CASE NO. S-24-653

IN THE NEBRASKA SUPREME COURT

STATE *ex rel.* ELIZABETH CONSTANCE, et al.,

Relators,

v.

ROBERT B. EVNEN, Nebraska Secretary of State,

Respondent,

ELIZABETH PETERSON, JAN KUEHN, MARK PATEFIELO, and MAUREEN BAUSCH

Intervenors.

Original Action

BRIEF OF INTERVENORS IN SUPPORT OF RESPONDENT

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Statement of Jurisdiction

On August 30, 2024, Relators filed their Application for Leave to Commence an Original Action. The same day, this Court granted the application. This Court generally has original jurisdiction over these kinds of legal-sufficiency pre-election actions for a writ of mandamus under Article V, Section 2 of the Nebraska Constitution and Neb. Rev. Stat. § 24-204. And "[w]hen a party has invoked [the Court's] original jurisdiction . . . , [the Court] may exercise [its] authority to grant requested declaratory relief under the Uniform Declaratory Judgments Act [UDJA] . . . ." *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 1005, 853 N.W.2d 494, 516 (2014) (*Loontjer II*). Despite this, the Court lacks jurisdiction over this action because, as explained below, Relators do not raise an actual case or controversy but rather assert unripe claims dependent on uncertain contingencies.

Statement of the Case

Nature of the Case. Relators request a writ of mandamus and declaratory judgment. (Pet. Prayer for Relief ¶¶ 2–3.) They seek to compel Respondent Secretary of State Robert B. Evnen to deny certification of the Protect Women and Children Initiative and withhold it from the November 2024 ballot. (*Id.* at ¶ 2.) In the alternative, Relators request an order declaring the Initiative invalid. (*Id.* at ¶ 3.)

Relators' action raises the single-subject rule in Article III, Section 2 of the Nebraska Constitution. But even they concede that the initiative "meet[s] the constitutional requirements for inclusion on the ballot." (Pet. ¶ 30.) Relators pursue this action only "to the extent that this Court were to rule" in a different case that a different initiative "cannot properly be placed before voters in November." (*Id.*) These odd circumstances—where Relators reject the merits of their own claims and premise their action on events that might never occur—do not present a ripe case or controversy. Even if they did, the claims fail on the merits, as Relators acknowledge, because the Protect Women and Children Initiative addresses only one subject.

Issues Presented. Based on the Court's August 30, 2024 Order granting leave to commence this case as an original action, the claims set forth in Relators' Verified Petition, and Intervenors' Answer to Relators' Verified Petition, the issues presented are:

1. Whether the Court lacks jurisdiction because Relators have failed to present a ripe case or controversy.

2. Whether the Protect Women and Children Initiative complies with the single-subject rule in Article III, Section 2 of the Nebraska Constitution.

Scope of Review. Relators' entitlement to relief depends on (1) whether the matter is justiciable and (2) whether the Protect Women and Children Initiative encompasses only "one subject," as required by the Nebraska Constitution. "Questions of justiciability and of constitutional interpretation that do not involve factual dispute are questions of law." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 149, 948 N.W.2d 244, 252 (2020). Those legal questions are reviewed de novo. *Id.*

Propositions of Law

1. "Questions of justiciability and of constitutional interpretation that do not involve factual dispute are questions of law." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 948, N.W.2d 244 (2020).

2. Questions of law are reviewed de novo. *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 149, 948 N.W.2d 244, 252 (2020).

3. "[A]n actual case or controversy is necessary for the exercise of judicial power." *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 79, 752 N.W.2d 137, 145 (2008).

4. "A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting." *US Ecology, Inc. v. State, Dep't of Env't Quality*, 258 Neb. 10, 17, 601 N.W.2d 775, 779–80 (1999).

5. The "fundamental principle" of ripeness "is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated." *Great Plains Livestock Consulting, Inc. v. Midwest Ins. Exch., Inc.*, 312 Neb. 367, 373, 979 N.W.2d 113, 119 (2022).

6. Ripeness analysis involves "a two-part inquiry: (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Great Plains Livestock Consulting, Inc. v. Midwest Ins. Exch., Inc.*, 312 Neb. 367, 374, 979 N.W.2d 113, 119 (2022). The first inquiry is jurisdictional; the second is prudential. *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 79–80, 752 N.W.2d 137, 145–46 (2008).

7. The fitness-for-decision inquiry "safeguards against judicial review of hypothetical or speculative disagreements." *Great Plains Livestock Consulting, Inc. v. Midwest Ins. Exch., Inc.*, 312 Neb. 367, 374, 979 N.W.2d 113, 119 (2022).

8. Cases fail the fitness-for-decision inquiry when additional developments are "necessary to clarify a concrete legal dispute"—in other words, when the relator seeks "an advisory opinion regarding contingent future events." *Shepard v. Houston*, 289 Neb. 399, 407, 855 N.W.2d 559, 566 (2014).

9. "A determination regarding ripeness depends upon the circumstances in a given case and is a matter of degree." *Williams v. Frakes*, 315 Neb. 379, 385, 996 N.W.2d 498, 503 (2023).

10. In an original action, it is only "[w]hen a party has invoked [the Court's] original jurisdiction under one of the causes of action specified in Neb. Const. art. V, § 2" that the Court "may exercise [its] authority to grant requested declaratory relief under the [UDJA]." *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 1005, 853 N.W.2d 494, 516 (2014).

11. A claim for declaratory judgment, no less than other claims, must "present a justiciable controversy which is ripe for judicial determination." *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 79, 752 N.W.2d 137, 145 (2008).

12. "[A] declaratory judgment will generally not lie where another equally serviceable remedy is available." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 162, 948 N.W.2d 244, 260 (2020). In a pre-election legal-sufficiency case like this, a meritorious "application for a writ of mandamus" provides such an "equally serviceable remedy." *Id.*

13. "The 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." Neb. Const. art. III, § 2.

14. "Initiative measures shall contain only one subject." Neb. Const. art. III, § 2.

15. The Court applies the "natural and necessary connection" test to determine if an initiative "contain[s] only one subject." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 151, 948 N.W.2d 244, 253 (2020).

16. "Where 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." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 151, 948 N.W.2d 244, 253 (2020) (cleaned up).

17. "The controlling factors in this inquiry are the initiative's singleness of purpose and the relationship of other details to its general subject." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 151, 948 N.W.2d 244, 253 (2020).

18. An initiative's general subject is defined by its "primary purpose." *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 151, 948 N.W.2d 244, 253 (2020).

19. "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).

20. Logrolling "is sometimes described as including favored but unrelated propositions in a proposed amendment to ensure passage of a provision that might otherwise fail." *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 995, 853 N.W.2d 494, 510 (2014).

21. Though "[t]he words in a constitutional provision" are often interpreted according to "their most natural and obvious meaning," at times "the subject indicates or the text suggests that they are used in a technical sense." *State ex rel. Peterson v. Shively*, 310 Neb. 1, 10, 963 N.W.2d 508, 516 (2021).

22. "If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Clark v. Scheels All Sports, Inc.*, 314 Neb. 49, 68, 989 N.W.2d 39, 52 (2023) (citation omitted).

Statement of Facts

At issue here is the Protect Women and Children Initiative (the "Children Initiative" or "Initiative"). Its sponsors filed the Initiative with the Nebraska Secretary of State on March 21, 2024. (Pet. ¶ 6; Answer ¶ 6.) The Initiative would amend Article I of the Nebraska Constitution by adding a new section (Section 31). (Pet. ¶ 7; Answer ¶ 7.) The new section would read: "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." (Pet. Ex. 2; Answer ¶ 9.)

The "object" language on the initiative petition was virtually identical: "The object of this petition is to . . . [a]mend the Nebraska Constitution to provide that 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." (Pet. Ex. 2.)

On July 3, 2024, the sponsors of the Children Initiative submitted sufficient signatures for it to be placed on the 2024 ballot. (Pet. ¶ 11; Answer ¶ 11.) The Attorney General then prepared an explanatory statement and ballot title pursuant to Neb. Rev. Stat. § 32-1410(1). (Pet. ¶¶ 14–15; Answer ¶¶ 14–15.) The explanatory statement would read:

> *A vote "FOR" will amend the Nebraska Constitution to provide that, 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.*
>
> *A vote "AGAINST" will not amend the Nebraska Constitution in such manner.*

(Pet. ¶ 14; Answer ¶ 14.) And the ballot title would read:

> Shall the Nebraska Constitution be amended to include a new section which provides:
>
> "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."

(Pet. ¶ 15; Answer ¶ 15.)

The Secretary of State confirmed on August 23, 2024, that the Children Initiative met the signature requirements and would be placed on the November 2024 ballot. (Pet. ¶ 21; Answer ¶ 21.)

Over the last year, a different group of initiative sponsors has been working to qualify another abortion-related initiative for the November 2024 ballot. That initiative is entitled "Protect the Right to Abortion" (the "Abortion Initiative"). (Pet. ¶ 5.) If approved by the voters, the Abortion Initiative would amend the Nebraska Constitution to

state that "[a]ll 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." (Pet. Ex. 1.) The Abortion Initiative also includes a novel redefinition of "fetal viability" (*id.*), transforming it from the "stage of human development when the unborn child is *potentially* able to live more than *merely momentarily* outside the womb of the mother by natural *or artificial means*," Neb. Rev. Stat. § 28-326 (emphasis added), to the point when "there is a *significant likelihood* of the fetus' *sustained survival* outside the uterus without the application of *extraordinary medical measures*" (Pet. Ex. 1).

Two original actions have been filed with this Court to block the Abortion Initiative from appearing on the November ballot. (Pet. ¶ 28.) One was brought by Carolyn I. LaGreca, and the other by Dr. Catherine Brooks. (Pet. ¶¶ 24–28.) In response to those challenges, Relators filed an Application for Leave to Commence an Original Action with an attached Verified Petition for Writ of Mandamus and Declaratory Judgment in this matter. Relators raise two counts: (1) "Violation of the Single Subject Rule, Nebraska Constitution, Article III, § 2"; and (2) "Creation of Voter Confusion and Doubt." (Pet. ¶¶ 31–43.) They base their second count on caselaw construing the single-subject rule. (Pet. ¶ 40.)

Relators "assert that both the [Abortion Initiative] and the [Children Initiative] meet the constitutional requirements for inclusion on the ballot." (Pet. ¶ 30.) Yet they claim that if the Court accepts "[t]he legal arguments made in the LaGreca and Brooks petitions" and removes the Abortion Initiative from the November 2024 ballot, the Children Initiative would also need to be removed. (Pet. ¶¶ 29–30.)

On September 4, the sponsors of the Children Initiative filed a Petition to Intervene and an Answer to Relators' Verified Petition for Writ of Mandamus and Declaratory Judgment. *See* Neb. Rev. Stat. § 32-1412(2). The Court promptly granted that request to intervene, and Intervenors now file this brief.

Summary of Argument

The Court lacks jurisdiction over this action because Relators fail to raise a ripe case or controversy. Relators admit that the Children Initiative meets the constitutional requirements for inclusion on the ballot. So they premise their case on this Court reaching a particular outcome, and adopting a specific line of reasoning, in other pending actions—uncertain contingencies that might never occur. Such conditional claims, which by design hinge on the outcome of separate cases, are not justiciable.

Relators' claims also falter on their merits, which is not surprising given Relators' recognition that the Children Initiative satisfies the single-subject rule. The Initiative contains only one subject, and all its contents fall squarely within its primary purpose. That purpose is to create explicit constitutional protection for unborn children from abortion after the first trimester that closely reflects existing protection under Nebraska statutes. Nebraska law currently shields unborn children from abortion after 12 weeks gestation, subject to exceptions for medical emergencies, sexual assault, and incest. The Children Initiative would similarly protect those children from abortion after the first trimester (or 13 weeks), subject to the same exceptions. Because every clause of the Initiative furthers its primary purpose, the single-subject rule is satisfied.

Argument

I. The Court lacks jurisdiction because Relators do not present an actual case or controversy but raise only unripe claims based on uncertain contingencies.

"[A]n actual case or controversy is necessary for the exercise of judicial power." *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 79, 752 N.W.2d 137, 145 (2008). "A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting." *US Ecology, Inc. v. State, Dep't of Env't Quality*, 258 Neb. 10, 17, 601 N.W.2d 775, 779–80 (1999).

Ripeness is one prerequisite of a case or controversy. The "fundamental principle" of ripeness "is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated." *Great Plains Livestock Consulting, Inc. v. Midwest Ins. Exch., Inc.*, 312 Neb. 367, 373, 979 N.W.2d 113, 119 (2022).

Ripeness analysis involves "a two-part inquiry: (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* at 374, 979 N.W.2d at 119. The first inquiry is jurisdictional; the second is prudential. *City of Omaha*, 276 Neb. at 79–80, 752 N.W.2d at 145–46. Relators' claims fail under the first part, which deprives this Court of jurisdiction.

The fitness-for-decision inquiry "safeguards against judicial review of hypothetical or speculative disagreements." *Great Plains Livestock Consulting*, 312 Neb. at 374, 979 N.W.2d at 119. Cases fail that inquiry when additional developments are "necessary to clarify a concrete legal dispute"—in other words, when the relator seeks "an advisory opinion regarding contingent future events." *Shepard v. Houston*, 289 Neb. 399, 407, 855 N.W.2d 559, 566 (2014). "A determination regarding ripeness depends upon the circumstances in a given case and is a matter of degree." *Williams v. Frakes*, 315 Neb. 379, 385, 996 N.W.2d 498, 503 (2023). A case is not ripe when the issue presented is "conjectural or hypothetical pending the outcome of [other] lawsuits." *Cf. Great Plains Livestock Consulting*, 312 Neb. at 377, 979 N.W.2d at 121.

A. Relators' claim for a writ of mandamus is not justiciable.

Relators' claim for a writ of mandamus does not present a ripe controversy. Notably, Relators do *not* argue that the Children Initiative is legally insufficient. On the contrary, they explicitly "assert" that the Initiative "meet[s] the constitutional requirements for inclusion on the ballot" and that "Nebraska voters are entitled to consider [it] in

November." (Pet. ¶ 30.) When parties come to court and agree with their opponents on the core legal question presented, there is no case or controversy to adjudicate.

Rather than squarely challenging the Children Initiative, Relators present claims that are contingent on something that has not—and might not ever—happen: this Court adopting the legal analysis in the pending challenges to the Abortion Initiative. Relators could not have been clearer about the contingent nature of their claims. They say "to the extent . . . this Court were to rule that the [Abortion Initiative] cannot properly be placed before voters in November, it must make the same ruling as to the [Children Initiative]." (Pet. ¶ 30.) Under Count 1, they reiterate that their claims arise only "[i]f the Court were to adopt the legal reasoning espoused in the LaGreca and/or Brooks petitions against the [Abortion Initiative]." (Pet. ¶¶ 35–36.) And under Count 2, Relators similarly qualify that their claims depend on embracing "the legal reasoning espoused in the LaGreca and Brooks petitions against the [Abortion Initiative]." (Pet. ¶¶ 41–42.)

If that weren't enough, Relators concede that their two substantive requests for relief apply only "if the Court decides to issue a writ of mandamus requiring Respondent to deny certification and withhold from the ballot . . . the [Abortion] Initiative, or alternatively, if the Court issues a writ of mandamus requiring the Respondent to abstain from counting and certifying the election results on the [Abortion Amendment]." (Pet. Prayer for Relief ¶¶ 2–3.) Such conditional claims, which rest on the uncertainty of how the Court will resolve *other* pending actions, are not ripe for adjudication. *See US Ecology*, 258 Neb. at 18, 601 N.W.2d at 780 (finding no "actual case in controversy" because it "remained uncertain" whether the state would deny the plaintiff company's application).

B. Relators' claim for a declaratory judgment is not justiciable.

Relators' declaratory judgment request fares no better than their claim for a writ of mandamus. The Court should decline to address it for three reasons.

First, because Relators' claim for a writ of mandamus is not justiciable, the Court lacks jurisdiction over the accompanying declaratory judgment claim. In an original action, it is only "[w]hen a party has invoked [the Court's] original jurisdiction under one of the causes of action specified in Neb. Const. art. V, § 2" that the Court "may exercise [its] authority to grant requested declaratory relief under the [UDJA]." *Loontjer II*, 288 Neb. at 1005, 853 N.W.2d at 516. So in a case like this, where a party has *not* properly invoked the Court's original jurisdiction, there is no authority to grant a declaratory judgment. Here, Relators' only basis for invoking this Court's "original jurisdiction" is that they are "seek[ing] a writ of mandamus." (Pet. ¶ 4.) Because that mandamus claim is not justiciable, the Court lacks jurisdiction to grant a declaratory judgment.

Second, a claim for declaratory judgment, no less than other claims, must "present a justiciable controversy which is ripe for judicial determination." *City of Omaha*, 276 Neb. at 79, 752 N.W.2d at 145; accord *US Ecology*, 258 Neb. at 17, 601 N.W.2d at 780 ("[A] court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination."). For the same reasons explained above, see *supra* § I.A., Relators' declaratory judgment claim—just like their request for a writ of mandamus—fails to present a ripe case or controversy.

Third, "a declaratory judgment will generally not lie where another equally serviceable remedy is available." *Wagner*, 307 Neb. at 162, 948 N.W.2d at 260. In a pre-election legal-sufficiency case like this, a meritorious "application for a writ of mandamus" provides such an "equally serviceable remedy." *Id.* So declaratory judgments are off the table.

II. The Court should deny the Verified Petition because the Children Initiative complies with the single-subject rule.

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." Neb. Const. art. III, § 2. This form of direct democracy is subject to an important limitation: "Initiative measures shall contain only one subject." *Id.* This is commonly referred to as the "single subject rule." *State ex rel. McNally v. Evnen*, 307 Neb. 103, 117, 948 N.W.2d 463, 476 (2020) (plurality opinion). The single-subject rule is a procedural aspect of an initiative's legal sufficiency. *Wagner*, 307 Neb. at 150–51, 948 N.W.2d at 253.

The single-subject rule itself was added to the Nebraska Constitution by a direct vote of the people. It was proposed by the Legislature in 1997, *see* 1997 Neb. Laws, L.R. 32CA, and approved by the voters in 1998, *see Wagner*, 307 Neb. at 151 n.16, 948 N.W.2d at 253 n.16. The core purposes of the single-subject rule are "to avoid voter confusion and logrolling." *Christensen v. Gale*, 301 Neb. 19, 31, 917 N.W.2d 145, 156 (2018); *see also Loontjer II*, 288 Neb. at 998, 853 N.W.2d at 512 ("The committee hearing [that discussed whether to add the single-subject requirement to Article III, Section 2] shows that senators were concerned about the potential for voter confusion and fraud in the initiative process.").

This Court applies the "natural and necessary connection" test to determine if an initiative "contain[s] only one subject." *Wagner*, 307 Neb. at 151, 948 N.W.2d at 253 ("We follow the natural and necessary connection test for determining whether a voter ballot initiative violates the single subject rule."). Caselaw describes the test this way: "Where 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." *Id.* (cleaned up). "The controlling factors in this inquiry are the initiative's single-

ness of purpose and the relationship of other details to its general subject." *Id.* The general subject is defined by the initiative's "primary purpose." *Id.*

Analysis under the natural-and-necessary-connection test begins by identifying the initiative's general subject, *Loontjer II*, 288 Neb. at 1001–03, 853 N.W.2d at 514–15, which, again, is "defined by its primary purpose," *Wagner*, 307 Neb. at 151, 948 N.W.2d at 253. The test does not bar secondary purposes but simply requires such secondary objectives to have a natural and necessary connection to the primary purpose. *See Christensen*, 301 Neb. at 34, 917 N.W.2d at 157 (concluding that "maximizing federal funding" for Medicaid expansion is "a detail related to the singleness of purpose of expanding Medicaid").

Applying these principles to the Children Initiative confirms that it "contain[s] only one subject" and should be placed on the November 2024 ballot for consideration by Nebraska voters.

A. The Children Initiative has only one subject, and all its content fits squarely within its primary purpose.

Assessing the Children Initiative's legal sufficiency starts by identifying its general subject and primary purpose. The Initiative's text and its object statement are helpful guides. *See Wagner*, 307 Neb. at 154, 948 N.W.2d at 255 (looking to these materials for evidence of the general subject). The proposed amendment states that "[e]xcept 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." (Pet. Ex. 2; Answer ¶ 9.) And the "object" statement similarly says that "[t]he object of this petition is to . . . [a]mend the Nebraska Constitution to provide that 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." (Pet. Ex. 2; Pet. to Intervene ¶ 6.)

These materials demonstrate that the general subject of the Children Initiative—as determined by its primary purpose—is the creation of constitutional protection for unborn children from abortion after the first trimester that resembles existing protection under Nebraska statutes. Those statutes presently protect unborn children from abortion after 12 weeks gestation. Neb. Rev. Stat. § 71-6915(2)(b). The Children Initiative would similarly protect those children after the first trimester—three months (or 13 weeks) into the pregnancy. (Meanwhile, by limiting abortions in the second and third trimesters, the measure also protects women because the health risks to women who have abortions escalate as gestational age increases. *E.g.*, Lauren Lederle et. al., *Obesity as a Risk Factor for Complication After Second-Trimester Abortion by Dilation and Evacuation*, 126 Obstetrics & Gynecology 585–92 (Sept. 2015) (finding that "later gestational duration is associated with an increased risk of complications"); Suzanne Zane et. al., *Abortion-Related Mortality in the United States 1998–2010*, 126 Obstetrics & Gynecology 258, 258 (Aug. 2015) (finding that "[t]he mortality rate increased with gestational age").)

The Children Initiative's treatment of "medical emergency," "sexual assault," and "incest" furthers the measure's primary purpose by conforming the protection for unborn children to existing Nebraska statutes. Indeed, Nebraska law currently allows abortions, just as the Initiative would, in the following three situations:

> (1) in cases of "[m]edical emergency," Neb. Rev. Stat. § 71-6915(3)(a); *see also* Neb. Rev. Stat. § 28-347(1) (allowing "a dismemberment abortion [when] necessary due to a medical emergency"); Neb. Rev. Stat. § 28-3,103(4) (defining "[m]edical emergency"); Neb. Rev. Stat. § 28-3,105(1) (allowing abortions "in the case of a medical emergency"); Neb. Rev. Stat. § 71-6901(8) (defining "[m]edical emergency"); Neb. Rev. Stat. § 71-6914(3) (defining "[m]edical emergency");

(2) when the "[p]regnancy result[s] from sexual assault," Neb. Rev. Stat. § 71-6915(3)(b); *see also* Neb. Rev. Stat. § 28-319 (defining crime of "sexual assault"); Neb. Rev. Stat. § 28-319.01 (defining crime of "sexual assault of a child"); and

(3) when the "[p]regnancy result[s] from incest," Neb. Rev. Stat. § 71-6915(3)(c); *see also* Neb. Rev. Stat. § 28-703 (defining crime of "incest").

Understood in these terms, there is no secondary purpose to analyze under the natural-and-necessary-connection test. The primary purpose of creating constitutional protection for unborn children from abortion that closely mirrors existing Nebraska law encompasses every part of the Children Initiative. This includes the Initiative's protection for unborn children in the second trimester, protection for unborn children in the third trimester, and exceptions for medical emergencies, sexual assault, and incest. Because every aspect of the Initiative fits within its general subject and primary purpose, the single-subject rule is satisfied.

B. Relators' single-subject allegations lack merit.

Relators suggest that (1) the Children Initiative might include "proposals" that do not satisfy the natural-and-necessary-connection test (Pet. ¶ 37); (2) the Initiative could amount to logrolling (Pet. ¶ 38); and (3) the Initiative may confuse voters and create doubt (Pet. ¶¶ 40–43). None of these points is persuasive.

1. Past application of the natural-and-necessary-connection test forecloses Relators' action.

Relators imply that "arguably-separate proposals" lurk within the Children Initiative's two short clauses. (Pet. ¶ 37.) But both clauses are part and parcel of the Initiative's primary purpose of creating constitutional protection for unborn children from abortion that reflects the protection already afforded them in existing Nebraska statutes.

Wagner is instructive on the proper framing of an initiative's general subject. 307 Neb. 142, 948 N.W. 2d 244. There, the Court considered a ballot initiative that would have legalized medicinal cannabis use. After assessing the initiative's language, the Court concluded that "[a]t an appropriate level of specificity," the initiative's "general subject [was] to create a constitutional right for persons with serious medical conditions to produce and medicinally use an adequate supply of cannabis, subject to a recommendation by a licensed physician or nurse practitioner." *Id.* at 153, 948 N.W.2d at 254–55. Notably, this characterization encompassed a limitation on the newly created constitution right. Similarly, here, the Children Initiative would "create a constitutional right" protecting unborn children from abortion after the first trimester, "subject to" medical emergencies, sexual assault, and incest. This framing of the Initiative's general subject, just like the formulation in *Wagner*, properly includes built-in limits on the new constitutional right. Any attempt by Relators to separate them runs afoul of *Wagner*.

What's more, the link between protecting unborn children from abortion and affording limited exceptions based on tragedies affecting their mothers is one of the most *natural* connections imaginable. During pregnancy, an unborn child is physically connected to the mother, and in some circumstances, a medical emergency means that without intervention one or both lives will be lost. The limited circumstances of a medical emergency, sexual assault, or incest are a natural place to consider women's interests. Demonstrating this close relationship, current Nebraska statutes contain these same exceptions within the very provision that protects children from abortion after twelve weeks gestation. Neb. Rev. Stat. § 71-6915. *Cf. Wagner*, 307 Neb. at 161, 948 N.W.2d at 259 ("That our laws have naturally separated these limitations" into "numerous [different] statutes" is "strong evidence that they are their own general subjects and not naturally or necessarily connected to the production and medicinal use of cannabis.").

2. The Children Initiative does not implicate concerns of logrolling.

"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." *Wagner*, 307 Neb. at 151, 948 N.W.2d at 253. "It is sometimes described as including favored but unrelated propositions in a proposed amendment to ensure passage of a provision that might otherwise fail." *Loontjer II*, 288 Neb. at 995, 853 N.W.2d at 510. Logrolling concerns are absent in this case for at least two reasons.

First, logrolling is not implicated for the same reasons that all aspects of the Children Initiative are naturally and necessarily connected to its general subject and primary purpose. *See supra* §§ II.A. & II.B.1. Satisfaction of the natural-and-necessary-connection test means that no parts of the Children Initiative are dissimilar and thus that logrolling is not occurring. *See Wagner*, 307 Neb. at 157, 948 N.W.2d at 257 (discussing *Christensen* and noting that "[t]he similarity between [the initiative's] two purposes demonstrated a singleness of purpose and a lack of logrolling concerns").

Second, a primary concern of logrolling is giving voters an unrelated benefit to "sweeten" an initiative they would otherwise reject. *Loontjer II* is a classic example. 288 Neb. at 973, 853 N.W.2d at 494. The Court there found no "natural and necessary connection" between "legalizing . . . new form[s] of wagering" and a "proposal to use tax revenues from . . . wagering for property tax relief." *Id.* at 1004, 853 N.W.2d at 515. Property tax relief's "only connection" to the authorization of gambling was to provide a new benefit to "enhance the odds that voters would approve the new form[s] of wagering." *Id.* Here, in contrast, no one suggests that the exceptions for medical emergencies, sexual assault, and incest provide new and unrelated inducements. Indeed, those exceptions already exist in Nebraska. *See supra* pp. 20–21 (collecting statutes).

3. The Children Initiative will not confuse voters or create doubts because the language is clear and rooted in existing Nebraska law.

Relators say that terms like "unborn children," "medical emergency," "sexual assault," and "incest" in the Children Initiative "create confusion and serious doubt" that raise single-subject problems. (Pet. ¶¶ 41–43.) Assuming questions of voter confusion and doubt are separate considerations in single-subject analysis under Article III, Section 2, *but see Wagner*, 307 Neb. at 157, 948 N.W.2d at 256 (bypassing the three-part test that included voter confusion and doubt), the Children Initiative does not create any confusion or ambiguity because its key terms are abortion-specific concepts that are well understood in Nebraska law.

Though "words in a constitutional provision" are often interpreted according to "their most natural and obvious meaning," at times, as here, "the subject indicates or the text suggests that they are used in a technical sense." *State ex rel. Peterson v. Shively*, 310 Neb. 1, 10, 963 N.W.2d 508, 516 (2021). When construing a new constitutional provision that protects unborn children from abortion, the proper approach to unpacking the key constitutional terms is to consult their technical meaning in existing Nebraska abortion law. As this Court recently observed, "[i]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Clark v. Scheels All Sports, Inc.*, 314 Neb. 49, 68, 989 N.W.2d 39, 52 (2023) (citation omitted); *see also United States v. Hansen*, 599 U.S. 762, 774–81 (2023) (applying the "old soil" principle to terms used in their "specialized, criminal-law sense"). Here, that soil provides rich and well-defined meanings for the key terms in the Children Initiative.

Start with "medical emergency," "sexual assault," and "incest." "Medical emergency" is defined in no less than three abortion-related statutes. *See* Neb. Rev. Stat. § 28-3,103(4) ("Medical emergency means a condition which, in reasonable medical judgment, so complicates the

medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function."); Neb. Rev. Stat. § 71-6901(8) (same); Neb. Rev. Stat. § 71-6914(3) (similar). "Sexual assault" and "incest" are also explicitly delineated in Nebraska's abortion statutes. *See* Neb. Rev. Stat. § 71-6915(3)(b)–(c) (providing that sexual assault is defined in Neb. Rev. Stat. § 28-319 and Neb. Rev. Stat. § 28-319.01 and incest is defined in Neb. Rev. Stat. § 28-703).

Straining to generate doubt where there is none, Relators also suggest that the term "unborn children" in the Initiative will have nefarious "collateral effects" such as potentially creating "multiple new constitutional rights for gestating fetuses." (Pet. ¶ 42.) This is wrong. The text of the Initiative identifies a specific right for "unborn children"—"protect[ion] from abortion" after the first "trimester[]" with exceptions for medical emergencies, sexual assault, and incest. It goes no further.

Nor is there anything abnormal or pernicious about using the term "unborn children" to refer to babies in the womb. Nebraska abortion statutes are replete with references to the "unborn child" and "unborn children." *E.g.*, Neb. Rev. Stat. § 28-327; Neb. Rev. Stat. § 28-329; Neb. Rev. Stat. § 28-347. That term means "an individual organism of the species homo sapiens from fertilization until live birth." Neb. Rev. Stat. § 28-3,103(9); *see also* Neb. Rev. Stat. § 71-6914(4) (similarly defining "[p]reborn child" as "an individual living member of the species homo sapiens, throughout the embryonic and fetal stages of development to full gestation and childbirth"). And the Legislature has already declared its desire "to provide protection for the life of the unborn child whenever possible." Neb. Rev. Stat. § 28-325. Given all this, it is baseless to suggest that including the term "unborn children" in the Initiative will somehow create mysterious "unspecified collateral" rights beyond those spelled out in the text.

In short, the Children Initiative poses no risk that voters might be surprised "by the inadvertent passage of a surreptitious provision coiled up in [its] folds," *Loontjer v. Robinson*, 266 Neb. 902, 921, 670 N.W.2d 301, 315 (2003) (Wright, J., concurring) (cleaned up) (*Loontjer I*), because the terms are well defined in Nebraska law and the initiative specifies the precise protection afforded unborn children.

Conclusion

The Court lacks jurisdiction over this case because Relators' claims are unripe and contingent on uncertain future events. Relators' claims also fail on the merits because the Children Initiative easily satisfies the single-subject requirement in Article III, Section 2 of the Nebraska Constitution.

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Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief (1) complies with the typeface requirements of Neb. Ct. R. App. P. § 2-103, (2) complies with that rule's word count requirements because it contains 6,811 words (excluding this certificate), and (3) was prepared using Word Microsoft 365.

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Certificate of Service

I hereby certify that on September 5, 2024, this brief was filed using the Court's electronic filing system and served via e-mail on the following:

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

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