to attribute educational funding to state control.

For example, in *Lawrence*, a citizen objector sought to enjoin the Secretary of State from placing a legislative enactment on the general election ballot for referendum. 192 Neb. at 508–09, 222 N.W.2d at 810. The enactment provided for the establishment of a public-school trust fund to assist the state in meeting its educational funding commitments for two fiscal years. *Id.* The objector argued that the legislation appropriated funds for the expense of state government, and thus could not be repealed by a popular vote of the people. *Id.*

This Court rejected the appeal and certified the referendum for the general election ballot. In doing so, the Court implied that legislation appropriating money to local school districts would not implicate the referendum exception because "local school districts are not part of state government nor are they state institutions." *Id.* at 510, 222 N.W.2d at 811 (Newton, J., concurring). As the concurring opinion explains,

> Local school districts in Nebraska are units of local self-government. Our decisions in this area are clear to the effect that the mere fact that a state has some supervisory control over institutions that the Legislature has created *does not mean that such institutions are part of 'state government' or are 'state institutions' under Article III, section 3, of the Constitution of Nebraska.*

Id. (emphasis added).

The *Lawrence* concurrence is premised on decades of precedent from this Court. Indeed, the Court has made clear that school districts and other local school organizations are a "subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools." *Campbell*, 183 Neb. at 323, 159 N.W.2d at 821. Thus, school districts are no different than municipal corporations—both "obtain their franchises from the state and are created for public purposes," but are nonetheless "unit[s] of local self-government." *Id.*; *see also Tallon*, 196 Neb. at 607, 244 N.W.2d at 186 (explaining that school districts "operate on a strictly local basis subject only to guidelines laid down by the Legislature"); *Schulz v. Dixon Cnty.*, 134 Neb. 549, 279 N.W. 179, 183 (1938) ("Every school district is a miniature democracy where the people, within certain limits, enact their own laws, levy their own taxes, and choose their own officers") (quoting 1 GEORGE E. HOWARD, AN INTRODUCTION TO THE LOCAL CONSTITUTIONAL HISTORY OF UNITED STATES 234–36 (1889)).

Thus, even if the Court characterizes LB 1402 at the broadest level of generality—*i.e.*, as an "education" expense—it is not an expense for state government or an existing state institution. At most, it pertains to local school districts, which are not part of state government and are not state institutions.

ii. If K–12 education was a function of "state government," Nebraska's educational funding scheme would be unconstitutional.

Elementary and secondary education in Nebraska is funded—at least in part—by state-levied property taxes. *See* Neb. Rev. Stat. §§ 79-1001–79-1033. This funding structure is constitutional only because, as this Court has repeatedly articulated, K–12 education is a function of local self-government, not the state government.

The constitutional prohibition on state-levied property taxes for "state purposes" sometimes requires courts to determine whether a particular property tax is for state purposes, and thus unlawful, or for local purposes, and thus permissible. Stated another way, "where state and local purposes are statutorily commingled, this court must determine whether the controlling and predominant purposes of the statute are state purposes or local purposes." *Swanson v. State*, 249 Neb. 466, 477, 544 N.W.2d 333, 341 (1996).

In evaluating this inquiry, the Court considers two factors. First, the Court considers whether the State has assumed "control [or] the primary burden of financial support" over a particular system, such as a school district. *Id.* at 478, 544 N.W.2d at 341. Next, the Court determines whether the State has "conditioned state funding on the performance of some act, or the levying of some tax, to benefit the State." *Id.* As discussed, the "mere granting of state aid does not render a school operation a state function." *Sarpy Cnty. Farm Bureau*, 283 Neb. at 242, 808 N.W.2d at 620 (quoting *Tallon*, 196 Neb. at 606, 244 N.W.2d at 186).

Applying these factors here, the "controlling and predominant purposes" of LB 1402 are local purposes. The State has not assumed control or the "primary burden of financial support" of public or private K–12 education through the enactment, and it has not conditioned "state funding on the performance of some act" to benefit the State. *Id.* If anything, Section 1(9) of LB 1402 expressly *disclaims* any expanded

authority or control by the State over K–12 education, ensuring that the State assumes no additional responsibilities:

> This section shall not be construed as granting any expanded or additional authority to the State of Nebraska to control or influence the governance or policies of any qualified school due to the fact that the qualified school admits and enrolls students who receive education scholarships.

L.B. 1402, 108th Leg., 2d Sess. (Neb. 2024).

Once again, even if the Court broadly characterizes LB 1402 as an education expense, it is not an expense for state government or an existing state institution. The simple granting of state aid to fund education does not render a school operation a state function. A different conclusion would jeopardize the funding structure on which K–12 education relies. Neb. Const. art. VIII, § 1A.

* * *

Even if LB 1402 appropriated funds for governmental expenses, the appropriation would not be "of the state government" within the meaning of the referendum exception. Private entities are not the state, and neither public nor private K–12 education is an expense of state government in Nebraska. On this ground alone, the Referendum qualifies for the ballot.

III. The Court should reject Relator's framing of the purported expense.

Relator attempts to characterize the purported expense as one "for the education of Nebraska students in kindergarten through twelfth grade." It is true that, in an attempt to avoid a referendum, the Legislature framed the expense in this manner and claimed that such an expense is "an ordinary expense of state government." L.B. 1402, 108th Leg., 2d Sess. (Neb. 2024). As discussed, this characterization does not achieve Relator's goal of depriving the people of the precious

opportunity to vote on the novel scholarship program created by LB 1402.

Still, the Court should explicitly reject this characterization for three reasons. First, this Court, not the Legislature, interprets the Constitution. Second, the Legislature's characterization—and, by extension, Relator's characterization—is wrong. Third, the Legislature's and Relator's characterization, if adopted, would undermine the manner in which the State funds public schools.

A. The Court, not the Legislature, interprets the Nebraska Constitution.

In passing LB 1402, the Legislature characterized its enactment as one falling within the narrow referendum exception. The Legislature states: "Funds appropriated for the education of students in kindergarten through twelfth grade are for a fundamental public purpose of state government and constitute an ordinary expense of state government." L.B. 1402, 108th Leg., 2d Sess. (Neb. 2024). This legislative "finding" is merely a legal conclusion that has no bearing on the outcome of this dispute. And the Legislature does not have the authority to unilaterally declare its enactments free from the referendum power.

It is this Court's, not the Legislature's, job to interpret and apply the Nebraska Constitution. "It is emphatically the province and duty of the judicial department to say what the law is." *Neb. Coal. for Educ. & Adequacy (Coal.) v. Heineman*, 273 Neb. 531, 546, 731 N.W.2d 164, 176 (2007) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). "It is a settled principle of constitutional law that the construction and interpretation of the Constitution is a judicial function and it is the duty of the judicial branch of our government to determine whether an act of the Legislature contravenes the provisions of the Constitution." *Planned Parenthood of the Heartland, Inc. v. Hilgers*, 317 Neb. 217, 224 (2024) (quoting *Jaksha v. State*, 241 Neb. 106, 133, 486 N.W.2d 858, 875 (1992)). The Legislature "may not

usurp a court's power to interpret and apply the law to the circumstances before it, for those who apply a rule to particular cases, must of necessity expound and interpret that rule." *Bank Markazi v. Peterson*, 578 U.S. 212, 225 (2016)(internal citations omitted) (cleaned up); *see also id.* at 225 n.17 ("A statute is invalid if it 'fails to supply new law, but directs results under old law.'" (alterations accepted) (quoting *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 439 (1992))).

Here, the Legislature attempts to usurp this Court's power to interpret the Nebraska Constitution unilaterally declaring that LB 1402 falls within the referendum exception. By doing so, the Legislature threatens the separation of powers.

Consider a hypothetical in which the people circulate an initiative that states in part: "This measure does not violate the single subject rule." Surely, this Court would not defer to that language but would independently determine whether the initiative in fact contains more the one subject. Just as the people cannot insulate an initiative from the single subject rule, the Legislature cannot insulate a bill from the referendum power by declaring it constitutes "an ordinary expense of state government." Whether a bill falls within the narrow exception to the referendum power, just like whether an initiative violates the single subject rule, is for the Court to decide.

B. The Legislature's and Relator's framing of LB 1402 as a mere "education" expense is too broad.

The Legislature and Relator define the expense too broadly. Just two years after the referendum power was adopted, this Court addressed the level of generality at which to define "expense" for purposes of determining the applicability of the referendum exception. *See Bartling*, 96 Neb. at 536–39, 148 N.W. at 509. The issue in *Bartling* was whether an act establishing and funding a memorial armory for the national guard was an expense of the state government or an existing state institution. *Id.* at 532–34, 148 N.W. at 507. The objector argued that the expense should be characterized broadly—as

an expense for the state military—which is both a part of the state government and was a state institution in existence at the time of the act's passage. *Id.* The Court, however, focused its analysis more narrowly, considering whether the expense for the *erection of a new building* constitutes an expense of the state government or an existing state institution, and holding it does not. *Id.* at 536–39, 148 N.W. at 509.

An analogous area of the law counsels for the same result. The Court has explained that its analysis under the single subject rule for constitutional amendments begins by characterizing the subject. *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 153, 948 N.W.2d 244, 254 (2020). The Court has cautioned against characterizing the subject too broadly, reasoning that the subject "must be characterized at a level of specificity that allows for meaningful review." *Id.* "The single subject requirement may not be circumvented by selecting a general subject so broad that the rule is evaded as a meaningful constitutional check on the initiative process." *Id.* (cleaned up).

The framing of the issue in *Bartling* (*i.e.*, military expense for expense of a new building) is instructive. Had the Court broadly characterized the expense as a military expense, the result could have been different. But the Court characterized the expense more specifically, allowing for meaningful review. Here, the Legislature (and now Relator) suggests that the expense is simply an education expense, which is a "fundamental public purpose of state government" and constitutes "an ordinary expense of state government." But like the attempt in *Bartling* to frame the expense as a "military expense," this attempt to frame the expense as an "education expense" is too broad. If adopted by the Court, the narrow exception to the referendum power would effectively swallow the referendum power itself. As *Bartling* demonstrates, the expense at issue must be defined with more specificity.

This Court's precedent dating back to the *Bartling* decision in 1914, a mere two years after the adoption of the referendum power, provides the guidance necessary to define the "expense" at issue. Based on this guidance, the expense at issue here is the expense of funding an experimental, first-of-its-kind program to pay for education scholarships for eligible students attending nongovernmental, privately operated K–12 schools.

C. The Legislature's and Relator's framing threatens State funding of K–12 education.

The Legislature (and now Relator) claims that funding K–12 education is "a fundamental purpose of state government" and constitutes "an ordinary expense of state government." If the Legislature and Relator are correct, the Legislature is likely violating the Constitution in a major way.

As noted, the State is "prohibited from levying a property tax for state purposes." Neb. Const. art. VIII, § 1A. Of course, K–12 education in Nebraska is funded in large part by property taxes. If funding K–12 education truly is "a fundamental purpose of state government," as the Legislature and Relator suggest, then the current scheme for funding education in Nebraska is likely unconstitutional. After all, the State may not levy a property tax for a state purpose.

The Legislature and Relator are wrong. Funding education is not and has never been a fundamental purpose of state government in Nebraska. LB 1402 is not an appropriation, it is not an ordinary expense, and it is certainly not an expense of the state government or an existing state institution.

IV. Secretary Evnen certified the Referendum for the ballot.

Although not in the record before the Court, Secretary Evnen certified the Referendum for the general election ballot after Relator filed this action. When a referendum is filed, the Secretary of State has a ministerial duty to "total the valid signatures and determine if

constitutional and statutory requirements have been met." Neb. Rev. Stat. § 32-1409(3). The Secretary will certify the referendum for placement on the general election ballot only if he determines the petition is "valid and sufficient." *Id.*

On September 5, 2024, after this original action was filed, Secretary Evnen issued an official statement saying he certified the Referendum for the ballot. *See* Press Release, Secretary of State Robert B. Evnen, Secretary of State Certifies Private Education Scholarship Partial Referendum for General Election Ballot (Sept. 5, 2024), https://perma.cc/9TZ2-JNYV. The heading of the statement is "Secretary of State certifies Private Education Scholarship partial referendum for general election ballot." *Id.* In addition to announcing his decision, Secretary Evnen discusses his intent to hold informational meetings in all three congressional districts, which happens only for properly certified ballot measures.

Under the plain text of Neb. Rev. Stat. § 32-1409(3), an initiative is "certified" if—and only if—the Secretary of State determines it has sufficient signatures and satisfies all "statutory and constitutional" requirements. Here, Secretary Evnen has released an official statement saying that he has "certified" the Referendum, meaning he has determined it to be legally sufficient in all material respects. This Court and the law "presumes that a public officer will faithfully perform his or her official duties," and that presumption can only be overcome by a showing of evidence to the contrary. *State v. Parnell*, 301 Neb. 774, 777, 919 N.W.2d 900, 902 (2018).

CONCLUSION

Secretary Evnen correctly determined that the Referendum satisfies all constitutional and statutory requirements for placement on the general election ballot. Relator's argument that Secretary Evnen erred because the Referendum falls within the sole, narrow exception to the referendum power fails as a matter of law. Section 1 of LB 1402 is not an appropriation within the meaning of Article III,

Section 3 of the Nebraska Constitution. Plus, funding educational scholarships for private K–12 schools is not an "ordinary running expense"—and it is certainly not an expense *of state government*. The Court should affirm Secretary Evnen's decision to certify the Referendum for the ballot and reject Relator's request for a writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and words-count requirement of Neb. Ct. R. App. P. § 2-103 because it contains 9,827 words excluding this certification. This brief was prepared using Microsoft Word 365.

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Certificate of Service

I hereby certify that on Monday, September 09, 2024 I provided a true and correct copy of this *Brief of Intervenors* to the following:

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