Case No. S-24-0658

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

STATE OF NEBRASKA EX REL. LATASHA COLLAR,
Relator,

v.

ROBERT EVNEN, NEBRASKA SECRETARY OF STATE,
Respondent.

ORIGINAL ACTION

BRIEF OF RELATOR LATASHA COLLAR

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STATEMENT OF JURISDICTION

This Court has original jurisdiction pursuant to Article V, Section 2 of the Constitution of the State of Nebraska and Neb. Rev. Stat. 24-204, as this case involves an action for mandamus and because the challenged proposed referendum relates to the revenue of the State of Nebraska. On September 6, 2024, this Court granted leave to commence this original action and docketed the case accordingly.

STATEMENT OF THE CASE

Relator brings this original action to compel Respondent to withhold the Private Education Scholarship Partial Referendum Petition (the "Referendum") on the 2024 general election ballot as the power of referendum cannot be invoked against LB 1402, the subject act of the Referendum. (*See* Collar Petition). LB 1402 makes an appropriation for the expense of state government and thus is not subject to referendum pursuant to Article III, Section 3 of the Nebraska Constitution. By certifying the Referendum for the 2024 general election ballot, despite its failure to meet constitutional and statutory requirements, Respondent has failed to exercise his duty to withhold legally insufficient ballot measures from the general election ballot and must be compelled by this Court to do so.

The issues before this Court are:

1. Whether LB 1402 is an act "making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act" within the meaning of Article III, Section 3 of the Nebraska Constitution.

2. Whether LB 1402 is exempt from referendum under Article III, Section 3 of the Nebraska Constitution and must be kept off of the 2024 general election ballot.

3. Whether the Secretary of State's decision to certify the

Referendum for the 2024 general ballot election, violates his duty to withhold any legally insufficient measure from the ballot.

PROPOSITIONS OF LAW

1. "Nebraska law imposes on the Secretary of State a nondiscretionary duty to determine the legal sufficiency of ballot measures and withhold any legally insufficient measure from the ballot." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 163, 948 N.W.2d 244, 260 (2020).

2. The Secretary of State is required "to 'determine if constitutional and statutory requirements have been met' before placing the measure on the ballot." *State ex rel. Lemon v. Gale*, 272 Neb. 295, 302, 721 N.W.2d 347, 355 (2006) (citing Neb. Rev. Stat. § 32-1409(3)).

3. A citizen may only invoke the right of referendum "against any act or part of an act of the Legislature, except those 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.

4. A referendum measure is legally insufficient and must not be certified or placed on the general election ballot if it targets any part of a legislative act that makes "appropriations for the expense of the state government or a state institution existing at the time of the passage of such act." *See Bartling v. Wait*, 96 Neb. 532, 148 N.W. 507 (1914); *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006); *State ex rel. McNally v. Evnen*, 307 Neb. 103, 948 N.W.2d 463 (2020); *Stewart v. Advanced Gaming Techs., Inc.*, 272 Neb. 471, 723 N.W.2d 65 (2006); *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 948 N.W.2d 244 (2020).

5. One "cannot do indirectly what the constitution prohibits

it from doing directly." *Steinacher v. Swanson*, 131 Neb. 439, 268 N.W. 317, 322 (1936) (examining legislative attempt to circumvent the Constitution).

6. The meaning of a term in the Nebraska Constitution must be resolved by the courts based on the meaning at the time of its adoption and "[t]he intent and understanding of its framers and the people who adopted it." *State ex rel. State Ry. Comm'n v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949).

7. The meaning of the term "appropriation" under Article III, Section 3 of the Nebraska Constitution, must be determined at the time of its adoption in 1920. *State ex rel. Peterson v. Shively*, 310 Neb. 1, 10, 963 N.W.2d 508, 516 (2021).

8. For purposes of determining whether an act is an "appropriation" under Article III, Section 3 of the Nebraska Constitution, the primary bill and accompanying A-bill must be analyzed as a whole. *State ex rel. Peterson v. Shively*, 310 Neb. 1, 10, 963 N.W.2d 508, 516 (2021); *State ex rel. State Ry. Comm'n v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949); *State v. Aguallo*, 294 Neb. 177, 182, 881 N.W.2d 918, 922 (2016), *abrogated on other grounds by State v. Guzman,* 305 Neb. 376, 940 N.W.2d 552 (2020).

9. Section 49-804 does not constitutionally define an appropriation in the context of Article III, Section 3 of the Nebraska Constitution. *State ex rel. Peterson v. Shively*, 310 Neb. 1, 10, 963 N.W.2d 508, 516 (2021); *State ex rel. State Ry. Comm'n v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949); *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947).

10. In the context of Article III, Section 3 of the Nebraska Constitution, "[t]he purpose or design of an appropriation bill is to make provision for lawfully taking money out of the state treasury as distinguished from lawfully putting money into the state treasury."

Rein v. Johnson, 149 Neb. 67, 78, 30 N.W.2d 548, 556 (1947).

11. When "ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed." *Pony Lake,* 271 Neb. at 185, 710 N.W.2d at 620.

12. The meaning of "expense" under Article III, Section 3 of the Nebraska Constitution must be construed to be consistent with the plain an ordinary meaning of the text and not interpret "expense" to mean "ordinary running expense." *Pony Lake Sch. Dist. 30 v. State Comm. for Reorganization of Sch. Districts, 271 Neb. 173, 710 N.W.2d 609 (2006)*; *State ex rel. Douglas v. Beermann*, 216 Neb. 849, 347 N.W.2d 297 (1984); *Bartling v. Wait*, 96 Neb. 532, 148 N.W. 507, 509 (1914).

STATEMENT OF FACTS

A. Parties.

Relator Latasha Collar is a registered voter and resident of Douglas County, Nebraska. (Collar Petition at ¶ 1). She is a devoted mother to two children. (*Id.*). Her daughter, currently a senior in Marian High School in Omaha, Nebraska, and has previously benefited from being a recipient of the Nebraska Opportunity Scholarships Act, which enabled her to attend Marian, an esteemed private preparatory school for young women in Nebraska. (*Id.*). Ms. Collar initiated this action because she is concerned that the inclusion of the Referendum on the general ballot could jeopardize the future of Nebraska students, including her daughter or those like her, by eliminating crucial support and funding necessary for their education. (*Id.*). Respondent Secretary of State is the duly elected and serving Secretary of State of the State of Nebraska. (*Id.* at ¶ 2).

The Sponsors of the Private Education Scholarship Partial

Referendum Petition include Support Our Schools – Nebraska, a Nebraska nonprofit public benefit corporation and ballot committee, and three of its board members: Jenni Benson, Paul Schulte, and Tim Royers (collectively the "Sponsors"). (Collar Petition, Ex. 1). The Sponsors filed a Petition to Intervene and Verified Answer to Relator's Verified Petition for Writ of Mandamus on September 9, 2024.

B. LB 1402 and its Companion Bill LB 1402A.

LB 1402 and its companion A-bill, LB 1402A, were passed by the 108th Nebraska Legislature and approved by the Governor on April 24, 2024. (Collar Petition at ¶ 10; *Id.*, Ex. 2). The Legislative intent of LB 1402 is found in Section 1, Subsection (1)(a) (now codified in Section 79-1608(1)(a)): "[t]he Legislature finds that: 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." (Collar Petition, Ex. 2). Section 1, Subsection (7), of LB 1402 (now codified in Section 79-1608), reads, "[i]t is the intent of the Legislature to appropriate ten million dollars from the General Fund for fiscal year 2024-25...to the State Treasurer for the purpose of providing education scholarships as provided in this section." (Collar Petition, Ex. 2).

C. The Ballot Referendum.

The Sponsors filed with Respondent the Private Education Scholarship Partial Referendum Petition (the "Referendum") on April 30, 2024. (Collar Petition at ¶ 9; Collar Petition, Ex. 1). The Referendum, the subject of this action, is a voter-initiated partial referendum ballot measure which proposes repeal of Section 1 of LB 1402 (Collar Petition at ¶ 9).

The Object Statement for the Referendum reads,

The object of this Petition is to...Repeal Section 1 of LB

> 1402, passed by the 108th Nebraska Legislature in 2024, *which directs $10 million dollars annually* for financial grants-in-aid for eligible students to attend a qualifying privately operated elementary or secondary school in Nebraska.

(Collar Petition, Ex. 1) (emphasis added).

On July 17, 2024, the Sponsors submitted to Respondent signatures to place the Referendum on the ballot for the November 5, 2024, general election. (Collar Petition at ¶ 13).

D. The Secretary of State's Certification of the Referendum.

On August 30, 2024, Respondent indicated that the Referendum was nearing the end of the verification process. (Collar Petition, Ex. 3). Respondent further provided, that while

> "[t]he Elections Division has not certified the petitions yet...the three remaining initiative and referendum petitions have met 100% signature threshold required for verification and certification, and subsequently, will qualify for the general election ballot once verification and certification has been completed."

(*Id.*).

The Respondent stated that the Referendum had "collected enough valid signatures to be certified but has not met the 110% threshold provided under state law to cease verifying signatures." (*Id.*).

On September 5, 2024, the Secretary of State released another statement confirming the certification of the Referendum for the general election ballot. The Secretary of State also noted that "[s]erious questions have been raised as to whether the statute sought to be repealed is a legislative appropriation," and stated "[u]nder the

Nebraska Constitution, legislative appropriations might not be able to be repealed by referendum. This question ought to be resolved by the courts."

SUMMARY OF THE ARGUMENT

The Nebraska Constitution vests complete legislative authority in the Legislature, subject only to specific reservations and restrictions. *State ex rel. Peterson v. Shively*, 310 Neb. 1, 11, 963 N.W.2d 508, 516 (2021). The power of referendum is one example of such reservation and is reserved to the electorate. NEB. CONST. ART. III, § 3. Article III, Section 3 of the Nebraska Constitution provides that the power of referendum may only be invoked "against any act or part of an act of the Legislature, *except* those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act." *Id.* (emphasis added). If a subject act is one that makes an appropriation under Article III, Section 3 of the Nebraska Constitution, the referendum power may not be exercised by the electorate and the act is exempt from referendum.

LB 1402 is an appropriation act within the constitutional meaning of Article III, Section 3 of the Nebraska Constitution and is not subject to referendum. First, this is supported by the plain and ordinary language of the Constitution. LB 1402, on its face, states it is an act making appropriations for the expense of state government. Second, Nebraska precedent on this issue supports that LB 1402 is exempt from referendum as it meets the constitutional definition of an appropriation because it is particular, definite, limited, and precise. *See State v. Wallichs*, 12 Neb. 407, 11 N.W. 860, 861 (1882); *see also State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 88, 69 N.W. 373, 376 (1896); *Rein v. Johnson,* 149 Neb. 67, 78, 30 N.W.2d 548, 556 (1947). Not only does Nebraska precedent support that LB 1402 is an appropriation, it also confirms that LB 1402 makes appropriations for the expense of state government within the meaning of Article III, Section 3 as it is an act that concerns a long-standing concern of state

government – funding and providing assistance to support a child's education. Third, the constitutional history of Article III, Section 3 and the history behind the Legislature's process for appropriation bills confirms that LB 1402 is an act not subject to referendum.

Because LB 1402 is an appropriation within the constitutional meaning of Article III, Section 3 of the Nebraska Constitution, Relator brings this mandamus action to compel Respondent to fulfill his duties to withhold the Referendum from the 2024 general election ballot. *State ex rel. Johnson v. Gale*, 273 Neb. 889, 895, 734 N.W.2d 290, 298 (2007) (a mandamus action can compel the performance of a ministerial act or duty imposed by law on an official where "(1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law"). Respondent must be compelled to withhold the Referendum from the 2024 general election ballot because: (1) LB 1402 is an act making appropriations for the expense of state government and thus the Referendum does not satisfy all constitutional and statutory requirements to be legally sufficient, (2) Respondent has "a nondiscretionary duty to determine the legal sufficiency of ballot measures and withhold any legally insufficient measure from the ballot," (3) and there is no plain and adequate remedy available to Relator aside from compelling Respondent to not place the Referendum on the general election ballot.

ARGUMENT

The Private Education Scholarship Partial Referendum (the "Referendum") violates the Nebraska Constitution's limitation on the referendum power and the Secretary of State failed to comply with his duty to withhold a legally insufficient measure from the ballot. As a result, Respondent must be compelled to not place the Referendum on the ballot for the upcoming general election.

Under the Nebraska Election Act, the Secretary of State is required to certify ballot measures, including referendum petitions, before placing the measure on the general election ballot. Neb. Rev. Stat. § 32-1409(3). "Nebraska law imposes on the Secretary of State a nondiscretionary duty to determine the legal sufficiency of ballot measures and withhold any legally insufficient measure from the ballot." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 163, 948 N.W.2d 244, 260 (2020). The "legal sufficiency" of a petition for referendum concerns not only form and technical requirements, but also whether the referendum complies with the Nebraska Constitution or other provisions of Nebraska law. *See State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006); *State ex rel. McNally v. Evnen*, 307 Neb. 103, 948 N.W.2d 463 (2020); *Stewart v. Advanced Gaming Techs., Inc.*, 272 Neb. 471, 723 N.W.2d 65 (2006); *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 948 N.W.2d 244 (2020). A ballot measure may not be certified and placed on the general election ballot by the Secretary of State unless all constitutional and statutory requirements are satisfied. *See Lemon,* 272 Neb. at 302, 721 N.W.2d at 355 ("[i]n addition to determining the validity and sufficiency of signatures on a filed initiative petition, the Secretary of State is required in the first instance to 'determine if constitutional and statutory requirements have been met' before placing the measure on the ballot").

The referendum power in the Nebraska Constitution has its limitations. A citizen may only invoke such right "against any act or part of an act of the Legislature, except those 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 (emphasis added). As explained more fully below, LB 1402 falls within the exception to the referendum power. The Referendum is therefore a legally insufficient attempt to go beyond the constitutional reservation of power of Article III, Section 3 of the Nebraska Constitution. Consequently, this Court must compel the Secretary of State to exclude the Referendum from the 2024 general election ballot as it fails

to meet the necessary constitutional and statutory requirements to be legally sufficient. *See Bartling v. Wait*, 96 Neb. 532, 148 N.W. 507 (1914) (determining whether a referendum petition was an appropriation act excluded from referendum under Article III such that the Secretary of State should be restrained from placing it on the general ballot due to legal insufficiency).

I. THE PLAIN AND ORDINARY LANGUAGE OF LB 1402 CONFIRMS IT IS NOT SUBJECT TO REFERENDUM.

Applying the plain text of LB 1402 to the text of Article III, Section 3 of the Nebraska Constitution confirms that, for purposes of determining whether the Referendum is legally sufficient under the Constitution, LB 1402 is not subject to referendum. Constitutional language must be interpreted using the most natural and obvious meaning unless the subject indicates, or the text suggests, the provision is to be used in a technical sense. *State ex rel. Peterson v. Shively*, 310 Neb. 1, 10, 963 N.W.2d 508, 516 (2021). Courts give the meaning that would be accepted and understood by laypersons when the meaning of the provision is clear. *Id.* When ascertaining the intent of a Constitutional provision, a court may not add any supposed omission or otherwise add or remove words from a Constitutional provision. *See Pony Lake Sch. Dist. 30 v. State Comm. for Reorganization of Sch. Districts*, 271 Neb. 173, 710 N.W.2d 609 (2006). The Court must therefore look to the natural and obvious meaning of the text of the Constitution, under the meaning that would be accepted and understood by laypersons, to determine whether LB 1402 falls under the exception to the referendum power.

The Nebraska Constitution vests complete legislative authority in the Legislature, subject only to specific reservations and restrictions. *Shively*, 310 Neb. at 11, 963 N.W.2d at 516; *see also Lenstrom v. Thone*, 209 Neb. 783, 789, 311 N.W.2d 884, 888 (1981) (stating the Legislature may legislate on any subject not inhibited by the Constitution). This Court has described the Legislature's power to

control the purse strings of government as "the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people." *State ex rel. Meyer v. State Bd. of Equalization & Assessment*, 185 Neb. 490, 498, 176 N.W.2d 920, 925 (1970) (citations omitted). The general authority over appropriations of public revenue is "paramount," subject only to constitutional restrictions. *Id.* "The Legislature has plenary or absolute power over appropriations." *Id.* at 499, 176 N.W.2d at 926.

The Nebraska Constitution vests plenary legislative power with the Legislature while reserving the initiative and referendum powers to the electorate. *See Klosterman v. Marsh*, 180 Neb. 506, 511, 143 N.W.2d 744, 748 (1966). The reserved powers do not hold superiority over the Legislature's legislative authority. *Id.* "In the absence of *specific constitutional restraint*," the electorate and the Legislature "may amend or repeal the enactments of the other." *Id.* (emphasis added). Here, the Nebraska Constitution provides that "[t]he second power reserved [from the Legislature's authority] is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, except those 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. On its face, the referendum power may not be invoked "against any act or any part of an 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." *Id.* If the referendum targets any part of a legislative act that makes an appropriation for the expense of the state government or a state institution existing at the time of the passage, then the referendum power may not be invoked.

The Referendum at-issue in this case does exactly that. Section 1, Subsection (1)(a) of LB 1402 identifies the act and includes "[f]unds *appropriated* for the education of students...for a fundamental public

purpose of state government and constitute an ordinary expense of state government." NE Leg. L.B. 1402, 108th Sess. (2024); Neb. Rev. Stat.§ 79-1608(1)(a) (emphasis added); *see also* NEB. CONST. ART. III, § 22 (providing that each Legislature must make appropriations for the expense of state government). The Legislature explicitly stated in Section 1, Subsection (7), of LB 1402 that "[i]t is the intent of the Legislature to appropriate ten million dollars from the General Fund for fiscal year 2024-25...to the State Treasurer for the purpose of providing education scholarships as provided in this section." NE Leg. L.B. 1402, 108th Sess. (2024); Neb. Rev. Stat.§ 79-1608(7). The legislative act thus not only called for an appropriation of ten million dollars, but also overtly confirmed the Legislature's intent to make an appropriation and that the appropriation was for an ordinary expense of state government. Further, in accordance with legislative rules and procedure, the Legislature completed the legislative act by passing LB 1402A, which itself identifies the coupling link to carrying out the provisions of LB 1402 and confirmed the intent of the legislature that the Private Education Scholarship Act is an act making appropriations for the expense of state government. *See* Section II.A.2., *infra.* LB 1402A provides in part: "[t]here is hereby appropriated (1) $10,000,000 from the General Fund for FY2024-25 and (2) $10,000,000 from the General Fund for FY2025-26 to the State Treasurer, for Program 480, to aid in carrying out the provisions of Legislative Bill 1402." NE Leg. L.B. 1402A, 108th Sess. (2024).

The Object Statement submitted by the sponsors for the Private Education Scholarship Partial Referendum further confirms that the Referendum targets a part of a legislative act that makes an appropriation for the expense of state government: "[t]he object...is to...Repeal Section 1 of LB 1402...which directs $10 million dollars annually...." (Collar Petition, Ex. 1). The text of the legislative act also identifies the appropriation. Statutory language must be given its plain and ordinary meaning. *E.g., Sanitary & Improvement Dist. No. 596 of Douglas Cnty. v. THG Dev., L.L.C.*, 315 Neb. 926, 941, 2 N.W.3d 602, 615 (2024) ("*SID 596*"); *Amen v. Astrue*, 284 Neb. 691, 694, 822

N.W.2d 419, 422 (2012); *see also Lawrence v. Beermann*, 192 Neb. 507, 508, 222 N.W.2d 809, 810 (1974) (examining whether a legislative bill, "on its face," made an appropriation).

Giving the statutory language its plain and ordinary meaning, the Referendum targets a part of a legislative act that makes appropriations for the expense of the state government. *Amen*, 284 Neb. at 694, 822 N.W.2d at 422; NEB. CONST. ART. III, § 3. As a result, the Referendum therefore is beyond the reach of the referendum power vested by the Nebraska Constitution.

II. ADDITIONAL ANALYSIS CONFIRMS LB 1402 IS NOT SUBJECT TO REFERENDUM.

As stated above, the Nebraska Constitution provides that if the referendum targets a legislative act that makes an appropriation for the expense of the state government or a state institution existing at the time of the passage of such act, then the referendum power may not be invoked. NEB. CONST. ART. III, § 3. While this Court need not look beyond the plain and ordinary text of the legislative act to conclude LB 1402 meets the constitutional requirements for referendum exception, Nebraska legal authorities further confirm that the text of LB 1402 meets the constitutional definition of appropriation and the Referendum, as a result, goes beyond the constitutional reservation of power and must be kept off the general election ballot.

A. LB 1402 Is An Act That Makes An Appropriation.

1. Nebraska precedent supports that LB 1402 is an act that makes an appropriation.

LB 1402 meets the constitutional definition of an appropriation under Nebraska precedent. This Court has long defined that, in the constitutional sense, "to 'appropriate' is to set apart from the public revenue a certain sum of money for a specified object, in such manner

that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other." *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 88, 69 N.W. 373, 376 (1896). In the context of Article III, Section 3 of the Nebraska Constitution, "[t]he purpose or design of an appropriation bill is to make provision for lawfully taking money out of the state treasury as distinguished from lawfully putting money into the state treasury." *Rein v. Johnson*, 149 Neb. 67, 78 (1947). There is no requirement for specific language and it "need not be in any set form of words," but an appropriation "must be express." *Moore*, 50 Neb. 88; *see also State v. Wallichs*, 15 Neb. 609, 20 N.W. 110, 110 (1884) ("[a] specific appropriation is one expressly providing funds for a particular purpose"). An express appropriation is one that is particular, definite, limited, and precise. *State v. Wallichs*, 12 Neb. 407, 11 N.W. 860, 861 (1882). In determining whether a legislative act makes an appropriation, the constitutional meaning of the term "appropriation" must first be considered. *Moore*, 50 Neb. 88. Then it must be ascertained whether, "in the law, the legislature has evidenced its intention to perform the act designated by that term." *Id.*

LB 1402 expressly makes an appropriation. It expressly identifies the intent to appropriate. It provides a particular, definite, limited, and precise appropriation. Specifically, Section 7 states, "[i]t is the intent of the Legislature to appropriate ten million dollars from the General Fund for fiscal year 2024-25...to the State Treasurer for the purpose of providing education scholarships as provided in this section." NE Leg. L.B. 1402, 108th Sess. (2024); Neb. Rev. Stat.§ 79-1608(7). The Legislature overtly intended to perform the act designated by the appropriation as LB 1402 states and includes the language "to appropriate ten million dollars from the General Fund[.]" NE Leg. L.B. 1402, 108th Sess. (2024); Neb. Rev. Stat.§ 79-1608(7). Under this Court's definition of an appropriation laid out in *Rein*, LB 1402 "provi[des] for lawfully taking money out of the state treasury" by appropriating money from the General Fund. LB 1402 also meets the

definition of "appropriation" as defined in *Moore* as it "set[s] apart from the public revenue [$10 million dollars] for [the specific purpose of providing education scholarships], in such manner that the [State Treasurer is] authorized to use that money, and no more, for that object, and for no other." *Moore*, 50 Neb. 88, 69 N.W. at 376. Furthermore, LB 1402A, in conformance with legislative procedure explained below, then carries out the intent of LB 1402. The Referendum therefore invalidly targets a legislative act that makes an appropriation and may not be invoked.

Analysis under additional Nebraska case law surrounding the issue leads to the same conclusion. In *Lawrence*, the Court determined that a legislative act was *not* an appropriation within the meaning of Article III, Section 3 of the Nebraska Constitution for several reasons, none of which are present with LB 1402. *Lawrence*, 192 Neb. 507, 222 N.W.2d 809. First, the Court noted that the legislative act on its face was not intended as an appropriation in the constitutional sense. *Lawrence*, 192 Neb. at 508, 222 N.W.2d at 810. The opposite is true here. The Legislature identified its intent to make an appropriation on the face of the Act, including in LB 1402 and LB 1402A, the bill that was triggered as a direct result of LB 1402.

Second, the legislative act in *Lawrence* was not a specific appropriation because it failed to "appropriate or set apart from the public revenue a certain sum of money." Instead, it identified an indefinite, general, open-ended funding formula. *Id.* The legislative act in *Lawrence* set aside funds for future allocation by the State Board of Education but the act had multiple objectives and did not allocate specific or ascertainable amounts. NE Leg. L.B. 772, 83rd Sess. (1974). For example, Section 9 allowed the State Board of Education to make allocations to school districts "only upon application to the board and showing of hardship." An appropriation is not specific "when it is to be ascertained only by the requisitions which may be made by the recipients." *State ex rel. Norfolk Beet-Sugar Co.*, 50 Neb. 88, 69 N.W. at

377 (1896). Because the school districts had to request an amount from the State Board of Education, the allocation was not an appropriation by constitutional definition because it did not set aside a certain sum nor was the amount ascertainable. Section 9 also provided that any remaining sum of money would be provided to school districts for different and distinct objectives set forth in Sections 6 and 7, further confirming the lack of the requisite specificity for an appropriation. Sections 6 and 7 then outlined a formula to calculate the remaining funds to be distributed to the school districts. NE Leg. L.B. 772, 83rd Sess. (1974). Unlike the act in *Lawrence*, LB 1402 is a specific appropriation. LB 1402 makes an express appropriation by identifying a specific sum of money – $10 million – beginning in 2024-2025 from the General Fund for the specific purpose of providing educational scholarships to qualifying Nebraska children in an ascertainable amount (the cost of their education). NE Leg. L.B. 1402, 108th Sess. (2024); Neb. Rev. Stat.§ 79-1608; *see State v. Babcock*, 24 Neb. 787, 40 N.W. 316 (1888) (determining that an act appropriating the proceeds of the sale of specific unsold lots and lands to the construction of the capitol was an absolute appropriation because the value of the property itself is an ascertainable amount). Unlike the legislative act in *Lawrence*, LB 1402 does not require or include a formula to calculate funding. NE Leg. L.B. 1402, 108th Sess. (2024); Neb. Rev. Stat.§ 79-1608. The specificity of the appropriation in LB 1402, along with its clear objective, distinguishes it from the legislative act in *Lawrence* as it does not require or include a formula to calculate funding.

Third, the act in *Lawrence* set up a new scheme for local public school district taxation and financing, and thus did not constitute an appropriation act within the meaning of Article III, Section 3 of the Nebraska Constitution. *Lawrence*, 192 Neb. at 508, 222 N.W.2d at 810. In fact, as the justification for finding the bill was *not* intended to make an appropriation, the Court highlighted the presence of the funding provision, which allowed for contributions outside the state's

revenues to operate the Fund, and that the act would not become effective for approximately two years. In stark contrast, LB 1402 does not set up a funding provision, does not provide for contributions, and contemplates fiscal year 2024-2025 as the first year of operation. NE Leg. L.B. 1402, 108th Sess. (2024); Neb. Rev. Stat.§ 79-1608(1). Because each of the factors highlighted in *Lawrence* are reasons the act was *not* intended as an appropriation are completely absent here, this Court's precedent supports that LB 1402 is an appropriation under Article III, Section 3 of the Nebraska Constitution.

2. ***The legislative act as a whole demonstrates that it is an act making appropriations pursuant to Article III, Section 3.***

Though the Court need not reach it for the reasons identified above, a look to the constitutional and legislative process history reinforces the conclusion that the Referendum may not be placed on the general election ballot. "The meaning of a constitutional provision is to be determined as of the time of its adoption." *State ex rel. State Ry. Comm'n v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949). In construing a constitutional provision, "[t]he intent and understanding of its framers and the people who adopted it as expressed in the instrument is the main inquiry in construing it." *Ramsey*, 151 Neb. at 340, 37 N.W.2d at 507; *see also Shively*, 310 Neb. at 11, 963 N.W.2d at 516 (courts must ascertain and carry into effect the intent and purpose of the framers of the constitution or of an amendment thereto). The exception limiting the power of referendum in Article III, Section 3 of the Nebraska Constitution has been in place since 1912 and adopted again in 1920. NEB. CONST. ART. III, § 1B (1912) (amended in 1920). When determining the meaning of the term "appropriation" in Article III, Section 3, the Court must derive from the intent and understanding of the framers at the time of passage in 1920 using with the most natural and obvious meaning of "appropriation." *See Shively*, 310 Neb. at 10, 963 N.W.2d at 516. As generally explained above and

as explained further below, when reading the act as a whole, LB 1402 falls within the meaning of "appropriation" under the most natural and obvious meaning of the term as determined at the time of the adoption of Article III, Section 3. *See* Section II.A.1., *supra.*

For context, the Nebraska Legislature has adopted various process changes regarding appropriation bills since the enactment of Article III, Section 3. The analysis of those changes only support that LB 1402 is an appropriation within the constitutional meaning. As a customary practice, the Nebraska Legislature adopts rules to govern and facilitate the process of introducing and passing laws. Decades after the adoption of Article III, Section 3 of the Nebraska Constitution in 1920, the Nebraska Legislature recognized the need to refine its procedures for handling bills requiring appropriations. In 1970, Rule 11, Section 3 of the Nebraska Legislature's Rules was adopted. The Rule identified that a separate appropriation bill *must* be prepared using information from the fiscal note. The appropriation bill, introduced by the original bill's sponsor, would bear the original bill's number with an "A" added and accompany the original bill through all legislative stages. RULE 11, SEC. 3, RULES OF THE NEBRASKA UNICAMERAL LEGISLATURE 1970. In other words, during the time before the legislative procedural change (including at the time Article III, Section 3 was adopted), the legislature did not employ the separate "A" bill practice. The current Legislative Rules, Rule 5, Section 7(f), continues the "A" bill procedure and provides that A-bills "shall accompany the original bill through all stages of the legislative process." RULE 5, SEC. 7(F), RULES OF THE NEBRASKA UNICAMERAL LEGISLATURE 2023-2024, at 36. This practice has been consistently maintained and updated but notably was not in existence at the time that the exception to the referendum power was put in the Constitution. *See Ramsey*, 151 Neb. at 340, 37 N.W.2d at 507; *see also Shively*, 310 Neb. at 11, 963 N.W.2d at 516 (intent of a constitutional provision to be determined as of the time of the adoption of the provision).

After the adoption of the A-bill requirement, the legislature encountered issues with ambiguous legislation that did not clearly indicate appropriation intent. *See* INTRODUCER'S STATEMENT OF PURPOSE, NE Leg. L.B. 232, 86th Sess. (1979). To address this, LB 232 was passed and is now codified as Neb. Rev. Stat. § 49-804. The law now provides a procedural mechanism for handling legislative acts requiring appropriations. The 2023-2024 Rules of the Nebraska Unicameral Legislature confirm as much. Rule 5, Section 2 identifies the form and content requirements for bills provides that the elements outlined in Neb. Rev. Stat. § 49-804 are the content and form requirements for A-bills. RULE 5, SEC. 2, RULES OF THE NEBRASKA UNICAMERAL LEGISLATURE 2023-2024, at 31.

However, Section 49-804 is the result of procedural changes within the Legislature. The reasons for the procedural rule changes in the 1970s and the enactment of Neb. Rev. Stat. § 49-804 show that the changes were not intended to and did not alter Article III, Section 3 (nor could they do so). *See generally Pony Lake*, 271 Neb. 173, 710 N.W.2d 609 (explaining that a court may not add or remove words from a constitutional provision). The constitutional meaning of "appropriation" found within in *Rein* and *Lawrence,* which predate the adoption of the A-bill rule and Neb. Rev. Stat. § 49-804, further support such conclusion. Instead, the changes were to streamline and formalize the legislative process for appropriation bills. Looking to the underlying reasons for the procedural changes (and the enactment of Section 49-804) while also ascertaining and carrying into effect the intent and purpose of the framers at the time of passage of Article III, Section 3, LB 1402 satisfies the constitutional definition of an appropriation.

The Legislature's conduct while debating LB 1402 further confirms the limited meaning of the procedural changes adopted after the 1920 amendment to Article III, Section 3. During the debate over LB 1402, Senator Conrad, a third term legislator with years of service as a member on the Appropriations Committee and an opponent of LB

1402, commented that LB 1402 itself, *not* its companion bill LB 1402A, was an appropriation that would not be subject to referendum. *See* NE Legis. Floor Deb. on L.B. 1402, 108th Sess. (2024) (ed. April 10, 2024), at p. 239 (statement of Sen. Danielle Conrad) ("[t]he other thing that I think it's important to note here is that this is very challenging from a technical perspective. On the one hand, if this is in fact an appropriation in LB 1402, which I think it is, it went to the Appropriations Committee, it does provide appropriations, language, and mechanisms, then it's not subject to a referendum according to our constitution, appropriations are not subject to referendum. However, the more that it is characterized as an appropriation, which I, I think it is, I think people are pretty straightforward about that and I think our legislative record is clear"); *see also See e.g., Omaha Public Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995) (illustrating that comments made during committee hearings and floor debates may be used to determine legislative intent); *Michelle Hug, Henstock, Inc. v. City of Omaha,* 275 Neb. 820, 749 N.W.2d. 884 (2008) ("Legislative history is defined as the background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates."). Senator Conrad's remarks, coupled with the background on the adoption of the A-bill rule, confirm that LB 1402 is an appropriation exempted from referendum.

When LB 1402 is read as a whole and in conjunction with its companion "A" bill, as must be done under rules of constitutional construction and in light of the evolution of the legislative process, the at-issue legislative act also meets the statutory definition of appropriation in addition to the meaning for constitutional purposes. For an appropriation to exist under the statutory definition, five criteria must be met: "(1) There shall be included the phrase there is hereby appropriated; (2) A specific fund type shall be identified and the fund shall be appropriated; (3) The amount to be appropriated from such fund shall be identified; (4) A specific budget program or a specific statement reflecting the purpose for expending such funds shall be

identified; and (5) The time period during which such funds shall be expended shall be identified." Neb. Rev. Stat. § 49-804; Neb. Rev. Stat. § 49-805; NEB. CONST. ART. III, § 22 (explaining the requirement for the Legislature to "make appropriations for the expenses of the Government.").

Read in harmony, LB 1402 with LB 1402A unquestionably satisfy the criteria. *See, e.g.*, *State v. Aguallo*, 294 Neb. 177, 182, 881 N.W.2d 918, 922 (2016), *abrogated on other grounds by State v. Guzman,* 305 Neb. 376, 940 N.W.2d 552 (2020) (citations omitted) (explaining the court must determine and give effect to the purpose of the Legislature from reading the entire language of the statute and further explaining that components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature). In addition to what is set forth in LB 1402 alone, LB 1402A essentially provides a formulaic recitation of the criteria in Section 49-804. NE Leg. L.B. 1402A, 108th Sess. (2024). The reason for that recitation is unsurprising; the evolution of the legislative rules described above mandate it. RULE 5, SEC. 2, RULES OF THE NEBRASKA UNICAMERAL LEGISLATURE 2023-2024, at 31. Therefore, properly reading LB 1402 and 1402A in unison removes any doubt about whether the legislative act is one beyond the referendum power.

For the sake of completeness, the unique structure of the Constitution – vesting complete legislative power with the Legislature save certain reservations – confirms why the primary bill and the trailing appropriation or "A" bill are inseparably coupled for the constitutional purposes of the referendum power. LB 1402 and LB 1402A are examples of why. If, hypothetically, LB 1402 was declared unconstitutional, then LB 1402A would effectively become a nullity. *See, e.g.*, Neb. Att'y Gen. Op. No. 289 (1980) (explaining that if the primary bill, which provided legislative authorization to collect a tax or to conduct some government program, was declared

unconstitutional by the courts, then the appropriations bill would become a nullity, and also noting that defining the powers of government officials should not be included in an appropriations bill). The Object Statement of the Referendum exemplifies why the primary and A-bill must be analyzed together. The Sponsors of the Referendum are not seeking to eliminate the operational directives of LB 1402; they seek to eliminate the $10 million appropriated for this end. (*See* Collar Petition, Ex. 1). The Object Statement states that "[t]he object...is to...Repeal Section 1 of LB 1402...which directs $10 million dollars annually...." (*See* Collar Petition, Ex. 1). In seeking repeal of LB 1402 without mentioning LB 1402A, the Sponsors seek to nullify LB 1402A by repealing LB 1402 because an A-bill is not effective without the primary bill. Such action cannot be supported.

The Referendum improperly seeks to do indirectly what the Constitution prohibits directly. It attempts to circumvent the constitutional exception to the power of referendum while achieving the same outcome. *See generally Steinacher v. Swanson*, 131 Neb. 439, 268 N.W. 317, 322 (1936) (in the legislative context, explaining that one cannot do indirectly what the Constitution prohibits directly). While the Court could, theoretically, declare the primary bill unconstitutional and thereby nullify the "A" bill, the Constitution prohibits that result by way of referendum. Notably, this Court holds the power to interpret the constitutional. *E.g.*, *In re Nebraska Cmty. Corr. Council to Adopt Voluntary Sent'g Guidelines for Felony Drug Offenses*, 274 Neb. 225, 229, 738 N.W.2d 850, 854 (2007). If the Legislature disobeyed the Constitution, then the Court has the power to declare the legislative act unconstitutional. If the legislative action is unconstitutional, then the appropriation for an unconstitutional expense of state government *must* become a nullity. Any other result would allow an unconstitutional use of appropriated funds.

In stark contrast, allowing the referendum power to render an "A" bill a nullity would make the Constitution's exception on the referendum power meaningless. The Constitution places a limitation

on the referendum power to prevent having acts for an appropriation subject to referendum. If a referendum sponsor could selectively avoid the legislative text that identifies the appropriation but, if the referendum passed, defeat the legislature's intent to make an appropriation, then every legislative act would be subject to referendum. The exception would cease to exist. Such interpretation would read "except those making appropriations for the expense of the state government or a state institution" out of existence. This Court must give effect to, not render meaningless, the text of the Constitution. *Shively*, 310 Neb. at 11, 963 N.W.2d at 516 (courts must ascertain and carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto). Doing so here, LB 1402 and LB 1402A must be read in unison, confirming that the referendum power may not be exercised here, and the Referendum must not be placed on the ballot.

B. The Appropriations Are For The Expense Of State Government.

LB 1402 makes appropriations for the expense of state government. As requested in its September 6, 2024, Order, this Court asked, "Is funding educational scholarships for private K-12 schools an ordinary running expense of government?" The addition of "ordinary running" to "expense" was an improper judicial modification of words to the constitutional text of Article III, Section 3 that changes the natural and obvious meaning of the Constitution and, consequently, should be used by this Court to define an appropriation under the referendum exception. *See Bartling*, 96 Neb. 532, 148 N.W. at 509 (adding "ordinary running" to modify "expense" from Constitution); *Pony Lake*, 271 Neb. 173, 710 N.W.2d 609 (explaining that a court may not add or remove words from a constitutional provision). Under the natural and obvious meaning of "expense" without the improper "ordinary running" modification, LB 1402 unquestionably is an "expense of state government." Additionally, for the sake of argument, LB 1402 provides for an ordinary running expense of government

notwithstanding the improper modification to the constitutional language.

1. *The plain and ordinary language of Article III, Section 3 confirms that "expense" is properly defined in Douglas.*

The evaluation of "expenses" in *Bartling* – injecting "ordinary running" to modify the Constitutional text – is contrary to Nebraska precedent and must not be used to determine whether LB 1402 is exempt from referendum. When "ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed." *Pony Lake,* 271 Neb. at 185, 710 N.W.2d at 620. When constitutional language is clear, the Court must not "read into it that which is not there." *Id.* at 187, 710 N.W.2d at 622.

In *Bartling*, the Court was faced with a question about the term "expense" under Article III, Section 3 of the Nebraska Constitution. *Bartling*, 96 Neb. 532, 148 N.W. at 509. The plain text of Article III, Section 3, provides that the power of referendum may be invoked "against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act." Despite that language, the Court incorrectly added words that modified the plain meaning of the text by construing the word "expenses" "to mean the ordinary running expenses of the state government and existing state institutions." *Bartling*, 96 Neb. 532, 148 N.W. at 509; *see Pony Lake,* 271 Neb. at 185, 710 N.W.2d at 620. In reaching this definition, the Court improperly relied on other state's constitutional provisions which expressly included modifying language before the word "expense," such as "current expenses," "the usual

current expenses," and "ordinary expenses." *Bartling v. Wait*, 96 Neb. 532, 148 N.W. 507, 509 (1914).

The Court's more recent exploration of the meaning of the word "expense" – absent any judicially-created modifying language – demonstrates that this Court should correct its precedent and refuse to modify the meaning of "expense" in Article III, Section 3. In *Douglas*, the Court correctly declined to construe the meaning of "expenses" to include "ordinary running expenses" or any modifying language not found in the actual text of the constitutional provision before the word "expense." *State ex rel. Douglas v. Beermann*, 216 Neb. 849, 347 N.W.2d 297 (1984). Addressing *Bartling*, the Court reasoned that "[t]he posture of the law in this jurisdiction at this point is that while one case has declared what is not an expense, no definition exists of what is an expense. We must now adopt such a definition." *Douglas*, 216 Neb. at 856, 347 N.W.2d at 302. The Court adopted a plain and ordinary meaning definition of "expense." *Id.* The definition of expense in *Douglas*, as opposed to *Bartling* (which was relied upon by *Lawrence*, a decision made before *Douglas*), is consistent with this Court's precedent on constitutional language interpretation – discerning the meaning from the text itself without adding or removing words. *See Pony Lake,* 271 Neb. at 185, 710 N.W.2d at 620.

The legislative history of Article III, Section 3 further confirms that the definition of "expense" in *Bartling* is contrary to the intent of the founders and incorrectly modifies the meaning of the plain text. In 1911, in the 32nd Session of the Nebraska legislature, Governor Shallenberger recommended certain measures for the legislature's consideration. NE. S. JOURNAL, 32nd Sess. (1911). Among these was the inclusion of the power of initiative and referendum in the Constitution. NE. S. JOURNAL, 32nd Sess. (1911), at 82-88. In furtherance of his recommendation, Governor Shallenberger stated that the "legislature should study well the experiences had and the results obtained under the initiative and referendum in other States and profit from their example in order to adopt an amendment free

from their mistakes and containing those provisions proven by experience as essential and satisfactory law." NE. S. JOURNAL, 32nd Sess. (1911), at 84. Subsequently, the legislature adopted an initiative and referendum amendment that did not modify the term "expense" as other states had done. The Court in *Bartling* went as far as to acknowledge that despite other states prefacing "expense" with an adjective, Article III, Section 3 of the Nebraska Constitution did not include such language, yet still proceeded to add language that was not included in the text of the provision when enacted in 1912 and re-adopted in 1920. *Bartling*, 96 Neb. 532, 148 N.W. at 509. Therefore, any modification or addition before "expense" would be contrary to the intent of the framers. *See Ramsey*, 151 Neb. at 340, 37 N.W.2d at 507; *see also Shively*, 310 Neb. at 11, 963 N.W.2d at 516.

Thus, this Court must construe the meaning of "expense" under Article III, Section 3 of the Nebraska Constitution to be consistent with the plain an ordinary meaning of the text as provided in *Douglas*, and not interpret "expense" to mean "ordinary running expense." *See Douglas*, 216 Neb. at 856, 347 N.W.2d at 302 (defining "expense" as "something expended in order to secure a profit or bring about a result"). This Court should accordingly correct its precedent which uses the improper "ordinary running" modifying language.

2. ***LB 1402 is both "an expense of state government" and "an ordinary running expense."***

Though this Court should correct *Bartling*'s modification of the constitutional text, LB 1402 nonetheless meets improperly modified definition of "expense" from *Bartling* and the plain meaning definition from *Douglas*. As mentioned above, this Court requested that the following question be addressed: "[i]s funding educational scholarships for private K-12 schools an ordinary running expense of government?" Before addressing the substantive portion of this question, it must be clarified that LB 1402 *does not* fund educational scholarships for private K-12 schools. LB 1402 provides scholarships to fund a child's

education. It *does not* provide funding to private institutions. *See* NE Leg. L.B. 1402, 108th Sess. (2024), at Sec. 1(1). Rather, the legislation provides quality educational opportunities to Nebraska children. NE Leg. L.B. 1402, 108th Sess. (2024); Neb. Rev. Stat.§ 79-1608. LB 1402 makes appropriations to fund education for Nebraska children and is an "ordinary running expense" under the improperly modified language in *Bartling* and also plainly an "expense" as explained in *Douglas*.

Though not the correct lens for the analysis, LB 1402 is for an "ordinary running expense" under the improper modification from *Bartling*. The legislative act in *Bartling*, which was further analyzed in *Lawrence* and *Douglas*, is readily distinguishable from LB 1402. First, the Court in *Bartling* critically identified that the legislative act before the Court was one for the erection of a new and permanent building. *Bartling*, 96 Neb. 532, 148 N.W. at 509. The Court juxtaposed that sort of expense with, in the same context, appropriations for the ongoing upkeep, improvement, repair, and maintenance of existing buildings. *Id.* Where there was a one-time, $20,000 expense to build a new armory building at-issue in *Bartling*, LB 1402 appropriates $10,000,000 to cover an "ordinary" expense of state government by funding elementary and secondary education for at-risk children.

Second, *Bartling* came sixty years prior to this Court's analysis in *Lawrence*. The Court in *Lawrence* cited *Bartling* in the context of the "ordinary running expenses of the state government and existing state institutions" language while, at the same time, identifying the difference between a constitutional appropriation and one that sets up its own funding and contribution mechanism. *Lawrence*, 192 Neb. at 508, 222 N.W.2d at 810. Here, rather than fund the construction of a new and permanent school building, LB 1402 appropriates a specific amount for the current biennium to cover ongoing expenses of state government to allow for the education of students as "an ordinary

expense of state government." NE Leg. L.B. 1402, 108th Sess. (2024); Neb. Rev. Stat.§ 79-1608(1)(a).

Third, this Court later identified that the Court in *Bartling* only analyzed one narrow example of an "expense" and did not set a proper definition for the term. *Douglas v. Beermann*, 216 Neb. 849, 856, 347 N.W.2d 297, 302 (1984). While it evaluated potential reimbursements for legislators, the Court in *Douglas* confirmed that *Bartling* only provided one particular example of what was *not* an expense. *Id.*

Conversely, LB 1402 is an ordinary expense of state government because it makes appropriations to support the State's continued, ongoing, running, and necessary interest and funding of a child's education, regardless of school settings. Not only does Article VII, Section 1 of the Nebraska Constitution provide that the legislature "shall provide for the free instruction in the common schools of this state," thereby confirming the ordinary running expense incurred with funding a child's education, Article I, Section 4 provides that "it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." NEB. CONST. ART. VII, § 1; NEB. CONST. ART. I, § 4. Such duties alone support a finding that assisting students attend schools, including not only public schools but also schools with religious affiliation, is an ordinary and running function of government.

The conclusion is further supported by the State's established statutory programs and regulatory oversight of the education of children, regardless of whether they attend public or nonpublic school. For example, the State has permitted and appropriated funds for busing transportation of students, including students who are en route to *non-public* schools. *See* Neb. Rev. Stat. § 79-601. Additionally, for decades, the State has supported *non-public* elementary and secondary students with textbooks and school safety. *See* Neb. Rev. Stat. §§ 79-

734, 79-3108, 79-3110. The State provides funding for students to receive an education at interim-program schools, including *non-public* schools. *See* Neb. Rev. Stat. § 79-1601. The State further has provided education funding for students attending public *or private* early childhood education programs and for children with special educational needs to receive free and appropriate education regardless of school public *or private* school setting. *See* Neb. Rev. Stat. §§ 79-318, 79-319, 79-1160. Further, the legislature has allowed for *non-public* forms of education through statute and both the legislature and the Nebraska Department of Education substantially regulate *non-public* elementary and secondary schools. *See* Neb. Rev. Stat. §§ 79-305, 79-318, 79-703, 79-1601. Such programs and practices only further confirm that the State has had and continues to have an interest in the education of children, whether they are enrolled in a public or nonpublic school. Therefore, education of children in Nebraska is a long-standing concern of state government and as such the funding and assistance provided to support a child's education is an ordinary running expense and LB 1402 provides an appropriation to cover such expense.

In addition to being an "ordinary running expense," LB 1402 is within the meaning of "expense" as defined in *Douglas* and under the actual language of Article III, Section 3. The definition of expense as provided in *Douglas* provides a clear framework for the term "expense" absent any added modifying language in Article III, Section 3, and further supports the conclusion that LB 1402 makes an appropriation for the expense of state government. *See Douglas*, 216 Neb. at 856, 347 N.W.2d at 302 (defining "expense" as "something expended in order to secure a profit or bring about a result"). LB 1402, on its face, is replete with examples of "expenses" of state government by allocating funds to expend to ensure that low-income children and other at-risk children receive quality educational opportunities. *See* Neb. Rev. Stat. §§ 79-601, 79-734, 79-3108, 79-3110, 79-1601, 79-318, 79-319, 79-1160, 79-305, 79-703. Therefore, under the plain meaning of "expense," LB 1402

is an appropriation for the expense of state government and therefore excepted from the referendum power under Article III, Section 2 of the Constitution.

3. *Under Article III, Section 3, an expense of the state government does not need to exist at the time of the passage of the act.*

Under the plain construction of Article III, Section 3, the expense of state government for which an appropriation is being made need not exist at the time of the passage of the act. When originally adopted in 1912, Article III, Section 3 provided, "The referendum may be ordered upon any act except acts making appropriations for the expenses of state government, and state institutions existing at the time such act is passed." NEB. CONST. ART. III, § 1B (1912) (amended in 1920). By use of the comma followed by the "and" conjunction, the plain text separated expenses of "state government" from "state institutions existing at the time such act is passed." The text was amended in 1920. The language was changed to allow the power of referendum to be invoked on any act or part thereof "except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act." The debate proceedings regarding the slight change in language from "and" to "or" confirm that the change did not change the meaning of any essential feature. *See* NE Convention Journal (1919-1920), at 1130, 1132 (providing that "it has not intentionally recommended any alteration that would affect any essential feature of the proposal")]. The modification to include the disjunctive "or" does not connect "expense of state government" modifier to "existing at the time of the passage of the act;" the modification remained attached only to "state institution" as was the case in the pre-amended language. *See Hoiengs*

v. Cnty. of Adams, 245 Neb. 877, 900–01, 516 N.W.2d 223, 240 (1994) (holding that the term "or" when used properly is disjunctive).

As explained above, LB 1402 makes appropriations for the expense of state government by providing ongoing and necessary support to fund the education of children in Nebraska. Under the meaning of Article III, Section 3, that subjects LB 1402 to the exception to the referendum power based on the appropriation being one for the expense of state government. Furthermore, assuming for the sake of argument that the "existing at the time of the passage of the act" modifier also modified "state government," LB 1402 still qualifies. At the time of the passage of the act, the expense addressed by LB 1402 existed well before the passage of the act, as explained above. Accordingly, LB 1402 makes appropriations for the expense of state government and is not subject to referendum.

III. THIS CASE PRESENTS A JUSTICIABLE ISSUE.

For the sake of completeness, Relator addresses justiciability and ripeness of the Verified Petition as generally flagged by the Court's Order seeking Relator show cause regarding the legal sufficiency of the Verified Petition. As provided in the Verified Petition, Respondent commented the Referendum would likely be placed on the ballot pending verification and certification (which had not yet been confirmed) but also noted that the Referendum had an adequate number of signatures to qualify for verification. (*See* Verified Complaint, Ex. 3). Given the statutory time limits on challenging certification and placement of a ballot measure for the general election ballot – namely the requirement that the Respondent is required to certify the November 5, 2024 general election ballot by September 13, 2024 – Relator filed her Application for Leave to Commence Original Action and Statement of Jurisdiction with her Verified Petition for Writ of Mandamus attached as Exhibit A (herein the "Application and Petition") at approximately 10:50 a.m. on September 5, 2024. Relator's

decision to file when she did was a result of both (i) the Secretary's preview that the Referendum met the signature threshold and would be certified and (ii) the need to present the issue before the Court with sufficient time to allow the Court to issue a writ of mandamus, recognizing these types of challenges give the Court a very narrow timeframe to make election-related legal determinations. The number of days between the Secretary certifying the referendum petition in this case and the ballot certification date appears to be historic, leaving this Court and the parties with a narrow timeframe to resolve legal actions. Relator sought to give this Court time to resolve the important legal issues presented.

Within this shrinking time frame, shortly before the close of business on September 5, 2024, after the filing of Relator's Application and Petition, the Secretary of State released another statement. That statement confirmed the certification of the Referendum Petition for the general election ballot. While Relator was in the process of preparing a submission to update the Verified Petition to identify the after-filing statement the Secretary of State made, this Court took up the Original Action and entered, among other orders, the Show Cause Order that prompted this filing. Relator thereafter filed a Motion for Leave to Supplement Petition to provide the Court with the Secretary of State statement made after Relator filed her Verified Petition. The Court has since overruled the Motion for Leave to Supplement Petition.

To the extent the Court finds that the Verified Petition does not show that Respondent had already certified or sufficiently showed his intent to certify and place the Referendum on the general election ballot as of the time the Verified Petition was filed, such finding is not determinative as to legally sufficiency of the Verified Petition. Relator seeks a writ of mandamus to compel Respondent to withhold a legally insufficient ballot measure. Respondent's duty to withhold the Referendum from the general election ballot should not arise only at the moment the Secretary decides to certify the ballot. For example, it

should already exist at the time the Sponsors submit presumably sufficient signatures to qualify the petition for placement on the ballot, given that verifying signatures and reviewing a petition for compliance with the Constitutional referendum exception are procedural requirements that exist independently from one another – i.e., nothing requires referendum exception review from preceding signature validation review. From at least the time the Sponsors submitted presumably sufficient signatures to qualify for the ballot, the Referendum failed to satisfy constitutional requirements to be legally sufficient because LB 1402 makes appropriations for the expense of state government. The Verified Petition therefore presents a justiciable issue for this Court's consideration and Relator respectfully requests the Court rule on that issue and order a writ of mandamus.

For the sake of clarity and recognizing the burden placed on all involved in situations when the Secretary of State does not announce a certification decision until shortly before ballots must be printed, Relator also respectfully suggests that this Court clarify whether such a legal sufficiency challenge should be contingent and dependent upon the Secretary of State's express certification of a measure for placement on the ballot as explained in the preceding paragraph. Requiring litigants to wait for the public official to act places this Court and the parties involved in position of litigating and resolving important legal matters on a historically short timeframe. That is especially true when instances of initiative and referendum efforts have been increasing in this State, thereby increasing the time it takes for the Secretary of State to make legal sufficiency and ballot certification decisions.

CONCLUSION

For the foregoing reasons, Relator's request for writ of mandamus ordering the Respondent to withhold the Referendum from the 2024 general election ballot should be granted.

Respectfully submitted September 9, 2024.

LATASHA COLLAR, Appellant.

By: */s/ Kamron T.M. Hasan*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was filed with the Court's electronic filing system and served via the Court's electronic filing system, this 9th day of September 2024, upon all counsel of record.

/s/ Kamron T.M. Hasan

CERTIFICATE OF COMPLIANCE

Pursuant to Neb. Ct. R. § 6-1505(A), Neb. Ct. R. App. P. § 2-103 (A) and (C), this brief was prepared using Microsoft Word 365 in 12-point Century Schoolbook font, in compliance with said rules.

Pursuant to Neb. Ct. R. App. P. § 2-103(C)(3), this brief contains 11,508 total words according to Microsoft Word. This word count complies with § 2-103(C)(3)(a).

/s/ Kamron T.M. Hasan