

No. 24-658

IN THE NEBRASKA SUPREME COURT

STATE EX REL. LATASHA COLLAR,
Relator,

v.

**ROBERT EVNEN, IN HIS OFFICIAL CAPACITY AS
NEBRASKA SECRETARY OF STATE,**
Respondent,

JENNI BENSON, ET AL.,
Intervenors.

Original Action

BRIEF OF SECRETARY EVNEN

MICHAEL T. HILGERS (#24483)
Attorney General of Nebraska

Nebraska Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509
Tel.: (402) 471-2683
Fax: (402) 471-3297

ERIC J. HAMILTON (#25886)
Solicitor General
eric.hamilton@nebraska.gov

ZACHARY A. VIGLIANCO (#27825)
Deputy Solicitor General

ZACHARY B. POHLMAN (#27376)
Assistant Solicitor General

Counsel for Secretary Evnen

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STATEMENT OF JURISDICTION

Latasha Collar filed an Application for Leave to Commence an Original Action and Verified Petition for Writ of Mandamus on September 5, 2024. This Court granted leave to commence an original action the next day. This Court has jurisdiction under Neb. Const. art. V, § 2, and Neb. Rev. Stat. § 24-204 (Reissue 2016).

Whether an act is ineligible for a referendum under Article III, Section 3, of the Nebraska Constitution is question about the “form of the measure or the procedural requirements for its placement on the ballot.” *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 985, 853 N.W.2d 494, 504 (2014). “Such challenges are ripe for resolution before an election.” *Id.*

STATEMENT OF THE CASE

Nature of the Case. Latasha Collar seeks a writ of mandamus compelling Secretary of State Robert Evnen to “deny certification and withhold from the ballot the Private Education Scholarship Partial Referendum Petition.” Verified Petition at 1.

Issues Presented. The Court’s September 6, 2024, order instructed the parties to brief three questions:

1. Has the Secretary of State determined if constitutional and statutory requirements have been met or made a finding that the referendum petition is valid and sufficient?
2. Does Section 1 of L.B. 1402 make an appropriation within the meaning of Article III, Section 3, of the Nebraska Constitution?

3. Is funding educational scholarships for private K–12 schools an ordinary running expense of state government?

Scope of Review. Whether the writ should issue depends on whether the referendum violates Article III, Section 3, of the Nebraska Constitution. As this is an original action, this Court will rule on that question in the first instance.

PROPOSITIONS OF LAW

1. The referendum power “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.” Neb. Const. art. III, § 3.

2. An appropriations bill under this section “appropriate[s] or set[s] apart from the public revenue a certain sum of money.” *Lawrence v. Beermann*, 192 Neb. 507, 508, 222 N.W.2d 809, 810 (1974) (per curiam).

3. The “expense of the state government” refers to “the ordinary running expenses of the state government.” *Bartling v. Wait*, 96 Neb. 532, 537, 148 N.W. 507, 509 (1914).

4. “It is permissible in seeking the meaning of the constitutional provision to consider the mischief attempted to be avoided and remedied, the object sought to be accomplished, the scope of the remedy its terms imply, and to give it such interpretation as appears best calculated to effectuate its design.” *Application of Omaha Transit Co.*, 167 Neb. 703, 713, 94 N.W.2d 461, 468–69 (1959).

BACKGROUND

I.A. Senator Lou Ann Linehan introduced L.B. 1402 on January 17, 2024. *See* L.B. 1402, 108th Leg., 2d Sess. (2024) (introduced Jan. 17, 2024). As introduced, Section 1 of the bill “hereby appropriate[d] \$25,000,000 from the General Fund for FY2024-25 to the State Treasurer for the purpose of providing grants to scholarship-granting organizations.” *Id.* The bill directed those organizations to “use such grant funds to provide education scholarships to eligible students to pay the costs associated with attending a qualified school.” *Id.*

L.B. 1402 was referred to the Appropriations Committee, Legislative Journal, 108th Leg., 2d Sess. 464 (Jan. 18, 2024), which amended L.B. 1402, *see* AM2679, L.B. 1402, 108th Leg., 2d Sess. (2024) (Feb. 23, 2024). As amended, L.B. 1402 stated that “[i]t is the intent of the Legislature to appropriate twenty-five million dollars from the General Fund . . . for the purpose of providing grants to scholarship-granting organizations as provided in this section.” *Id.* § 1(7)(a). The Committee’s report summarized that, even with the amendment, “L.B. 1402 appropriates \$25 million for FY2024-25 for the purpose of providing for education scholarships to be distributed through the office of the State Treasurer.” Committee Report, Appropriations Committee, 108th Leg. 2d Sess. (Feb. 6, 2024).

Under the Legislature’s rules, any bill that “proposes adoption of a new program or change of an existing program either of which would require an appropriation to implement in the ensuing fiscal year, an appropriation bill for the purposes of funding the provisions of such bill shall be prepared.” Rules of the Nebraska Unicameral Legislature, 108th Leg., Rule 5, § (7)(f) (2023). These bills, called “A” bills, must “accompany the original

bill through all stages of the legislative process.” *Id.* A bill and its “A” bill are voted on separately, but votes are not permitted on “A” bills until their companion bills are approved. *Id.* Rule 5, § (7)(g). Consistent with Rule 5, L.B. 1402A was created and introduced shortly after the Appropriations Committee placed L.B. 1402 on the general file. L.B. 1402A, 108th Leg., 2d Sess. (2024) (introduced Mar. 25, 2024). As introduced, L.B. 1402A “hereby appropriated (1) \$25,000,000 from the General Fund for FY2024-25 and (2) \$31,125,000 from the General Fund for FY2025-26 to the State Treasurer, . . . to aid in carrying out the provisions of Legislative Bill 1402.” L.B. 1402A, § 1, 108th Leg., 2d Sess. (2024) (introduced Mar. 25, 2024).

During legislative debate, the amount appropriated by L.B. 1402 and its “companion” was reduced to \$10 million per fiscal year. As amended, L.B. 1402 stated the “intent of the Legislature to appropriate ten million dollars from the General Fund for fiscal year 2024-25 and each fiscal year thereafter to the State Treasurer for the purpose of providing education scholarships as provided in this section.” AM 3431, L.B. 1402, 108th Leg., 2d Sess. (2024) (adopted Apr. 9, 2024). The very next day, L.B. 1402A was amended to “appropriate[] (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 . . . to aid in carrying out the provisions of Legislative Bill 1402.” AM 3478, L.B. 1402A, § 1, 108th Leg., 2d Sess. (2024) (adopted Apr. 10, 2024).

While debating the bill, the Legislature also modified the structure of the scholarship program. As amended, L.B. 1402 repealed and replaced an existing private-school scholarship program called the Opportunity Scholarships Act. *See* L.B. 1402, 108th Leg., 2d Sess. §§ 2, 3, 4, 6, 7 (2024) (enacted). In its place, the bill established and funded a scholarship-granting program

for students to use at privately operated elementary and secondary schools in Nebraska. *Id.* § 1(1)(c). The Treasurer oversees the program. *Id.* § 1(3). He is authorized to “enter into contracts with up to three program managers” to carry out the program. *Id.* § 1(6). In awarding scholarships, the Treasurer is to give priority to students who have previously received an education scholarship, those whose household income is less than 185 percent of the federal poverty level, those who have an individualized education program, those who are experiencing bullying, and those who are in foster care, among others. *Id.*

In its final form, L.B. 1402 aims to enable more Nebraska parents “to choose among quality educational opportunities” for their children,” *id.* § 1(1)(a), including opportunities in private schools, *see id.* § 1(1)(c), (2)(c). The bill finds that funding this “education of students” is “a fundamental public purpose of state government and constitute[s] an ordinary expense of state government.” *Id.* § 1(1)(a). Both bills passed the Legislature on April 18 and were signed by the Governor at the same time on April 24. Legislative Journal, 108th Leg., 2d Sess. 1816 (Apr. 24, 2024).

B. On April 30, 2024, Intervenors Jenni Benson, Paul Schulte, Tim Royers, and Support Our Schools – Nebraska filed a petition titled the “Private Education Scholarship Partial Referendum” with the Secretary of State. Verified Petition, Ex. 1, at 1. The referendum’s stated object was to “[r]epeal Section 1 of L.B. 1402, passed by the 108th Nebraska Legislature in 2024.” *Id.* at 2. The object statement asserted that “Section 1 of L.B. 1402 . . . 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.” *Id.* Intervenors submitted the signatures they collected in July 2024. Verified Petition at 4. On August 30, Secretary Evnen announced that the

referendum had “met the 100% signature threshold required for verification and certification.” Verified Petition, Ex. 3. He stated that the referendum “will qualify for the general election ballot once verification and certification has been completed.” *Id.* at 1.

II. On September 5, 2024, Latasha Collar applied for leave to docket an original action and verified petition for mandamus. App. for Leave to Commence Original Action (No. S-24-658) (Sept. 5, 2024). This Court granted the application and ordered Collar to show cause why her petition should not be denied on grounds that it is legally insufficient.

By separate order, the Court ordered briefing and scheduled the case for oral argument. That order required the parties to brief three questions identified on pages 6 to 7 of this brief. Earlier today, Jenni Benson, Paul Schulte, Tim Royers, and Support Our Schools – Nebraska, the sponsors of the referendum, petitioned to intervene in the case. This Court granted the petition.

SUMMARY OF THE ARGUMENT

The referendum is invalid because the bill it challenges “mak[es] appropriations for the expense of the state government.” Neb. Const. art. III, § 3. Section 1 of L.B. 1402 makes a \$10 million annual appropriation. The Legislature’s passage of an “A” bill with L.B. 1402 proves that the bill is an appropriation. L.B. 1402’s “A” bill will be inoperative if Section 1 of L.B. 1402 is repealed. Interpreting L.B. 1402 as something other than an appropriation would thus create a significant loophole for the appropriations exception to referenda. That result is inconsistent with the appropriations exception’s purpose, which is to preserve legislative appropriations.

L.B. 1402's appropriation falls within Article III's appropriations exception because it involves an "ordinary running expense[] of the state government." *Bartling v. Wait*, 96 Neb. 532, 537, 148 N.W. 507, 509 (1914). The bill modifies a public benefits program. Such programs account for a large share of the state budget and are typical government expenses. Nothing about L.B. 1402's aid for private education makes it extraordinary. It is not the State's only scholarship program for private education, and most States have some form of a school-choice aid program. The Court should hold that Section 1 of L.B. 1402 is ineligible for a referendum.

ARGUMENT

I. Secretary Evnen Made a Legal Sufficiency Determination.

The Court's first question asks whether Secretary Evnen determined that "constitutional and statutory requirements have been met or made a finding that the referendum is valid and sufficient." The answer is yes. Secretary Evnen's August 30 statement announced that the referendum had met the minimum signature requirements and "will qualify for the general election ballot once verification and certification has been completed." Verified Petition, Ex. 3. Although not stated explicitly, it is implicit in this statement that the referendum met legal sufficiency requirements. State law requires election officials to continue to verify signatures until the requirement has been met by 110 percent. Neb. Rev. Stat. § 32-1409(1) (Reissue 2016). But there is no requirement that a ballot initiative collect 110 percent of the required number of signatures to qualify for the ballot.

Although Secretary Evnen had determined that the referendum met legal sufficiency requirements, after reviewing Collar’s petition, Secretary Evnen is convinced that the referendum is not legally sufficient. As explained below, the ballot measure wrongly seeks a referendum on an appropriation for the expense of the state government. *See* Neb. Const. art. III, § 3. Because his legal sufficiency judgments only “have the force of law until changed by the courts,” Neb. Rev. Stat. § 32-201 (Reissue 2016), and the Court has accepted this suit as an original action, he has not formally rescinded his legal sufficiency determination.

Consistent with the position described below, if this Court dismisses Collar’s petition for ripeness or other procedural reasons, Secretary Evnen will immediately rescind his legal sufficiency determination and not place the referendum on the ballot. At the same time, Secretary Evnen will encourage Intervenors, the referendum’s sponsors, to seek a writ of mandamus compelling him to place the referendum on the ballot. Secretary Evnen believes this Court—not the Secretary of State—should decide whether the referendum appears on the ballot. If this Court rules on the merits of Collar’s arguments, Secretary Evnen will of course abide by that judgment.

II. L.B. 1402 Makes an Appropriation.

The referendum power “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.” Neb. Const. art. III, § 3. An appropriations bill under this section “appropriate[s] or set[s] apart from the public revenue a certain sum of money.” *Lawrence v. Beermann*, 192 Neb. 507, 508, 222 N.W.2d 809, 810 (1974) (per curiam). Black’s Law Dictionary defines an

“Appropriations Bill” as “[a] bill that authorizes governmental expenditures.” *Appropriations Bill*, Black’s Law Dictionary (12th ed. 2024).

L.B. 1402 is an appropriations bill. It accomplishes two objects. *First*, Sections 2, 3, 4, 6, and 7 of L.B. 1402 repeal the Opportunity Scholarships Act. That part of the bill does not appropriate. *Second*, Section 1 of L.B. 1402 with L.B. 1402A together makes a specific appropriation for a replacement education scholarship program. Section 1(3) of L.B. 1402 directs “[t]he State Treasurer” to “establish a program to provide education scholarships to eligible students.” L.B. 1402, § 1(3) 108th Leg., 2d Sess. (2024) (enacted). Section 1(7) of L.B. 1402 creates a permanent appropriations expectation for the Treasurer: “It is the intent of the Legislature to appropriate ten million dollars from the General Fund for fiscal year 2024-25 and each fiscal year thereafter to the State Treasurer for the purpose of providing education scholarships as provided in this section.” *Id.* § 1(7). L.B. 1402A fulfills that expectation for Fiscal Years 2024 and 2025 by adding that “[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” L.B. 1402A, § 1, 108th Leg., 2d Sess. (2024) (enacted).

The referendum seeks the repeal of only Section 1 of L.B. 1402 and not L.B. 1402A (or the sections repealing the Opportunity Scholarships Act). That still implicates the appropriations exception. In substance, Section 1 of L.B. 1402 and L.B. 1402A are a unit. Both are completely ineffective on their own and depend on each other to achieve their purposes. As explained in the background, “A” bills like L.B. 1402A are created out of a primary bill by the Appropriations Committee. Legis. Rule 5, § 7(f). And they must “accompany the original bill through all stages of the

legislative process.” *Id.* Intervenor’s have recognized since the beginning of their effort that Section 1 of L.B. 1402 is inextricably intertwined with L.B. 1402A. Their object statement describes “Section 1 of L.B. 1402”—not L.B. 1402A—as “direct[ing] \$10 million dollars annually for financial grants-in-aid for eligible students.” Verified Petition, Ex. 1, at 2. Intervenor’s all but admit that they seek the repeal of an appropriation.

Holding that this referendum does not implicate an appropriation because it leaves L.B. 1402A untouched would defeat the appropriations exception’s purpose. “It is permissible in seeking the meaning of the constitutional provision to consider the mischief attempted to be avoided and remedied, the object sought to be accomplished, the scope of the remedy its terms imply, and to give it such interpretation as appears best calculated to effectuate its design.” *Application of Omaha Transit Co.*, 167 Neb. 703, 713, 94 N.W.2d 461, 468–69 (1959). “A textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.” Antonin Scalia & Bryan A. Garner, *Reading Law* 63 (2012).

“This canon follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness.” *Id.* This canon opposes a holding that Section 1 of L.B. 1402 does not involve an appropriation for Article III purposes. “[I]f [a] primary bill [is] declared unconstitutional in totality, the accompanying appropriations bill would become, for all practical purposes, a nullity.” Op. Att’y Gen. No. 80-289, 1980 WL 97426 (May 14, 1980). Likewise, repealing a primary bill without the accompanying appropriations bill renders the “A” bill a nullity. The appropriations exception’s purpose is the *preservation* of

appropriations, and referenda that write around an “A” bill subvert that purpose.

Lawrence supports treating Section 1 of L.B. 1402 as an appropriation. The bill subjected to the referendum in *Lawrence*, L.B. 772, 83d Leg., 2d Sess. (1974), “set[] up a new scheme for local public school district taxation and financing.” *Lawrence*, 192 Neb. at 508, 222 N.W.2d at 809. The Court held “[i]t appear[ed] on the face of [the bill] that no appropriation in the constitutional sense was intended” for two reasons. *Id. First*, the bill “set[] up a funding provision, providing for contributions.” *Id. Second*, it “provide[d] that the act shall not become effective until September 1, 1976”—more than two years after it was enacted. *Id.*

L.B. 1402 differs from the *Lawrence* bill on both points. *First*, the absence of an appropriation from L.B. 772 is obvious from the fact it did not have a companion “A” bill. The 1974 Legislative Rules required the creation of an “A” bill anytime a bill “require[d] an appropriation of \$50,000 or more in the ensuing fiscal year.” Rules of the Nebraska Unicameral Legislature, 83d Leg., 2d Sess. Rule 5, § 6(g) (1974). But L.B. 772 never had an “A” bill. Instead, L.B. 772 was a “taxation and financing” bill that “provid[ed] for contributions.” *Lawrence*, 192 Neb. at 508, 222 N.W.2d at 810. By contrast, L.B. 1402 has an “A” bill. And *both* L.B. 1402 and L.B. 1402A identify “the General Fund” as the source of the “ten million dollars” “appropriate[d].” L.B. 1402, § 1(7); L.B. 1402A, § 1.

Second, *Lawrence* held L.B. 772 did not appropriate because it did not take effect until September 1, 1976—almost two years after the 1974 election. 192 Neb. at 508, 222 N.W.2d at 810. The appropriations exception prevents referenda from inflicting “uncertainty and delay” on appropriations. *Bartling v. Wait*, 96 Neb. 532, 537, 148 N.W. 507, 509 (1914). A referendum on

spending that will take place almost two years after the election does not create uncertainty or delay. L.B. 1402 differs from L.B. 772 here too. Section 1 of L.B. 1402 took effect almost two months ago on July 19, 2024. L.B. 1402, § 5. And both L.B. 1402 and its companion “A” bill recognize an appropriation for the current fiscal year. Section 1 of L.B. 1402 states “[i]t is the intent of the Legislature to appropriate ten million dollars from the General Fund for fiscal year 2024-25.” *Id.* § 1. L.B. 1402A likewise describes an appropriation “from the General Fund for FY2024-25.” L.B. 1402A, § 1. The State Treasurer is authorized to use L.B. 1402’s appropriation today. Allowing a referendum on L.B. 1402 creates the significant “uncertainty and delay” that the exception is meant to avoid. *Bartling*, 96 Neb. at 537, 148 N.W. at 509.

* * *

L.B. 1402’s “A” bill confirms L.B. 1402’s status as an appropriations bill. Allowing the sponsors of the referendum to indirectly repeal L.B. 1402 by writing around the “A” bill would create a loophole to Article III’s appropriations exception. The Court should give L.B. 1402 the same interpretation that appears on Intervenors’ object statement. “Section 1 of L.B. 1402 . . . directs \$10 million dollars annually for financial grants-in-aid for eligible students” Verified Petition, Ex. 1, at 2. That describes an appropriation under the Constitution’s appropriations exception for referenda. Neb. Const. art. III, § 3.

III. L.B. 1402 Appropriates Funds for a State Government Expense.

An appropriations bill is excepted from the referendum power if it makes an “appropriation[] 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. The “expense of the

state government” refers to “the ordinary running expenses of the state government.” *Bartling*, 96 Neb. at 538, 148 N.W. at 509; see also *Lawrence*, 192 Neb. at 509, 222 N.W.2d at 810. The “state institutions” exception concerns “buildings.” *Bartling*, 96 Neb. at 538, 148 N.W. at 509. “[A]ppropriations made for the necessary upkeep, improvement, repair, and maintenance of existing public buildings . . . or for minor structures appurtenant thereto, made necessary by stress of circumstances” cannot be referred. *Id.* “[M]oney to be paid for the erection of new and permanent buildings” is subject to the referendum power. *Id.*

L.B. 1402 is not subject to a referendum because it appropriates funds for “the ordinary running expenses of the state government.” *Id.* “Ordinary” means “[o]ccurring in the regular course of events; normal; usual.” *Ordinary*, Black’s Law Dictionary 1325 (11th ed. 2019). “Running” means “continuous.” *Running*, Merriam-Webster’s Dictionary, <https://perma.cc/7ZAG-B5RW>. A *Lawrence* concurring opinion suggests that the “of the state government” condition excludes expenses of political subdivisions. 192 Neb. at 510, 222 N.W.2d at 811 (Newton, J., concurring).

L.B. 1402’s first sentence expresses the Legislature’s judgment that the bill “appropriate[s] . . . for a fundamental public purpose of state government and constitute[s] an ordinary expense of state government.” L.B. 1402, § 1(1)(a). That is correct: The bill reforms a continuous public benefits program, an everyday expense for state governments. L.B. 1402’s program authorizes “education scholarships” to help offset “the costs associated with attending” a “nongovernmental, privately operated elementary or secondary school.” *Id.* § 1(2)(c), (3). And like many public benefits programs, persons of “limited means” receive priority for the benefit. *Id.* §§ 1(1)(d), (3)(a)(ii)–(iv).

None of that is extraordinary. The Legislature’s June 2024 report on the Biennial Budget identifies L.B. 1402 as just one of many appropriations falling within the “State Aid to Individuals/Others” category. FY2023-24 and FY2024-25 Biennial Budget 47 (June 2024), <https://perma.cc/G5D2-BF9L>. That category “includes programs such as Medicaid, public assistance programs, child welfare services and student scholarships where state funds are provided for the direct benefit of an individual.” *Id.* The program also funds education, which accounts for a significant share of state government expenses. *See Nebraska Coal. for Educ. Equity & Adequacy v. Heineman*, 273 Neb. 531, 553, 731 N.W.2d 164, 180–81 (2007) (“direct state aid to education” made up “almost 29 percent of the total state budget”).

L.B. 1402 is not the State’s only scholarship program. L.B. 1329 and L.B. 1329A, enacted earlier this year, together appropriated \$8 million from the General Fund for Nebraska Career Scholarships. L.B. 1329, 108th Leg., 2d Sess. §§ 95–100 (2024) (enacted); L.B. 1329A, 108th Leg., 2d Sess. § 3 (2024) (enacted). That program awards education scholarships to students with top scores on college admissions tests. Neb. Rev. Stat. §§ 85-3003–05 (Cum. Supp. 2022). Last year’s mainline budget bill authorized appropriations for at least one other scholarship program. It appropriated \$1.5 million from the General Fund for the Access College Early Scholarship Program. L.B. 814, 108th Leg., 1st Sess. § 189 (2023) (enacted). That program “provide[s] financial assistance to low-income students” in high schools who wish to take postsecondary courses. Neb. Rev. Stat. § 85-2103 (Reissue 2014). L.B. 1402 comfortably follows in these programs’ wake.

There also is nothing extraordinary about state aid for private education. The Access College Early Scholarship Program permits scholarships for private school education. *See id.* § 85-

2102(4) (Reissue 2014); *see also Postsecondary Institutions Participating in the Access College Early Scholarship Program*, Coordinating Commission for Postsecondary Education, <https://perma.cc/S475-Z348>. Other examples of private-education state aid appear in this Court’s decisions. This Court has previously examined a scholarship program for private and public postsecondary education, *Lenstrom v. Thone*, 209 Neb. 783, 785, 311 N.W.2d 884, 886 (1981), a textbook loan program for students in private schools, *Cunningham v. Lutjeharms*, 231 Neb. 756, 757, 437 N.W.2d 806, 808 (1989), and a mandate that public buses transport private-school students, *State ex rel. Bouc v. Sch. Dist. of Lincoln*, 211 Neb. 731, 732, 320 N.W.2d 472, 474 (1982). The adoption of L.B. 1402’s predecessor ended Nebraska’s status as “the only state in the union that doesn’t provide some sort of ‘school choice.’” Paul Hammel, *Opportunity Scholarship Bill Advances to Provide Tax Credits for Private School Scholarships*, Neb. Examiner (April 13, 2023), <https://perma.cc/V5N3-QDY2>. All of this reinforces the conclusion that L.B. 1402 appropriates funds for an ordinary running expense of state government.

Nothing about the definition of “ordinary running expenses” excludes something that is new. If it did, hardly anything would come within the appropriations exception since all referenda are held on recently enacted statutes. Regardless, private education scholarships for K–12 students are not new to Nebraska. L.B. 1402 replaced an earlier education scholarships program with a new one. The earlier program, called the Opportunity Scholarships Act, created an “education scholarship” program “to pay all or part of the tuition and fees for attending” “nongovernmental, privately operated elementary or secondary school[s].” L.B. 753, §§ 3(2), (4), 108th Leg., 1st Sess. (2023) (enacted). It also gave priority to persons of “limited means.” *Id.*

§ 2(3). The Opportunity Scholarships Act used different channels to award scholarships, working outside the State Treasurer’s office. *Id.* §§ 4–9. L.B. 1402 replaced that Act with a similar program that has a different scheme for implementation.

Bartling does not suggest a different result. That case allowed a referendum on an act that authorized the construction of an armory building in Nebraska City. 96 Neb. at 533, 148 N.W. at 507. *Bartling* devotes most of its analysis to interpreting the “state institutions” exception to refer to “buildings.” *Id.* at 537–38, 148 N.W. at 509. It held that the armory was not a “state institution[] existing at the time such act was passed” because it authorized the construction of a new building. *Id.* at 537, 148 N.W. at 509; Neb. Const. art. III, § 3 (1912). *Bartling* also briefly concludes that the “expense of state government” exception would not cover “money to be paid for the erection of new and permanent buildings.” *Id.* If it did, that would make superfluous Article III’s “existing at the time such act was passed” condition for “state institutions.” Neb. Const. art. III, § 3 (1912). L.B. 1402 does not appropriate funds for the construction of new buildings. It modifies a public benefits program that resembles public benefit programs in other States.

This understanding of the appropriations exception interprets the exception to vindicate its purpose. The exception ensures that government spending is not “interfered with or crippled by the uncertainty and delay which would surely result if appropriations for their expense should be submitted to a referendum vote.” *Bartling*, 96 Neb. at 537, 148 N.W. at 509. That interest is especially significant for in-progress public benefits programs that prioritize persons of limited means.

This understanding also makes the referendum power operative against the great majority of legislation. Less than one-

third of the 150 bills passed in this year’s legislative session had “A” bills. *See Legislative Bills Operative Dates Report*, 108th Leg., 2d Sess. (2024), <https://perma.cc/LWR8-KVX6>. And many bills with “A” bills will not fall within the appropriations exception. State aid to political subdivisions is subject to a referendum. *Lawrence*, 192 Neb. at 510, 222 N.W.2d at 811 (Newton, J., concurring). So is the construction of new facilities. *Bartling*, 96 Neb. at 537, 148 N.W. at 509. And one-off or extraordinary government services or benefit programs can also be referred. None of these categories describes L.B. 1402’s public benefits program. It appropriates an “ordinary running expense[] of the state government,” *Bartling*, 96 Neb. at 537, 148 N.W. at 509, and is accordingly ineligible for a referendum.

CONCLUSION

The Court should grant a peremptory writ compelling Secretary Evnen to remove the Referendum from the ballot.

Dated: September 9, 2024

Respectfully submitted.

MICHAEL T. HILGERS (#24483)
Attorney General of Nebraska

/s/ Eric J. Hamilton
ERIC J. HAMILTON (#25886)
Solicitor General

Nebraska Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509
Tel.: (402) 471-2683
Fax: (402) 471-3297

eric.hamilton@nebraska.gov

ZACHARY A. VIGLIANCO (#27825)
Deputy Solicitor General

ZACHARY B. POHLMAN (#27376)
Assistant Solicitor General

Counsel for Secretary Evnen

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and word-count requirements of Neb. Ct. R. App. P. § 2-103 because it contains 5,245 words excluding this certificate. This brief was prepared using Microsoft Word 365.

/s/ Eric J. Hamilton

ERIC J. HAMILTON

Certificate of Service

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

Jenni Benson represented by Alexander Scott Arkfeld (27277) service method: Electronic Service to **alex@gutmanllc.com**

Jenni Benson represented by Daniel Jacob Gutman (26039) service method: Electronic Service to **daniel@gutmanllc.com**

Jenni Benson represented by Sydney L. Hayes (27051) service method: Electronic Service to **sydney@gutmanllc.com**

Paul Schulte represented by Alexander Scott Arkfeld (27277) service method: Electronic Service to **alex@gutmanllc.com**

Paul Schulte represented by Daniel Jacob Gutman (26039) service method: Electronic Service to **daniel@gutmanllc.com**

Paul Schulte represented by Sydney L. Hayes (27051) service method: Electronic Service to **sydney@gutmanllc.com**

Support Our Schools - Nebraska represented by Alexander Scott Arkfeld (27277) service method: Electronic Service to **alex@gutmanllc.com**

Support Our Schools - Nebraska represented by Daniel Jacob Gutman (26039) service method: Electronic Service to **daniel@gutmanllc.com**

Support Our Schools - Nebraska represented by Sydney L. Hayes (27051) service method: Electronic Service to **sydney@gutmanllc.com**

Tim Royers represented by Alexander Scott Arkfeld (27277) service method: Electronic Service to **alex@gutmanllc.com**

Tim Royers represented by Daniel Jacob Gutman (26039) service method: Electronic Service to **daniel@gutmanllc.com**

Tim Royers represented by Sydney L. Hayes (27051) service method: Electronic Service to **sydney@gutmanllc.com**

Latasha Collar represented by Aubrey Lynne Wells (27956) service method: Electronic Service to **aubrey.wells@huschblackwell.com**

Latasha Collar represented by Brenna Marie Grasz (26794) service method: Electronic Service to **bgrasz@keatinglaw.com**

Latasha Collar represented by Kamron Thomas Mitchell Hasan (25494) service method: Electronic Service to **kamron.hasan@huschblackwell.com**

Latasha Collar represented by Marnie Anne Jensen (22380) service method: Electronic Service to **marnie.jensen@huschblackwell.com**

Signature: /s/ Eric James Hamilton (25886)