IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LS POWER MIDCONTINENT, LLC; and SOUTHWEST TRANSMISSION, LLC, Plaintiffs, vs. STATE OF IOWA; IOWA UTILITIES BOARD; GERI D. HUSER; GLEN DICKINSON; and LESLIE HICKEY, Defendants.	Case No. CVCV060840 DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss this action. In support of this motion, Defendants state as follows:

I. INTRODUCTION

This case resembles *LSP Transmission Holdings, LLC v. Federal Energy Regulatory Commission (LSP I)*, 700 F. App'x 1 (D.C. Cir. 2017) (per curiam). *LSP I* arose after the Federal Energy Regulatory Commission (FERC) issued "Order 1000," which the court in *LSP I* characterized as overhauling FERC's "rules governing the planning and development of electric transmission." *Id*. at 1-2. Order 1000 eliminated federal rights of first refusal (ROFRs), which in context means "rights to have a first crack at constructing an electricity transmission project." *MISO Transmission Owners v. Fed. Energy Regulatory Comm'n*, 819 F.3d 329, 331 (7th Cir. 2016). But although Order 1000 eliminated *federal* ROFRs, it anticipated *state* ROFRs and was expressly intended not "to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities." *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, ¶ 227, 76 Fed. Reg. 49,842,

49,880 (Aug. 11, 2011); *see also MISO Transmission Owners*, 819 F.3d at 336. Accordingly, "in response to Order 1000," several states "enacted a state statutory ROFR" to restore or continue the state of affairs preceding Order 1000. *LSP Transmission Holdings, LLC v. Sieben (LSP II)*, 954 F.3d 1018, 1024 (8th Cir. 2020). During the 2020 legislative session, Iowa joined the list of states with statutory ROFRs by enacting House File (HF) 2643. (Petition ¶ 13.)

Plaintiff LS Power Midcontinent, LLC ("LS Power") "is a transmission company that would like to compete with the incumbent transmission companies to build [transmission] projects." *MISO Transmission Owners*, 819 F.3d at 335. (Petition ¶¶ 27, 34.) Plaintiff Southwest Transmission, LLC also fits that description. (Petition ¶¶ 27, 34.) Transmission companies like Plaintiffs have sought both to invalidate state statutory ROFRs directly, and to overturn FERC orders that have approved tariffs authorizing ROFRs. Both types of challenges have been uniformly unsuccessful. *See LSP II*, 954 F.3d at 1022-23 (rejecting a dormant commerce clause challenge to Minnesota's statutory ROFR); *NextEra Energy Capital Holdings, Inc. v. Walker*, No. 19-CV-626-LY, 2020 WL 3580149, at *8 (W.D. Tex. Feb. 26, 2020) (dismissing a dormant commerce clause challenge to Texas's statutory ROFR); *see also LSP I*, 700 F. App'x at 2 (noting a challenge to FERC's approval of a tariff that included ROFRs); *MISO Transmission Owners*, 819 F.3d at 336-37 (noting a challenge to FERC's approval of a tariff honoring ROFRs "created by state and local law"). Plaintiffs' challenge in this case similarly seeks to eliminate a state ROFR; however, it must be dismissed for several reasons.

First, Plaintiffs lack standing because the injuries the petition alleges are hypothetical and speculative, and Plaintiffs' assertion that they have suffered actual, imminent injury (Petition ¶ 35) is a legal conclusion not entitled to any presumption of truth. *See Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014). Second, and similarly, Plaintiffs' claims are not yet ripe because

no specific electric transmission project in Iowa (that would be subject to the statutory ROFR) has been identified.[1] Several of Plaintiffs' claims are also subject to dismissal for claim-specific reasons. For example, Plaintiffs' challenges under article III, section 29 of the Iowa Constitution (Count I and Count II) are untimely because the relevant session law has already been codified. Moreover, Plaintiffs do not state a claim upon which the Court can grant relief because their claims under the title clause and the equal protection clause of the Iowa Constitution (Count II and Count III) fail on the merits.

If the Court does not dismiss the case entirely or dismiss individual counts, the Iowa Utilities Board ("IUB" or "the Board"), Geri Huser, Glen Dickinson, and Leslie Hickey should still be dismissed because they are unnecessary. *See King v. State*, 818 N.W.2d 1, 35 (Iowa 2012) (concluding that, "[g]iven [the] disposition of plaintiffs' substantive claims," there was no need to reach the contention that one person was "not a proper defendant"). Dismissing IUB and the individual defendants from the case would not realistically foreclose any measure of the relief Plaintiffs have sought, because the State of Iowa is also named.

II. MOTION TO DISMISS STANDARD

"A motion to dismiss tests the legal sufficiency of the challenged pleading." *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 194 (Iowa 2007). The petition's facts are "assessed in the light

[1] Additionally, if Plaintiffs' claims eventually ripen, any challenge to agency action by the Iowa Utilities Board—like an instance in which the Board decides whether to grant a franchise to construct, erect, maintain, or operate an electric transmission line under Iowa Code chapter 478—is exclusively subject to judicial review under chapter 17A rather than actions seeking declaratory and injunctive relief. *See* Iowa Code § 17A.19; *Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 835 (Iowa 1979); *cf. Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 835 (Iowa 2019) (noting petitioners sought judicial review to challenge the Board's finding that a proposed oil pipeline would promote public convenience and necessity). Further, a challenge to FERC action regarding a particular electric transmission project—such as an approval of a relevant tariff—might be available through federal review procedures. *See MISO Transmission Owners*, 819 F.3d at 336-37 (noting a challenge to FERC's approval of a tariff honoring ROFRs).

most favorable to the plaintiffs, and all doubts and ambiguities are resolved in the plaintiffs' favor." *Id.* However, the Court does *not* presume the petition's legal conclusions are true or resolve them in the plaintiff's favor. *Shumate*, 846 N.W.2d at 507; *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 8 (Iowa 2006). When properly stripped of bare legal conclusions, Plaintiffs' petition in this case is legally insufficient and therefore must be dismissed.

III. ARGUMENT

A. Plaintiffs Allege Only Speculative Injuries and Therefore Lack Standing.

"Courts have traditionally been cautious in exercising their authority to decide disputes." *Godfrey v. State*, 752 N.W.2d 413, 417 (Iowa 2008). They generally "refuse to decide disputes presented in a lawsuit when the party asserting an issue is not properly situated to seek an adjudication." *Id.* A party that is properly situated has standing. *See id.* Standing is required for single-subject challenges under article III, section 29 of the Iowa Constitution, and single-subject challenges brought by litigants who lack standing are subject to dismissal. *See id.* at 416 ("This appeal involves a claim by a litigant that the Iowa legislature violated the single-subject rule of the Iowa Constitution . . . . The district court concluded the litigant had no standing to assert the claim and dismissed the action without addressing the merits. On appeal, we affirm the judgment of the district court."); *Rush v. Reynolds*, No. 19-1109, 2020 WL 825953, at *5 (Iowa Ct. App. Feb. 19, 2020); *Duff v. Reynolds*, No. 19-1789, 2020 WL 825983, at *3 (Iowa Ct. App. Feb. 19, 2020).

When evaluating standing, the Court's "task is not to judge the merits of the plaintiff's contentions," but "to determine whether these plaintiffs are the proper parties to bring the action." *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 870 (Iowa 2005). "In short, the focus is on the party, not the claim." *Id.* at 864; *see also Lewis Consol. Sch. Dist. v. Johnston*, 256 Iowa 236, 242, 127 N.W.2d 118, 122 (1964) ("[N]o one may question the constitutionality of a statute unless he can

show that he is injured by it."). The legal merit of the claim is irrelevant. *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004). And if the plaintiff's claimed injury is speculative, hypothetical, and anticipatory, it "is not sufficient for standing." *Alons*, 698 N.W.2d at 870.

The claimed injuries in this case are purely speculative, hypothetical, and anticipatory. Plaintiffs "desire to construct, own and maintain transmission lines" in Iowa in the future. (Petition ¶ 27.) The petition also pleads facts concerning the process by which electric transmission projects are planned and operated—which generally involves the Iowa Utilities Board, FERC, and several non-governmental agencies. (Petition ¶¶ 28-30.) But crucially, Plaintiffs do not assert any *specific* project is underway or even imminent. Instead, they merely assert that someday, additional electric transmission projects in Iowa are "estimated" (Petition ¶ 31) to arise. Theoretical and speculative "someday" injuries do not confer standing. *See Godfrey*, 752 N.W.2d at 423 (concluding a plaintiff lacked "any immediacy to support standing" because there was "nothing to show that the future injury is not merely theoretical"); *Alons*, 698 N.W.2d at 870 ("[T]he injury the plaintiffs claim is anticipatory, which . . . is not sufficient for standing.").

A comparison to other ROFR challenges litigated in federal courts illustrates that the injuries these Plaintiffs allege are hypothetical and speculative. Iowa's standing doctrine "parallels the federal doctrine," *Godfrey*, 752 N.W.2d at 418, and so federal cases are persuasive here. *See Alons*, 698 N.W.2d at 869 (considering "federal authority persuasive on the standing issue").

For example, in *LSP II*, the plaintiffs filed suit *after* FERC approved "the Huntley-Wilmarth line," a "proposed 345 kilovolt electric transmission line," and *after* other transmission companies exercised their respective ROFRs. *LSP II*, 954 F.3d at 1025. Likewise, in *NextEra*, the challenge to Texas's statutory ROFR involved a specific project: "the Hartburg-Sabine

Junction Transmission Project . . . , a new 500 kilovolt transmission line and substation facilities proposed to run within Orange and Newton Counties in East Texas." *NextEra*, 2020 WL 3580419, at *3. Additionally, one plaintiff in *NextEra* had *actually been selected* to build the project but asserted the ROFR statute prevented it from obtaining the appropriate state regulator's approval. *See id.* Thus, the plaintiffs' standing in both cases was evident; an actual, concrete, specific transmission project was (1) in the works, and (2) subject to a state ROFR.

By contrast, in *LSP I*, the plaintiff lacked standing because it "suffered no injury-in-fact." *LSP I*, 700 F. App'x at 2. It "identified no specific project . . . approved for regional cost allocation" that was both subject to a state ROFR *and* that had been awarded to an incumbent because of the ROFR. *Id.* The plaintiff's indication that it "might someday wish to build" a project was "only conjectural" and not enough for standing. *See id.* (quoting *N.Y. Reg'l Interconnect, Inc. v. Fed. Energy Regulatory Comm'n*, 634 F.3d 581, 587-88 (D.C. Cir. 2011)).

This case is materially analogous to *LSP I*. Plaintiffs do not identify any specific electric transmission project in Iowa that has been or is about to be approved. *See id.* Likewise, Plaintiffs do not identify any specific instances in which they will certainly be excluded from Iowa operations because an incumbent will certainly exercise its statutory ROFR. *See id.* Plaintiffs merely hypothesize that a series of events might occur—a transmission project located in Iowa might be approved, and it might be subject to the statutory ROFR, and the incumbent might exercise that ROFR. That chain of purported harm "stacks speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *N.Y. Reg'l Interconnect*, 634 F.3d at 587.

Iowa cases addressing challenges under article III, section 29 of the Iowa Constitution also demonstrate that these Plaintiffs lack standing. For example, in *Godfrey*, the plaintiff claimed that

provisions "enacted by the legislature in violation" of article III, section 29 would "limit any future amount of benefits" she could recover in workers' compensation proceedings. *Godfrey*, 752 N.W.2d at 422. That claimed injury, however, was "merely theoretical" and "lack[ed] any immediacy to support standing to raise a constitutional claim" under article III, section 29. *Id.* at 423. Similarly, in *Rush*, the plaintiffs claimed their votes as members of the state judicial nominating commission would be diluted or extinguished "sometime in the future." *Rush*, 2020 WL 825953, at *5. The court rejected that claimed injury and held it was too conjectural or hypothetical; the record was "devoid of any evidence this [injury] has occurred, and [the Court] cannot say with certainty that it will occur in the future." *Id.* Finally, in *Duff*, the plaintiff's open-ended future plans to apply for a judgeship, and his fear he would not be nominated as a finalist by the state judicial nominating commission, was "purely speculative and reveal[ed] no 'injury in fact.'" *Duff*, 2020 WL 825983, at *3.

Plaintiffs here run squarely into these Iowa cases. Like *Godfrey*, Plaintiffs' supposition about the effects of HF 2643 in the future is just that—supposition. *See Godfrey*, 752 N.W.2d at 422-23. Plaintiffs anticipate the ROFR statute will harm them eventually, but "'simply anticipating some wrong or injury' is not enough for standing." *Alons*, 698 N.W.2d at 872 (quoting *Polk Cty. v. Dist. Ct.*, 110 N.W. 1054, 1055 (Iowa 1907)). Because Plaintiffs' claimed injuries are purely anticipatory, hypothetical, and speculative, Plaintiffs lack standing and the case must be dismissed.

B. Plaintiffs' Claims Are Unripe.

The ripeness doctrine prevents courts "from entangling themselves in abstract disagreements over administrative policies" by avoiding premature adjudication, and also protects agencies "from judicial interference until an administrative decision has been formalized and its

effects felt in a concrete way by the challenging parties." *Gospel Assembly Church v. Iowa Dep't of Revenue*, 368 N.W.2d 158, 160 (Iowa 1985) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515 (1967)). When determining whether a claim is ripe, the basic question is "whether the facts alleged show there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant [relief]." *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 474 (Iowa 2004) (quoting *Katz Inv. Co. v. Lynch*, 242 Iowa 640, 648, 47 N.W.2d 800, 805 (Iowa 1951)). Additionally, exhaustion of administrative remedies is a condition precedent to ripeness. *Molo Oil Co. v. City of Dubuque*, 692 N.W.2d 686, 693 (Iowa 2005).

This case does not meet those standards. Plaintiffs' claims are premature and unripe because there is no substantial controversy of sufficient immediacy between the parties. Plaintiffs have not alleged that they have been denied the opportunity to build any specific transmission lines in Iowa, prevented from contracting to build any specific transmission lines in Iowa, or otherwise been negatively impacted with respect to any specific project within Iowa. Indeed, this case is materially analogous to *Covington v. Reynolds*, where the Iowa Court of Appeals rejected, on ripeness grounds, a similar constitutional challenge to a statute administered by a different state agency—the Iowa Department of Human Services. *See Covington v. Reynolds*, No. 19-1197, 2020 WL 4514691, at *3 (Iowa Ct. App. Aug. 5, 2020). *Covington* described in detail why the challenge—which sought to invalidate a provision about Medicaid funding for gender-affirming surgical procedures—was not ripe:

> [Plaintiffs] have not requested Medicaid pre-authorization, their Medicaid providers have not evaluated the request, and no notice of decision had been issued. The district court determined that until their Medicaid providers deny them coverage, the controversy is purely abstract because they have not been adversely affected in a concrete way. We agree. Although the [statutory] amendment is clearly calculated to allow Medicaid providers to deny gender-affirming surgical

> procedures to transgender Iowans, nothing prohibits Medicaid providers from allowing such a claim. Thus, any dispute is speculative until a denial occurs and the matter is not ripe for adjudication.

Id. The same principles apply here. Plaintiffs do not identify any specific electric transmission project in Iowa that is planned (or underway) and that might be (or is) subject to the statutory ROFR. *See id.* Until that happens, Plaintiffs "have not been adversely affected in a concrete way." *Id.* As *Covington* instructs, no matter what HF 2643 appears to be "clearly calculated" to accomplish, any dispute is speculative until a project actually arises and a ROFR is actually exercised. *See id.*

If Plaintiffs suffer a concrete injury and their claims ripen, they may be able to seek relief in various venues—perhaps through judicial review of some action by the Iowa Utilities Board, or through a challenge to some FERC action. *See LSP I*, 700 F. App'x. at 1 (stating a challenge to a FERC action or approval would be available if and when a concrete injury occurs). But until then, this challenge cannot proceed. Plaintiffs' claims are not ripe and must be dismissed.

C. Plaintiffs' Single-Subject and Title Challenges Did Not Precede Codification.

Even if Plaintiffs have demonstrated standing, Counts I and II of the petition must still be dismissed because the procedural challenge to the passage of HF 2643 is untimely.

There exists "a window of time measured from the date legislation is passed until such legislation is codified. During this window of time, the legislation may be challenged as violative of article III, section 29 of the Iowa Constitution." *State v. Mabry*, 460 N.W.2d 472, 475 (Iowa 1990). "Absent a successful challenge during this period of time, the new legislation, if it is otherwise constitutional, becomes valid law," even if its passage violated article III, section 29. *Id.* Future challenges under article III, section 29 are "barred even though future litigants may claim they were in no position to make such a challenge before the codification." *Id.* In other

words, "[o]nce a bill is codified, any constitutional defect relating to title or subject matter is cured." *State v. Taylor*, 557 N.W.2d 523, 526 (Iowa 1996).

"Neither case law nor statutory law provide[s] . . . a specific time at which codification of new legislation occurs." *Scott v. State*, 517 N.W.2d 718, 721 (Iowa Ct. App. 1994). However, in discussing the "codification window," the Iowa Supreme Court referred to a since-repealed statute that provided a new Iowa Code "shall be issued as soon as possible after the final adjournment of the second regular session of the general assembly." Iowa Code § 14.15 (1987); *see Iowa Dep't of Transp. v. Iowa Dist. Ct.*, 586 N.W.2d 374, 377 n.1 (Iowa 1998). In other words, the caselaw in the 1990s equated "codification" with "issuance" of a new Code volume.

Since then, however, the relevant statute has changed. In 2010, the legislature amended the statute to direct the legislative services agency (LSA) to *publish*—not "issue"—an annual edition of the Code as soon as possible after adjournment. 2010 Iowa Acts ch. 1031, § 38 (now codified at Iowa Code § 2B.12(2) (2019)). The legislature chose the verb "publish," while the preceding caselaw used the verbs "issue" and "codify." The Court "must assume the legislature is familiar with the holdings" of the Iowa Supreme Court when the legislature passes new laws or amends old ones. *Mallory v. Paradise*, 173 N.W.2d 264, 266 (Iowa 1969); *accord Roberts Dairy v. Billick*, 861 N.W.2d 814, 821 (Iowa 2015) ("[W]e presume the legislature was aware of our decisions when it crafted new statutes."). Further, altering statutory language can be "material even if the legislature does not expressly indicate that it is." *Oyens Feed & Supply v. Primebank*, 879 N.W.2d 853, 861 (Iowa 2016); *see also Orr v. Lewis Cent. Sch. Dist.*, 298 N.W.2d 256, 260-61 (Iowa 1980) (concluding the legislature materially amended a statute by removing "the language which had been determinative" in prior cases, even though there was no "indication that a substantive change in the law was intended"). These principles of statutory interpretation reveal

that the change from "issue" to "publish" (1) was deliberate, and (2) indicates publication and codification mean different things.

Whereas publication remains the formal process of printing new Code books, codification—the event that measures the window within which a challenge may occur—is a preliminary step that occurs *before* publication. Codification is the process of inserting new statutes "in a logical order . . . in accordance with the policies of the legislative council." Iowa Code § 2B.12(3). It also includes arranging the Code into distinct units, including titles, chapters, sections, and subsections. *Id.* § 2B.12(5)(*g*). And the codification process also involves the code editor exercising power to "[t]ransfer, divide, or combine sections or parts of sections." *Id.* § 2B.13(1)(*f*). These qualitative descriptions of codification demonstrate that codification can be—perhaps even *must* be—complete before a publisher prints new hard copy volumes.

And here, codification was complete before Plaintiffs filed their petition. An "early release" version of the 2021 Iowa Code, that includes "legislative and editorial additions and changes to Code section text, history, and footnotes," was already publicly available before mid-October when Plaintiffs filed the petition. Iowa Legislature, *Iowa Law*, http://legis.iowa.gov/law/statutory. Volume V, pages V-1350 to V-1352 of the early release version demonstrate that the provisions Plaintiffs seek to invalidate have already been incorporated into the appropriate place in the Code—in other words, codified.

Plaintiffs filed the petition over three months after the Governor signed HF 2643. (Petition ¶ 10.) Plaintiffs waited that long even though the law passed the legislature in mid-June (Petition ¶¶ 17-19); even though Plaintiff LS Power wrote to the Governor on June 23, urging her to item veto the ROFR provision (Petition Exh. 2); and even though the Governor signed the bill on June 30 (Petition ¶ 10). *Cf. Rush*, 2020 WL 825953, at *2 (noting that plaintiffs raising single-

subject and title challenges to a piece of legislation filed their lawsuit just one week after the Governor signed the bill). Perhaps an earlier challenge might have preceded codification. Plaintiffs' petition in this case, however, did not. Accordingly, any procedural defect in the passage of HF 2643 has been cured, *see Taylor*, 557 N.W.2d at 526, and Count I and Count II must be dismissed.

D. HF 2643's Title, Although Broad, Is Constitutionally Adequate.

Even if Plaintiffs have demonstrated standing, have raised ripe claims, and have lodged a timely challenge to HF 2643, Count II nonetheless fails to state a claim because HF 2643's title is adequate.

Article III, section 29 of the Iowa Constitution "contains two separate provisions derived from independent historical bases:" the single-subject clause, and the title clause. *Godfrey*, 752 N.W.2d at 426. The title clause "requires the subject of a bill to be expressed in the title." *Id.* "[I]f the title fails to express adequately the subject matter of the act or is misleading in its expression of the subject of the act, then a portion or all of the act must be held invalid." *Long v. Bd. of Supervisors*, 258 Iowa 1278, 1287, 142 N.W.2d 378, 383 (1966). "However, the title need not be an index or epitome of the act or its details. The subject of the bill need not be specifically and exactly expressed in the title." *State v. Talerico*, 290 N.W. 660, 663 (Iowa 1940). "It is not contemplated that anything more than general terms shall be used in the title . . . ." *State ex rel. Witter v. Forkner*, 62 N.W. 772, 774 (Iowa 1895). Indeed, a title can be broad and remain constitutionally valid "unless matter *utterly incongruous* to the general subject of the statute is buried in the act." *W. Int'l v. Kirkpatrick*, 396 N.W.2d 359, 365 (Iowa 1986) (emphasis added). A title can even identify a bill merely as an "amending act . . . , without stating the specific

character or substance of the amendment." *McGuire v. Chi., Burlington & Quincy Ry. Co.*, 108 N.W. 902, 904 (Iowa 1906).

HF 2643's title satisfies these standards, especially given the "deferential consideration" afforded to bills challenged under article III, section 29. *Utilicorp United, Inc. v. Iowa Utils. Bd.*, 570 N.W.2d 451, 454 (Iowa 1997) (en banc); *see also* Op. No. 85-5-1, 1985 WL 68969, at *1 (Iowa Att'y Gen. May 1, 1985) ("The legal environment established by Article III, § 29 is not demanding."). HF 2643's title is certainly broad and contains general terms; it indicates the bill makes appropriations and provides for both "legal and regulatory responsibilities" and "other properly related matters." (Petition ¶ 11; Petition Exh. 1.) But breadth and generality alone do not violate article III, section 29, and the ROFR provision is fairly characterized as imposing "legal and regulatory responsibilities" on the Iowa Utilities Board. For example, the Board must receive notices that an incumbent provider intends to exercise its ROFR, receive cost estimates, and receive quarterly reports while construction is ongoing. 2020 Iowa Acts ch. 1121, § 128. More importantly, though, beyond these obligations simply to receive information, the Board must also affirmatively adopt rules. *See id.* And, if an incumbent provider does not exercise a ROFR for a given project, the Board may "determine whether another person may construct the electric transmission line." *Id.*

These provisions establish "legal and regulatory responsibilities," a phrase expressly included in HF 2643's title. *See Rush*, 2020 WL 825953, at *13 n.21 (observing that even if several divisions of a bill might appear to contain more than a single subject, they did not violate the title clause of article III, section 29 because they "arguably fit under the legal and regulatory responsibilities clause" in the bill's title). The ROFR provisions are not "utterly incongruous," *W. Int'l*, 396 N.W.2d at 365, to a bill that expressly indicates it provides legal and regulatory

responsibilities for various state agencies. Because the bill's title is adequate, Count II must be dismissed for failure to state a claim.

E. The Statutory ROFR Does Not Violate Article I, Section 6.

Count III must also be dismissed for failure to state a claim. Plaintiffs cannot establish differential treatment of similarly situated people—but that is a necessary prerequisite for any analysis under article I, section 6 of the Iowa Constitution. Further, even if Plaintiffs are similarly situated to incumbent providers, there exists a conceivable rational basis for HF 2643. Eliminating "uncertainty produced by FERC's Order 1000" is "within the purview of a State's legitimate interest in regulating the intrastate transmission of electric energy." *LSP II*, 954 F.3d at 1031.

Article I, section 6 states, "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6. Similar to the guarantee of equal protection found in the United States Constitution, Iowa's guarantee is essentially a direction "that similarly situated citizens should be treated alike." *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 856 (Iowa 2015); *accord Varnum v. Brien*, 763 N.W.2d 862, 878-79 (Iowa 2009). However, courts must still give deference to the legislature and presume the constitutionality of enacted laws. *Varnum*, 763 N.W.2d at 879. And uniform *operation* in the constitutional sense "does not necessarily require uniform consequences." *LSCP*, 861 N.W.2d at 858.

This case involves an equal protection challenge and not a dormant commerce clause challenge. Nonetheless, the two types of challenges are often raised together, and both the terminology and the analysis bear some similarities. *See id.* at 853 (noting a litigant challenged a tax statute under both article I, section 6 and the dormant commerce clause). Accordingly, the

Court should find federal courts' dormant commerce clause analysis, in *LSP II* and *NextEra*, persuasive as to some analogous aspects of the equal protection analysis under article I, section 6.

"The first step of [analyzing] an equal protection claim is to identify the classes of similarly situated persons singled out for differential treatment." *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 204 (Iowa 2002). "If a plaintiff fails to articulate, and the court is unable to identify, a class of similarly situated individuals who are allegedly treated differently under the challenged statute," the analysis ends. *Timberland Partners XXI, LLP v. Iowa Dep't of Revenue*, 757 N.W.2d 172, 175 (Iowa 2008). The reason for this threshold inquiry is plain: "Dissimilar treatment of persons dissimilarly situated does not offend equal protection." *City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 531 (Iowa 2008).

Count III of this case fails at this threshold step. The relevant inquiry involves specific circumstances, not Plaintiffs' general status as electric transmission providers. *Cf. New Midwest Rentals, LLC v. Iowa Dep't of Commerce*, 910 N.W.2d 643, 653 (Iowa Ct. App. 2018) (rejecting an equal protection challenge because the relevant classification was not all "Iowa retailer beer permittees," but all permittees with the same specific ownership circumstances as the appellant). Non-incumbent providers like Plaintiffs are not similarly situated to incumbent providers; incumbents are already subject to regulation by the Iowa Utilities Board, while Plaintiffs are not. Moreover, incumbent providers have existing facilities (that will usually be connection points for any new projects), which gives them a unique interest in coordination to ensure the new project's safety and reliability. The *NextEra* court found the distinction compelling in the dormant commerce clause context. *See NextEra*, 2020 WL 3580149, at *6 ("The existing regulated transmission-line providers with a right of first refusal are not similarly situated with unregulated providers such as NextEra Midwest."). It is equally compelling here. *See Timberland Partners*,

757 N.W.2d at 177 (ending equal protection analysis at the "similarly situated" stage). Indeed, this case is in some respects the reverse of *City of Coralville*; just as "[c]itizens serviced by different public utilities are not similarly situated" even if they live in the same municipality, *City of Coralville*, 750 N.W.2d at 531, neither are different electric transmission providers serving different geographic areas similarly situated to one another.

Instead, Plaintiffs are similarly situated to other non-incumbents—but they cannot show the statute treats Plaintiffs differently from those other non-incumbents. Therefore, the equal protection claim fails at the outset. *See New Midwest*, 910 N.W.2d at 653. But even proceeding past the similarly situated question, Count III still does not state a claim under article I, section 6.

In this case, as in most cases raising equal protection claims, the court should use the rational basis test. Under the rational basis test, Plaintiffs have "the heavy burden of showing the statute unconstitutional and must negate every reasonable basis upon which the classification may be sustained." *Bierkamp v. Rogers*, 293 N.W.2d 577, 579–80 (Iowa 1980). A statute will satisfy equal protection so long as there is a plausible policy reason and the relationship of the classification to that reason is not so attenuated as to be arbitrary or irrational. *Varnum*, 763 N.W.2d at 879 (citing *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004)).

As noted above, FERC Order 1000 eliminated the federal ROFR. *LSP II*, 954 F.3d at 1023. However, Order 1000 specifically recognized individual states' rights to continue to regulate electric transmission lines, including siting, permitting, and construction authority. *Id.* at 1024. Iowa's ROFR statute is merely one of several that have been enacted since FERC issued Order 1000. *See, e.g.*, S.D. Codified Laws § 49-32-20; Neb. Rev. Stat. § 70-1028; 17 Okla. Stat. § 292. Minnesota has also enacted an ROFR statute that is similar to Iowa's and faced a dormant commerce clause challenge; the dismissal of that challenge was affirmed by the Eighth Circuit.

Minn. Stat. § 216B.246, subdiv. 2; *LSP II*, 954 F.3d at 1031. The United States District Court for the District of Minnesota found that the plaintiff, as an unregulated transmission company, was not similarly situated to Minnesota's regulated utilities and transmission companies. *LSP II*, 954 F.3d at 1026-27. The Eighth Circuit did not decide that question but still determined that Minnesota's ROFR statute did not discriminate against interstate commerce or against the plaintiff in that case. *Id.* at 1029-30. Minnesota's ROFR statute applied "evenhandedly to all entities." *Id.* at 1028.

A similar analysis in this case requires a finding that the statute does not violate Iowa's equal protection guarantee. Plaintiffs are not similarly situated to incumbent owners and the claim must fail based upon that fact alone. Further, states have inherent police powers which include the regulation of utilities. *Id.* at 1029 (citing *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377, 103 S. Ct. 1905, 76 L.Ed.2d 1 (1983)). FERC has left states with the authority to control siting, permitting, and constructing of transmission lines and has not precluded ROFR laws to use that authority. *Id.* at 1029-30. The use of a ROFR law as part of Iowa's overall regulatory framework for public utilities is not discriminatory in effect or purpose. And although the Eighth Circuit was not deciding an equal protection claim, its conclusion that a ROFR statute "applies *evenhandedly* to all entities," *id.* at 1028 (emphasis added), carries some weight when evaluating whether a law provides *equal* treatment. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473, 101 S. Ct. 715, 729 (1981) (finding the same state interest satisfied both equal protection and dormant commerce clause analysis).

Indeed, from a conceptual standpoint, it may be easier to demonstrate a dormant commerce clause violation than an equal protection violation; "state interests that are legitimate for equal protection . . . purposes may be insufficient to withstand Commerce Clause scrutiny." *Bendix*

Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 894, 108 S. Ct. 2218, 2222 (1988); *see also Fulton Corp. v. Faulkner*, 516 U.S. 325, 345, 116 S. Ct. 848, 861 (1996) (differentiating between the legal standards applicable to equal protection and dormant commerce clause challenges); *Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978, 991 (S.D. Iowa 2003) (noting that a regulation can face stricter scrutiny under the dormant commerce clause than under the equal protection clause), *vacated on other grounds*, 367 F.3d 1061, 1066 (8th Cir. 2004). These authorities further demonstrate that an unsuccessful dormant commerce clause challenge—even one that took place in another forum—is persuasive when considering Plaintiffs' equal protection challenge to a similar statute in Iowa.

But even setting the potential relationship between claims aside, a ROFR provision is rationally related to a legitimate state interest. Iowa's statutory ROFR is consistent with the existing regulation of retail electric utilities delivering service to end-users including the residents and businesses of Iowa. Since 1979, electric utilities have had assigned service areas, which are exclusive to a specific utility and in which no other utility may serve a customer without approval, "to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public." Iowa Code § 476.25. This framework was affirmed by state and federal courts in an anti-trust challenge, noting that Iowa had "clearly articulated a state policy to prevent electricity suppliers from competing for retail customers." *N. Star Steel Co. v. MidAmerican Energy Holdings Co.*, 184 F.3d 732, 738 (8th Cir. 1999); *see also N. Star Steel Co. v. Iowa Utils. Bd.*, No. AA3127 (Iowa Dist. Ct. Polk Cty. Jan. 29, 1999) (affirming on judicial review the Board's declaratory ruling regarding exclusive service territories). The enactment of the ROFR statute for electric transmission lines similarly encourages the development of

coordinated statewide electric service and eliminates or avoids unnecessary duplication of facilities. Such rationales are reasonably related to the overall public policies regarding electric service in Iowa and are not so attenuated as to be arbitrary or irrational. Additionally, eliminating possible uncertainty following Order 1000 is a valid step to take in furthering "a State's legitimate interest in regulating the intrastate transmission of electric energy." *LSP II*, 954 F.3d at 1031. And a legitimate interest for equal protection purposes "can be any reasonable justification, not just the one the legislature actually chose." *LSCP*, 861 N.W.2d at 858. Plaintiffs' equal protection claim must fail and should be dismissed.

F. IUB, Huser, Dickinson, and Hickey Are Unnecessary Defendants.

Even if the Court does not dismiss this action or any counts of it, Geri Huser and the Iowa Utilities Board should still be dismissed as Defendants.

Geri Huser is named in her official capacity as chair of the Iowa Utilities Board (Petition ¶ 3), which means she is unnecessary as a defendant because "the real party in interest is the entity" in which she holds office—the Board. *Kentucky v. Graham*, 473 U.S. 159, 166, 405 S. Ct. 3099, 3105 (1985); *cf. Middle States Utils. Co. v. City of Osceola*, 231 Iowa 462, 466, 1 N.W.2d 643, 646 (1942) (noting with respect to a mandamus proceeding that "the real party in interest is the . . . public body whom the board represents and not the individuals who happen to be incumbents"—which in that case meant the "city of Osceola and not the mayor and individual councilmen"). Plaintiffs do not seek any relief specifically from Chair Huser; they merely seek to prevent *the Board* from administering a statute. Because that duty to administer statutes in the Board's area of expertise belongs to the Board "generally, the identity of the ministerial officers [is] irrelevant." *Birusingh v. Knox*, 409 N.W.2d 189, 191 (Iowa 1987). Accordingly, Huser should be dismissed as a defendant.

But the Board really isn't a proper defendant either. The only action the Board *must* take under the statute is to promulgate rules. 2020 Iowa Acts ch. 1121, § 128. That rulemaking process is lengthy; it requires notice and opportunity for public comment and is subject to judicial review even after rules are finalized. *See City of Des Moines v. Iowa Dep't of Transp.*, 911 N.W.2d 431, 435-38 (Iowa 2018) (detailing a different agency's rulemaking process and the subsequent legal challenge to those rules once they had been applied on an individualized basis). And other possible actions the Iowa Utilities Board *may* take under the ROFR statute—such as determining which provider may build a hypothetical future electric transmission project—are merely speculative at this point. Accordingly, any "claims" against the Board are premature and unripe.

The Board is a state regulatory agency charged with, among other duties, the franchising of electric transmission lines. *See generally* Iowa Code chapter 478. "The Iowa Utilities Board may grant the franchise in whole or in part upon the terms, conditions, and restrictions, and with the modifications as to location and route as may seem to it just and proper. Before granting the franchise, the utilities board shall make a finding that the proposed line or lines are necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest." Iowa Code § 478.4. However, before the Board may take any action regarding a transmission line franchise, a petition for the franchise must be filed. *Id.* § 478.2; *see also id.* § 478.4 (requiring the Board to "consider the petition and any objections filed to it in the manner provided"). In this case, Plaintiffs have not made any filings with the Board either seeking or objecting to any electric transmission line franchises, or otherwise attempted to exhaust administrative remedies with the Board. The claims against the Board, and by extension Huser, are mere speculation and not ripe, and those defendants should be dismissed.

Removing the Board, Huser, Dickinson, and Hickey from the case would not realistically foreclose any measure of relief Plaintiffs have sought, because the State of Iowa is separately named as a defendant. If (1) the case proceeds past this motion to dismiss, and (2) Plaintiffs prevail and the Court invalidates HF 2643 or the ROFR provisions, that judgment invalidating a statute as against the State would also prevent the Board from administering it. Likewise, any judgment preventing or enjoining the State from publishing part or all of HF 2643 would also apply to Dickinson and Hickey, who are named only in their official capacities as State employees.

Even if this case proceeds past the motion to dismiss stage, it can and should be streamlined by dismissing unnecessary defendants.

IV. CONCLUSION

HF 2643 may have jolted Plaintiffs into action, but it didn't create a judicially cognizable dispute. Plaintiffs lack standing; the claims are unripe; and some of the claims simply fail on the merits. The case must be dismissed.

WHEREFORE, Defendants respectfully request that the Court (1) dismiss this case; (2) assess all costs to Plaintiffs; and (3) award any other relief the Court deems appropriate under the circumstances.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that the foregoing instrument was served upon counsel of record via EDMS on this 16th day of November, 2020:

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/s/ Rhonda L. Parr