No. S-24-0653

IN THE SUPREME COURT OF NEBRASKA

STATE ex rel. ELIZABETH CONSTANCE, et al.,
Relators,
v.
ROBERT B. EVNEN, Secretary of State for the State of Nebraska,
Respondent.

Original Action

BRIEF OF RELATORS

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Two competing ballot initiatives for constitutional amendments relating to abortion have been certified by Respondent Secretary of State Robert B. Evnen for the November 2024 General Election. The Protect the Right to Abortion initiative (which this brief will refer to as the "Rights Amendment") seeks to constitutionally protect abortion access in specified circumstances. The Protect Women and Children initiative (which this brief will refer to as the "Restrictions Amendment") seeks to ban abortion access during the second and third trimesters of pregnancy, with certain exceptions.

Currently, there are two pending actions that seek to deny Nebraska voters the choice to enshrine certain abortion rights in the Nebraska Constitution by keeping the Rights Amendment off the ballot. [Cite Brookes/LaGreca]. As a result, Relators herein reluctantly and conditionally seek that same relief with respect to the Restrictions Amendment to ensure that both of the proposed amendments are fairly subjected to the same legal standards for ballot inclusion.

Relators urge the Court to leave undisturbed Secretary Evnen's decision to include both initiatives on the November 2024 ballot. But if the Court instead were to order Secretary Evnen to remove the Rights Amendment initiative from the ballot, fair application of the relevant legal standard would compel the Court to issue the same order with respect to the Restrictions Amendment, as set forth more fully below.

I. STATEMENT OF JURISDICTION

This Court has original jurisdiction pursuant to Neb. Const. art. V, § 2 and Neb. Rev. Stat. § 24-204.

On August 30, 2024, Relators, pursuant to Neb. Ct. R. App. P. § 2-115, filed an Application for Leave to Commence an Original Action and a Verified Petition for Writ of Mandamus, asking this Court to exercise original jurisdiction under Article V, Section 2 of the Nebraska Constitution and Neb. Rev. Stat. § 24-204.

On August 30, 2024, this Court granted leave to commence this original action and docketed the case accordingly. That same day, the

Court issued an Alternative Writ of Mandamus compelling Respondent, the Secretary of State, to withhold and remove from the November 5, 2024 General Election ballot the ballot measure proposed by initiative petition entitled "Protect Women and Children Constitutional Amendment," or show cause why a peremptory writ commanding Respondent to do so should not issue.

II. STATEMENT OF THE CASE

As announced by Secretary Evnen on August 23, 2024, two ballot initiatives concerning abortion have qualified to be placed before voters on the November 2024 ballot—one that seeks to enshrine certain abortion rights in the Nebraska Constitution (the "Protect the Right to Abortion" initiative, or the "Rights Amendment") and one that seeks to enshrine bans and restrictions on abortion access (the "Protect Women and Children" initiative, or the "Restrictions Amendment").

The single issue before this Court is whether Respondent, in his capacity as Secretary of State, correctly determined that the Restrictions Amendment initiative (along with the Rights Amendment initiative) complied with all statutory and constitutional requirements of Article III, Section 2 of the Nebraska Constitution to be placed on the November 2024 general election ballot, or whether fair and equal application of the single subject requirement requires that ***both*** the Rights Amendment and Restrictions Amendment be withheld from that ballot.

III. GROUNDS FOR MANDAMUS

Nebraska law requires the Secretary of State to determine whether a proposed initiative measure meets all constitutional and statutory requirements to be placed on the ballot. Neb. Rev. Stat. § 32-1409(3). If the Secretary of State finds the petition to be "valid and sufficient," the Secretary of State shall proceed to place the measure on the general election ballot. §§ 32-1409(3) –32-1411(2).

The Secretary's "statutory duties to provide the ballot form for proposed constitutional amendments and to certify its contents, coupled with his duties to supervise elections and decide disputed points of election laws, clearly require him to consider whether a proposed amendment complies with the separate-vote provision." *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 991, 853 N.W.2d 494, 507–08 (2014). In a legal sufficiency challenge, the Secretary has a duty to reject a proposed amendment as legally defective if it fails to satisfy form and procedural requirements. *Id.* at 991.

Neb. Rev. Stat. § 32-1412(2) provides that, on a showing that an initiative petition is not legally sufficient, the Court, on the application of any resident, may enjoin the Secretary of State and all other officers from certifying or printing on the official ballot for the next general election the ballot title and number of such measure.

IV. PROPOSITIONS OF LAW

1. Article III, section 2 of the Nebraska Constitution provides that "[t]he first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature."

2. "The right of initiative is precious to the people and one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." *Christensen v. Gale*, 301 Neb. 19, 27, 917 N.W.2d 145, 153 (2018).

3. Nebraska law requires the Secretary of State to determine whether an initiative measure on the ballot meets all constitutional and statutory requirements. Neb. Rev. Stat. § 32-1409(3).

4. "The power of initiative must be liberally construed to promote the democratic process, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual." *State ex rel. McNally v. Evnen*, 307 Neb. 103, 118, 948 N.W.2d 463, 476 (2020).

5. In a legal sufficiency challenge, the Secretary "has a duty to reject a proposed amendment as legally defective for failing to satisfy form and procedural requirements." *Loontjer*, 288 Neb. at 991, 853 N.W.2d at 508.

6. The Nebraska Constitution provides that "[i]nitiative measures shall contain only one subject." Neb. Const. art. III, § 2.

7. The Secretary's "statutory duties to provide the ballot form for proposed constitutional amendments and to certify its contents, coupled with his duties to supervise elections and decide disputed points of election laws, clearly require him to consider whether a proposed amendment complies with the separate-vote provision." *Loontjer*, 288 Neb. at 991, 853 N.W.2d at 507–08.

8. The purposes of single-subject rules are "to avoid voter confusion and logrolling." *McNally*, 307 Neb. at 134, 137, 948 N.W. 2d at 486, 487 (2020) (Cassel, J., concurring and Heavican, C.J., Stacy, and Freudenberg, JJ., dissenting); *Christensen*, 301 Neb. at 31, 917 N.W.2d at 156.

9. Logrolling "is the practice of combining dissimilar propositions into one voter initiative so that voters must vote for or against the whole package even though they only support certain of the initiative's propositions." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 151, 948 N.W.2d 244, 253 (2020); *accord Christensen*, 301 Neb. at
31, 917 N.W.2d at 156.

10. When evaluating whether an initiative contains distinct propositions in a single vote, this Court "follow[s] the natural and necessary connection test." *Planned Parenthood of the Heartland, Inc.*
v. Hilgers, 317 Neb. 217, 229, 9 N.W.3d 604, 612–613 (2024) (quoting *Wagner*, 307 Neb. at 151, 948 N.W.2d at 253 and *Loontjer*, 288 Neb. 973, 853 N.W.2d 494); *accord Christensen*, 301 Neb. at 32, 917 N.W.2d at 156.

11. Under the "natural and necessary connection" test, "[w]here the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general

subject, the proposal is a single and not a dual proposition." *Planned Parenthood of the Heartland*, 317 Neb. at 229, 9 N.W.3d at 612–613 (quoting *Wagner*, 307 Neb. at 151, 948 N.W.2d at 253 and *Loontjer*, 288 Neb. at 999, 853 N.W.2d at 513).

12. "The controlling factors in this inquiry are the initiative's singleness of purpose and the relationship of other details to its general subject." *Planned Parenthood of the Heartland*, 317 Neb. at 229, 9 N.W.3d at 613 (quoting *Wagner*, 307 Neb. at 151, 948 N.W.2d at 253 and *Loontjer*, 288 Neb. at 999, 853 N.W.2d at 513); *accord Christensen*, 301 Neb. at 32, 917 N.W.2d at 156.

13. "An initiative's general subject is defined by its primary purpose." *Planned Parenthood of the Heartland*, 317 Neb. at 229, 9 N.W.3d at 613 (quoting *Wagner*, 307 Neb. at 151, 948 N.W.2d at 253 and *Loontjer*, 288 Neb. at 1001–1002, 853 N.W.2d at 514); *accord Christensen*, 301 Neb. at 32, 917 N.W.2d at 156.

14. 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. *Wagner*, 307 Neb. at 153, 948 N.W.2d at 254.

15. The single subject rule "must not become a license for the judiciary to 'exercise a pedantic tyranny' over efforts to change the law." *McNally*, 307 Neb. at 125, 948 N.W.2d at 480.

V. STATEMENT OF FACTS

A. The Parties

Relators are registered voters and residents of Nebraska. Each Relator is a retired or currently practicing physician, specializing in obstetrics and gynecology, pediatric radiology, surgery, internal medicine, neonatology, family medicine, psychiatry, or otolaryngology. Verified Petition, ¶ 1.

Respondent Robert B. Evnen is the duly elected, authorized, and acting Secretary of State of the State of Nebraska. Verified Petition, ¶ 2.

B. The Ballot Initiatives

This case involves two proposed ballot initiatives: the Rights Amendment initiative and the Restrictions Amendment initiative. The Rights Amendment initiative and the Restrictions Amendment initiative each would amend Article I of the Nebraska Constitution by creating a new section, section 31. Verified Petition, ¶ 7.

The Rights Amendment initiative would constitutionally protect the right to access abortion until the point of fetal viability and otherwise when needed to protect the life or health of the pregnant patient. Verified Petition, ¶ 8. The Rights Amendment defines fetal viability, for that purpose, based on the professional judgment of the patient's treating health care practitioner. Verified Petition, ¶ 8.

The Restrictions Amendment initiative would seem to recognize some degree of constitutional protection for abortion in cases of medical emergency, in cases where pregnancy resulted from sexual assault, and in cases where pregnancy resulted from incest. Verified Petition, ¶ 9. Outside of those specific contexts, the Restrictions Amendment would ban all abortions in the second trimester of pregnancy and would ban all abortions in the third trimester of pregnancy. Verified Petition, ¶ 9. The Restrictions Amendment would also recognize gestating fetuses as "unborn children" for the first time in Nebraska constitutional history. Verified Petition, ¶ 9.

C. The Secretary's Decision to Place the Initiatives on the Ballot

On November 13, 2023, sponsors filed the proposed Rights Amendment initiative with Secretary Evnen. Verified Petition, ¶ 5.

On March 21, 2024, sponsors filed the proposed Restrictions Amendment initiative with Secretary Evnen. Verified Petition, ¶ 6.

On July 3, 2024, each set of sponsors submitted signatures to Secretary Evnen for validation and certification of their respective initiatives for placement on the November 5, 2024 general election ballot. Verified Petition, ¶¶ 10, 11.

On Friday, August 23, 2024, Secretary Evnen issued a statement confirming that the signature requirements had been met for both the Rights Amendment initiative and the Restrictions Amendment initiative and that he would permit both initiatives to be placed on the November 2024 general election ballot "[b]arring any legal challenges." Verified Petition, Exhibit 6.

D. Procedural Background

On Monday, August 26, 2024, Carolyn I. LaGreca, represented by the Thomas More Society (an organization that advocates to restrict choice and ban abortion across the country), filed a petition in this Court seeking to block the Rights Amendment initiative from appearing on the ballot (Dkt. No. 24-0635). Because the application was not supported by an affidavit or positively-verified application, Ms. LaGreca's case had to be refiled twice. On August 30, the Court entered an order granting Ms. LaGreca leave to commence an original action (Dkt. No. 24-0654).

On Wednesday, August 28, 2024, Dr. Catherine Brooks, represented by attorney Brenna Grasz, Esq., filed a similar petition seeking to block the Rights Amendment from appearing on the ballot (Dkt. No. 24-0645). Less than 48 hours before filing that lawsuit on Dr. Brooks's behalf, Ms. Graz resigned from the position of campaign treasurer for the committee advocating for passage of the Restrictions Amendment initiative, pursuant to Neb. Rev. Stat. § 49-1447—a role in which she had served until that time. Because the application was not supported by an affidavit or positively-verified application, Dr. Brooks's case had to be refiled. On August 30, the Court entered an order granting leave to commence an original action (Dkt. No. 24-0647).

In direct response to those two attempts by proponents of the Restrictions Amendment to deny Nebraska voters the choice to enact the Rights Amendment, and in anticipation that Dr. Brooks would re-file her rejected challenge, on August 30, 2024, the twenty-nine undersigned Nebraska physician relators reluctantly filed an application for leave to commence an original action and a Verified

Petition for Writ of Mandamus requiring the Respondent, in his capacity as Secretary of State for the State of Nebraska, to deny certification and withhold from the November 2024 ballot the Restrictions Amendment initiative as well, or, in the alternative, to issue an order declaring the Restrictions Amendment voter initiative for a constitutional amendment invalid.

VI. SUMMARY OF THE ARGUMENT

Consistent with Secretary Evnen's determination, and this Court's precedent concerning the application of the single subject rule, Relators assert that the Rights Amendment clearly meets the constitutional requirements for inclusion on the ballot. Verified Petition, ¶ 30. And applying that same precedent, Relators acknowledge that the Restrictions Amendment potentially does, too. Verified Petition, ¶ 30. As such, Nebraska voters are entitled to consider both amendments in November. This Court has held that "[t]he power of initiative must be liberally construed to promote the democratic process, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual." *McNally*, 307 Neb. at 118, 948 N.W.2d at 476.

However, as both proposed initiatives are structured similarly, if this Court were to rule that the Rights Amendment initiative cannot properly be placed before voters in November for any of the reasons asserted in the LaGreca and/or Brooks challenges, it must make the same ruling as to the Restrictions Amendment initiative. A consistent and fair application of the relevant constitutional principles reveals that the Rights Amendment initiative cannot possibly violate the single subject requirement unless the Restrictions Amendment initiative also violates it.

If the Court were to adopt the legal reasoning espoused in the LaGreca and/or Brooks petitions challenging the Rights Amendment initiative, it necessarily would have to conclude that the Restrictions

Amendment initiative contains several proposals that constitute separate and distinct measures.

The language of the proposed amendments is similarly structured:

Rights Amendment	Restrictions Amendment
All persons shall have a fundamental right to abortion until fetal viability, or when needed to protect the life or health of the pregnant patient, without interference from the state or its political subdivisions. Fetal viability means the point in pregnancy when, in the professional judgment of the patient's treating health care practitioner, there is a significant likelihood of the fetus' sustained survival outside the uterus without the application of extraordinary medical measures.	Except when a woman seeks an abortion necessitated by a medical emergency or when the pregnancy results from sexual assault or incest, unborn children shall be protected from abortion in the second and third trimesters.

The Rights Amendment's text is one sentence longer because, unlike the Restrictions Amendment, the Rights Amendment defines its key concept of "fetal viability" and specifies who is to make the relevant determination—providing more transparency and specificity to aid voter understanding and, if ultimately adopted by the voters, to aid judicial application. The Rights Amendment also provides more detail than "necessitated by a medical emergency" by specifying that access to abortion is protected "when needed to protect the life or health of the pregnant patient." The Restrictions Amendment is only shorter because it leaves its key terms undefined and provides no guidance as to how they are to be implemented.

The attempts by Brooks and LaGreca to deny voters the choice to adopt the Rights Amendment both rely on minute hair-splitting of the Rights Amendment's straightforward language. The Brooks and LaGreca petitions argue that the Rights Amendment's two sentences impermissibly embrace multiple subjects because such language purportedly would:

(1) Create a constitutional right to abortion until the point of fetal viability;

(2) Extend that same constitutional right to abortion throughout pregnancy when needed to protect the life or health of the pregnant patient;

(3) Apply that fundamental right to access abortion to all people, regardless of age, biological sex, or pregnancy status;

(4) Specify that the State of Nebraska and its political subdivisions cannot interfere with such rights;

(5) Specify that "fetal viability" is to be determined by the professional judgment of each patient's treating health care practitioner. *See* Brooks Petition ¶¶ 10, 24; LaGreca Petition ¶¶ 7, 16.

The hyper-technical approach espoused by the Brooks and LaGreca petitions runs directly counter to this Court's previous direction that the single subject rule "must not become a license for the judiciary to 'exercise a pedantic tyranny' over efforts to change the law." *McNally*, 307 Neb. at 125, 948 N.W.2d at 480. But, if the Court were to retreat from its prior construction and adopt the approach proposed by Brooks and LaGreca, the Restrictions Amendment initiative would violate the single subject test even more clearly than the Rights Amendment purportedly does.

Applying the (unsupported) approach proposed by Brooks and LaGreca, at least six different subjects are evident in the text of the Restrictions Amendment:

(1) seeming constitutional protection of abortion access throughout pregnancy when necessitated by a medical emergency

(without any guidance as to what constitutes a qualifying medical emergency and who would make that decision);

(2) seeming constitutional protection of abortion access throughout pregnancy when a pregnancy results from sexual assault (with no definition of "sexual assault" or indication of how the connection between such sexual assault and the subject pregnancy would need to be demonstrated, or who would make that decision);

(3) seeming constitutional protection of abortion access throughout pregnancy when a pregnancy results from incest (with no definition of "incest" or indication of how the connection between such incest and the subject pregnancy would need to be demonstrated, or who would make that decision);

(4) in all other cases, a blanket ban on abortion in the second trimester of pregnancy;

(5) in all other cases, a blanket ban on abortion in the third trimester of pregnancy; and

(6) constitutional identification of gestating fetuses as "unborn children" and thus, as persons with potentially a wide range of cognizable constitutional rights not presently contemplated.

Under the approach proposed by Brooks and LaGreca, these six subjects would lack a natural and necessary connection with each other, and would thus constitute separate subjects that must be submitted separately so as to enable the electors to vote on each proposition separately. Otherwise, under that approach, the current form of the Restrictions Amendment initiative would combine several propositions into one question, forcing voters to vote for or against all of the six propositions above as one package and creating the very danger of logrolling that the single subject rule is designed to guard against.

The particular combination of proposals in the Restrictions Amendment initiative—specifically, the combination of some seeming measure of constitutional protection for abortions in limited circumstances (e.g., sexual assault, incest, medical emergency, etc.)

and bans in most other circumstances—may trap voters into voting for the whole package even though certain of those individual proposals would have failed if submitted separately.

Finally, a significant danger posed by logrolling is that it confuses voters and creates serious doubt as to what the voters will have decided after the election. *See McNally*, 307 Neb. at 134, 137, 948 N.W. 2d at 486, 487 (2020) (Cassel, J., concurring and Heavican, C.J., Stacy, and Freudenberg, JJ., dissenting); *Christensen*, 301 Neb. at 31, 917 N.W.2d at 156. Here, applying the approach espoused by Brooks and LaGreca, the combination of six arguably-separate proposals into one constitutional amendment would present serious questions about what exactly would be enacted if the Restrictions Amendment initiative were to pass. Specifically, the constitutional identification of gestating fetuses as "unborn children" (*i.e.*, persons) for the first time in Nebraska's history would have the potential for multiple as of yet unquantified and unspecified collateral effects regarding the interpretation of constitutional and statutory provisions, including the potential creation of multiple new constitutional rights for gestating fetuses. The Brooks and LaGreca petitions argue that the Rights Amendment's definition of "fetal viability" would trigger potential secondary impacts across Nebraska law, but that is even more clearly true with respect to the Restrictions Amendment's use of the term "unborn children" without any Nebraska constitutional precedent.

Once again, to be clear, Relators do ***not*** believe that the approach urged by Brooks and LaGreca is a correct application of the single subject test under Nebraska law. Relators here argue only that, ***if*** it is adopted for purposes of scrutinizing the Rights Amendment initiative, the approach proposed by Brooks and-LaGreca must similarly be applied to the Restrictions Amendment initiative—which would even more clearly fail that hyper-technical test.

VII. LEGAL STANDARD

Mandamus is an action at law, issued to compel the performance of a purely ministerial act or duty by a governmental officer where (1) the relator has a clear right to the relief sought; (2) the respondent has a corresponding clear duty resulting from his or her office to perform the act; and (3) there is no other plain and adequate remedy available at law. Neb. Rev. Stat. § 25-2156; *State ex rel. Johnson v. Gale*, 273 Neb. 889, 895, 734 N.W.2d 290, 298 (2007).

VIII. ARGUMENT

A. Applying the approach proposed by Brooks-LaGreca to the single subject rule, the Restrictions Amendment would violate that rule far more clearly than the Rights Amendment would.

The Nebraska Constitution provides that "[i]nitiative measures shall contain only one subject." Neb. Const. art. III, § 2. The core purposes of these single-subject rules are "to avoid voter confusion and logrolling." *Christensen*, 301 Neb. at 31, 917 N.W.2d at 156.

When evaluating whether an initiative contains distinct propositions in a single vote, this Court "follow[s] the natural and necessary connection test." *Christensen*, 301 Neb. at 32, 917 N.W.2d at 156. Under the "natural and necessary connection" test, an initiative "does not violate the single subject rule if [its] provisions have *a natural and necessary connection with each other and together are part of one general subject*." *Loontjer*, 288 Neb. at 1000, 853 N.W.2d at 513
(quoting *City of North Platte v. Tilgner*, 282 Neb. 328, 350, 803 N.W.2d 469, 487 (2011)) (emphasis in original). Under the test, "[t]he general subject is defined by [the initiative's] primary purpose." *Christensen*, 301 Neb. at 32, 917 N.W.2d at 156. Without a unifying purpose, separate proposals in a ballot measure necessarily present independent and distinct proposals that require a separate vote. *Loontjer*, 288 Neb. 973, 853 N.W.2d 494.

1. The Restrictions Amendment would variously protect or ban abortion in multiple different time periods and circumstances.

The Brooks and LaGreca petitions argue that the Rights Amendment initiative violates the single subject rule because it would create a right to abortion both "until fetal viability" and "when needed to protect the life or health of the pregnant patient." See Brooks Petition ¶¶ 10, 24; LaGreca Petition ¶¶ 7, 16. If the Court were to accept the argument that those two aspects of the Rights Amendment initiative lack a natural and necessary connection to one another under the same general subject matter, it would also have to conclude that the same is true of the Restrictions Amendment initiative.

First, the Restrictions Amendment seemingly would constitutionally protect abortion access rights in three different circumstances (one at least partly overlapping with the Rights Amendment): (1) when "necessitated by a medical emergency"; (2) "when the pregnancy results from sexual assault"; or (3) "when the pregnancy results from … incest." Under the (unsupported) approach urged by Brooks and LaGreca, these would be separate and insufficiently-related subjects and the single subject rule would be violated.

Second, the Restrictions Amendment would otherwise ban abortion in two different time periods: the second trimester of pregnancy and the third trimester of pregnancy. Once again, under the (unsupported) approach urged by Brooks and LaGreca, these would be separate and insufficiently-related subjects.

To the extent the Court were to accept a primary purpose broad enough to unite these various bans and seeming protections under a single general subject matter (e.g., "regulating when abortions are and are not allowed to occur," etc.), the Court must similarly do so with respect to the Rights Amendment initiative and allow Secretary Evnen to place both on the ballot.

2. The Restrictions Amendment initiative is no more specific, and no less broad, than the Rights Amendment initiative with respect to the individuals to whom it would apply.

The Brooks and LaGreca petitions next argue that the Rights Amendment violates the single subject rule because it would create the specified abortion access rights for "all persons," regardless of age, biological sex, or pregnancy status. See Brooks Petition ¶¶ 10, 24; LaGreca Petition ¶¶ 7, 16. The approach to the single subject rule that Brooks and LaGreca urge seemingly would require separate ballot initiatives to reflect the very same rights for each identifiable group of individuals to whom those rights would be conferred (e.g., one for adults and a separate one for minors, etc.). Undersigned counsel can find no support for such a requirement in Nebraska law.

Moreover, once again, the Restrictions Amendment initiative would fail any such version of the single subject test. The Restrictions Amendment does not specify which groups (by age, biological sex, or otherwise) could access abortion throughout pregnancy in the case of sexual assault, or in the case of incest. Nor does the Restrictions Amendment differentiate groups of potentially impacted individuals with respect to its abortion ban in the second trimester of pregnancy or its abortion ban in the third trimester of pregnancy. For all of those purposes, it would apply equally to minors and adults, and to biologically male and biologically female and biologically intersex people. If, as Brooks and LaGreca argue, that constitutes a failure of the single subject test on the part of the Rights Amendment initiative, the same necessarily would be true of the Restrictions Amendment initiative.

3. If enacted, the Restriction Amendment's reference to "unborn children" would open a Pandora's box of impacts across a wide range of constitutional provisions.

Finally, the Brooks and LaGreca petitions fault the Rights Amendment initiative for purportedly creating widespread impacts across Nebraska law through its definition of "fetal viability" and its specificity as who would make the relevant determination. Once again, such concerns aren't actually a component of the single subject test as this Court has applied it.

If the Court were nonetheless to adopt that aspect of the approach urged by Brooks and LaGreca, however, it would have to order Secretary Evnen not to include the Restrictions Amendment initiative on the November ballot based solely upon the Pandora's box of impacts (intended or unintended) of constitutionally recognizing gestating fetuses as "unborn children" (i.e., as persons who seemingly would have legal status and cognizable constitutional rights) for the first time in Nebraska's history.

In addition to being a form of logrolling, granting legal personhood to a gestating fetus would open the door to a variety of collateral effects, intended or unintended, across multiple subjects of Nebraska constitutional and statutory law. Redefining gestating fetuses as "unborn children" in the Nebraska Constitution presumably would grant all such fetuses constitutional rights as persons, unsettling and destabilizing longstanding legal doctrines. Redefining "persons" to include fetuses would necessarily have unintended and in some cases absurd consequences when read in conjunction with the other provisions of the Nebraska Constitution, such as those pertaining to due process, equal protection, and apportionment, upending the predictability and stability of the established constitutional principles. Some examples follow.

a. Redefining persons in the Nebraska Constitution to include gestating fetuses could result in the assignment of constitutional rights to an unprecedented class of persons.

The proposed Restrictions Amendment seeks to classify fetuses as "unborn children." Children are "persons" under the Nebraska Constitution, which grants all persons within Nebraska's borders certain inalienable rights by virtue of their status as persons. Article I of the Nebraska Constitution states, in part, "[a]ll *persons* are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness" and "[n]o *person* shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." Neb. Const. art. I, §§ 1, 3 (emphasis added). Such rights include protection under the equal protection and due process clauses, including to a trial by impartial jury and reasonable access to the courts. *State v. White*, 543 N.W.2d 725 (1996); *Conn v. Conn*, 695 N.W.2d 674 (2005). The application of these principles to "unborn children" would be unprecedented and impractical, and would conflict with federal law, as the United States Constitution has not been interpreted to provide such rights to the unborn. *See, e.g., Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022) (explicitly declining to address status of fetal personhood in the United States Constitution).

Beyond the inalienable rights granted to all persons under the Nebraska Constitution, other state constitutional rights seemingly would extend to fetuses if the term "unborn children" were to be adopted in the proposed Restrictions Amendment. For example, the Nebraska Constitution provides that "no person shall be held to answer for a criminal offense…unless on a presentment or indictment of a grand jury" and that no person will be subject to cruel and unusual punishment. Neb. Const. art. I, §§ 9–10. If a pregnant person were convicted and sentenced to prison or other punishment by the state, the "unborn child" would effectively be "held to answer for a criminal offense" by being subject to its mother's prison sentence or other penal punishment without an indictment by a grand jury, given the inherent, biological nature of gestation. The fetus would not have committed a

crime, would not have been arraigned or charged, would not have been provided a trial by a jury of its peers, would not have had the opportunity to confront its (parent's) accuser, and yet it would nonetheless jointly receive punishment from the state. There is no remedy for such a scenario, as the "unborn child" cannot be removed or separated from its mother, so it must suffer the consequences of the actions of another without due process.

Arguably, such a scenario would subject the innocent "unborn child" to cruel and unusual punishment as well. The "unborn child" would be jointly answering for a crime its parent alone was convicted of committing, a punishment that is "clearly and totally rejected throughout society" and "patently unnecessary" amounting to cruel and unusual. *Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring). Pregnant people could essentially be barred from incarceration, as doing so would confine a second person, the unborn child, without due process.

b. Redefining persons in the Nebraska constitution to include gestating fetuses could affect how population must be counted in the state apportionment process, causing significant financial and operational burden to the state.

There are several clauses in the Nebraska Constitution that require the legislature to apportion the state into districts according to population. For example, Article III, § 5 directs the Nebraska state legislature to divide the state into legislative districts, and "the basis of apportionment shall be the population excluding aliens, as shown by the next preceding federal census." Article IV, § 20 states that "[c]ommissioners shall be elected by districts of substantially equal population as the Legislature shall provide." Other apportionment clauses direct the state legislature to divide the state into districts "of approximately equal population." *See, e.g.*, Neb. Const. art. V, § 5; art. VII, § 3; art. VII §§3, 10.

If gestating fetuses were to be defined as children and, thus, legal persons under the Nebraska Constitution as a secondary subject of the Restrictions Amendment initiative, they presumably would have to be counted for purposes of apportionment. Including "unborn children" in an apportionment count is not a large leap once personhood is ascribed to a fetus. Georgia has demonstrated this through the passage of the Georgia Living Infants Fairness and Equality (LIFE) Act, which, among other things, recognizes fetal personhood and requires that "unborn children" be counted in population-based determinations in the state. The Georgia Living Infants Fairness and Equality (LIFE) Act, Ga. Code Ann. § 1-2-1 (2019). That is an example of a secondary subject and impact of passage of the Restrictions Amendment initiative.

However, the inclusion of "unborn children" in the Nebraska apportionment count when determining the population of legislative districts would have several more unexpected and untoward consequences. First, the Nebraska Constitution specifies that apportionment be based on the federal census, however, the federal census does not currently account for fetuses as persons. Neb. Const. art. III, §5; *see also* U.S. Census 2020, U.S. DEP'T OF COMM. Pursuant to the state's new constitutional requirement flowing from passage of the Restrictions Amendment initiative, Nebraska would presumably have to conduct its own census at its own expense to include gestating fetuses ("unborn children") in the population count, The introduction of a second census would then raise a practical question of which census, the federal or Nebraskan, would govern the apportionment of representatives and resources, likely necessitating an additional constitutional amendment and raising legal challenges to clarify the ambiguity. Second, a population count that includes fetuses will be unreliable, as some people would not know that they are pregnant at the time that such a census would be taken, and in other cases, a fetus may be lost due to miscarriage or stillbirth yet would have been counted in a census.

c. Ascribing personhood to gestating fetuses could cause the redefinition of "dependent" for tax regimes and state assistance.

If the Nebraska Constitution were to recognize fetuses in the second and third trimesters of gestation as "unborn children" that have the legal rights of personhood, it could also affect the definition of "dependent children" in other parts of the Nebraska statutory regime. Under the insurance and worker's compensation statutes, "dependent" is defined, in part, as a child under the age of nineteen years. Neb. Rev. St. § 48-124; Neb. Rev. Stat. Ann. § 44-5238. While these statutes make no direct reference to "unborn children", an "unborn child" is by necessity younger than nineteen and could fall under the statutory definitions as written, and thus expending coverage to a new subset of persons. Given this, if the phrase "unborn children" is included in the Nebraska Constitution, the definitional ambiguity will likely be the basis for legal challenges to clarify the statutory language, and potentially resulting in the expansion of the scope of coverage under insurance and worker's compensation statutes.

For example, if fetuses are granted legal personhood status pursuant to the Restrictions Amendment, it is then reasonable to expect such "unborn children" to be considered dependents for Nebraska income tax purposes. Other states have taken a similar stance on the effect of fetal personhood, such as Georgia, which in the wake of the *Dobbs* decision, permitted taxpayers to take a dependency deduction on state income tax returns for "any unborn child (or children) with detectable human heartbeat." Guidance Related to House Bill 481, Living Infants and Fairness Equality (LIFE) Act, GA. DEPT. OF REV. (Aug 1, 2022). Such a change would raise many practical questions that would need resolution: What evidence would be sufficient to withstand an audit by the Nebraska taxing authorities? Are taxpayers allowed to claim two "unborn" dependency deductions in one year, such as in the event of a miscarriage or stillbirth followed by a subsequent pregnancy? Such questions highlight the complexity and

difficult nature of expanding personhood to fetuses. Viewed through the (unsupported) lens urged by Brooks and LaGreca, these are all secondary subjects wrapped up in the Restrictions Amendment initiative that would cause it to violate the single subject rule.

Granting constitutional personhood to "unborn children" would also expand the pool of those fetuses eligible for state financial assistance. Under existing Nebraska law, dependent children eligible for state assistance "shall include an unborn child but only during the last three months of pregnancy." Neb. Rev. Stat. Ann. § 43-504; *see also* 479 Neb. Admin. Code § 1-0006.01(A)(i) (permitting pregnant foster children to receive maintenance payments for their gestating fetus "during the third trimester of pregnancy"). Granting legal personhood to fetuses in the second and third trimester, as a secondary subject of the Restrictions Amendment initiative, would necessitate the expansion of such state assistance eligibility to include those "unborn children" in the second trimester, along with the third, increasing state expenses on assistance programs.

These are just some examples, among many, of the potential widespread and far-flung impacts currently contained within the Pandora's box of adding "unborn children" language to the Nebraska Constitution for the first time, if the Restrictions Amendment initiative were to be approved.

IX. CONCLUSION

For the foregoing reasons, the twenty-nine undersigned Nebraska physician Relators respectfully submit that the Restrictions Amendment initiative cannot possibly meet the requirements for submission to the people in Article III, Section 2 of the Nebraska Constitution if the Court were to determine that the Rights Amendment falls short of those standards. Relators therefore respectfully request that, ***if*** the Court were to decide to issue a writ of mandamus requiring Respondent to deny certification and withhold from the ballot the proposed constitutional amendments contained in

the "Protect the Right to Abortion" Initiative, or alternatively, if the Court were to issue a writ of mandamus requiring the Respondent to abstain from counting and certifying the election results on the proposed "Protect the Right to Abortion" amendment, that the Court issue identical writs with respect to the "Protect Women and Children" Initiative.

Dated this 5th day of September, 2024.

Elizabeth Constance, Linda Collins, Courtney McLean, Claire Baker, Rachel Brock, Amy Garwood, Stephanie Gawel, Patricia Bohart, Mark R. Hutchins, Stacie Bleicher, Matthew Glathar, Julie Filips, Sharon Hammer, Deanna L. Hutchins, William Johnson, Alex Dworak, Kate Rosenberger, Brian Gallagher, Quinn Willet, Dawn Hosein, Andrew Bohart, Rachel Blake, Katherine Willet, Tracy Mak, Tara Kirkpatrick, James Nora, Erica Carlsson Buchta, Ryan Shelstad, Kathryn Borman, Relators

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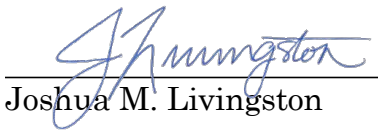
CERTIFICATE OF WORD COUNT COMPLIANCE

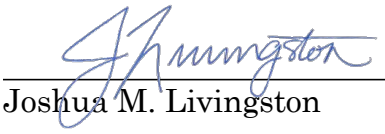
As required by Neb. Ct. R. App. P. § 2-103(C)(4), I, the undersigned Joshua M. Livingston, certify that the foregoing BRIEF OF RELATORS complies with the word limit because the brief contains 7,074 words, excluding the Certificate of Word Count Compliance. The BRIEF OF RELATORS was prepared with Microsoft® Word for Microsoft 365 MSO and complies with typeface requirements.



Joshua M. Livingston

CERTIFICATE OF SERVICE

I, the undersigned Joshua M. Livingston, state that I am the attorney for Relators and that on this 5th day of September, 2024, a copy of the foregoing BRIEF OF RELATORS was filed electronically through the Nebraska Appellate E-Filing System and that service thereof shall be deemed to have been made by Appellate E-Service pursuant to Neb. Ct. R. App. P. § 2- 200(c), and that true and correct courtesy copies were emailed to all counsel of record.



Joshua M. Livingston

Certificate of Service

I hereby certify that on Thursday, September 05, 2024 I provided a true and correct copy of this *Brief of Relators* to the following:

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