IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LS POWER MIDCONTINENT, LLC, and SOUTHWEST TRANSMISSION, LLC, Plaintiffs, vs. THE STATE OF IOWA, IOWA UTILITIES BOARD, GERI D. HUSER, GLEN DICKINSON and LESLIE HICKEY, Defendants.	)	CASE NO. CVCV060840 **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION**

Plaintiffs LS Power Midcontinent, LLC and Southwest Transmission, LLC, by and through the undersigned, hereby state the following in support of their Motion for Temporary Injunction.

PRELIMINARY STATEMENT

On November 13, 2020, Plaintiffs moved for temporary injunction, requesting the Court enjoin (1) publication of Division XXXIII of H.F. 2643 in the Iowa Code; (2) the Iowa Utilities Board from taking action, including rulemaking, on Division XXXIII and (3) enforcement and operation of Division XXXIII during the pendency of this action. The State of Iowa, Iowa Utilities Board, Geri D. Huser, Glen Dickinson and Leslie Hickey (hereinafter collectively, "the State") filed its resistance on November 23, 2020. In its response, the State conceded or did not address several legal issues put forth in Plaintiffs' Motion. Thus, as a preliminary matter, Plaintiffs will clarify issues remaining before the Court.

Notably, in its resistance, the State *did not* argue it was likely to succeed on the merits of Count I, the single-subject challenge. Nor does the State argue that with respect to enforcement of the law, any alternative legal remedy is available. Finally, regarding enjoining publication, the State concedes "subsequent publication of the Iowa Code does not moot or nullify Plaintiffs' challenge." Def.'s Resistance to Pl.'s Mot. for Temp. Inj., at 3; *id.* at 8-9; *id.* at 15. On this point,

it appears Plaintiffs and the State agree: timeliness of a challenge under Article III, Section 29 is measured at the time the claim is "raised" or "lodged," even if ultimate success does not occur until after the bill is codified. *See State v. Mabry*, 460 N.W.2d 472, 475 (Iowa 1990) (noting the "window of time" to bring a "successful challenge" is "measured from the date legislation is passed until such legislation is codified"). Recent Iowa Supreme Court opinions support this interpretation. *Iowa Dep't of Transp. v. Iowa Dist. Court. for Linn Cty.*, 586 N.W.2d 374, 378-79 (Iowa 1998); *State v. Taylor*, 557 N.W.2d 523, 526 (Iowa 1996); *Giles v. State*, 511 N.W.2d 622, 626 (Iowa 1994). Thus, although Plaintiffs moved out of an abundance of caution to enjoin Division XXXIII's publication, if this Court agrees with the parties' position, the Court can simply enter an order on the timeliness of Plaintiffs' claims and need not enter temporary relief.[1]

Therefore, what remains disputed before the Court is whether to temporarily enjoin enforcement of Division XXXIII of H.F. 2643, enacted in violation of the single-subject, title, equal protection and privileges and immunities clauses of the Iowa Constitution, and any rulemaking thereon. As demonstrated by their Resistance to Defendants' Motion to Dismiss, Plaintiffs meet the standards for temporary injunction, including showing (1) substantial injury or damages will result unless the request for injunction is granted, (2) a likelihood of success on the merits and (3) the balance of harms weighs in favor of injunction. Injunction should be granted.

[1] To the extent the State raises *other* arguments with respect to timeliness, those arguments have been addressed in Plaintiffs' Resistance to Defendants' Motion to Dismiss. In short, Plaintiffs' claims are timely, as they were lodged prior to official publication of the relevant code section, which has always been used as the end date of the "codification" process for purposes of a timely challenge. *Mabry*, 460 N.W.2d at 475 (noting window ends when the code is "issued"); *Iowa Dep't of Transp.*, 586 N.W.2d at 377 n.1. Nonetheless, as the State's timeliness argument does not rest on the upcoming publication of Division XXXIII, it does not require injunction thereof.

LEGAL ANALYSIS

Although the State recites generalized principles relating to deference accorded legislative judgment, it fails to recite an equally important principle: "When it is clear that ... the Constitution has been disregarded, [a court] must not hesitate to proclaim the supremacy of the Constitution." *Western Int'l v. Kirkpatrick*, 396 N.W.2d 359, 366 (Iowa 1996) (quoting *Chicago, Rock Island & Pac. Ry. Co. v. Streepy*, 224 N.W. 41, 43 (Iowa 1929)). A court cannot be so reluctant to step in that it "abdicate[s] in its duty to enforce the Constitution." *Dublin v. State*, 768 N.E.2d 436, 446 (Ohio Com. Pl. 2002) (quoting *State ex rel. Dix v. Celeste*, 464 N.E.2d 153, 157 (Ohio 1984)). Here, Article III, Section 29 and Article I, Section 6 of the Iowa Constitution have been violated. Plaintiffs, in vindicating their constitutional interests, seek a temporary injunction during the pendency of the litigation. Because Plaintiffs will suffer substantial injury if an injunction does not issue, have established a likelihood of success on the merits and the State will suffer little harm from an injunction, temporary relief is warranted.

I. THE TEMPORARY INJUNCTION STANDARDS ARE MET.

A. Plaintiffs Suffer Irreparable Harm By the State's Threatened Enforcement and Rulemaking on Division XXXIII.

In large part, the State's resistance focuses on the ability of Plaintiffs to establish harm. Under Iowa Rule of Civil Procedure 1.1502, injunction is appropriate where a party seeks to "restrain[] the commission or continuance of some act which would greatly or irreparably injure" it, or where a party "threatens or is about to do, an act ... tending to make the judgment ineffectual." Plaintiffs must demonstrate "an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for injunction is granted; and (3) there is no adequate legal remedy available." *Community State Bank, Nat'l Ass'n v. Cmty. State Bank*, 758 N.W.2d 520, 528 (Iowa 2008). Because enactment of Division XXXIII deprives Plaintiffs of their

competitive interest and ability to compete for projects that will undoubtedly arise during the pendency of this litigation and because substantial damages to Plaintiffs (unable to be compensated at law)[2] will ensue if not enjoined, Plaintiffs meet the applicable standards for relief. *Id.* Temporary injunction is necessary to "maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation." *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985).

1. Plaintiffs Have Standing and Their Claims are Ripe for Adjudication.

The State first suggests no harm has befallen, or will befall, Plaintiffs based on Division XXXIII because "Plaintiffs' supposition that they will be prevented from bidding on or building future electric transmission projects is speculative and anticipatory." This argument largely rests on the State's standing and ripeness arguments in its Motion to Dismiss, which are addressed by Plaintiffs in their Resistance filed November 30, 2020. In short, Division XXXIII, enacted in violation of the single-subject and title clauses of the Iowa Constitution, deprives Plaintiffs of their opportunity to compete for certain federally approved electric transmission projects and harms their competitive interests by awarding their competitors a right of first refusal. *See* Pl.'s Resistance to Def.'s Mot. to Dismiss, at 7-8. Such harms are sufficiently concrete to confer standing. *See Hawkeye FoodService Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 607

[2] Not only are constitutional injuries such as those alleged in Counts I-III unable to be fully alleviated by monetary damages, but even if monetary damages were sought, the State has sovereign immunity from such relief. *See Baker Elec. Co-Op., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (finding irreparable harm established when party "would be unable to recover any damages resulting ... as [the State] has ... sovereign immunity" in suits requesting money damage); *see also Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin.*, 458 F. Supp. 3d 1061-62 (E.D. Wis. 2020); *Indiana Fine Wine & Spirits, LLC v. Cook*, 459 F. Supp. 3d 1157, 1170 (S.D. Ind. 2020). Indeed, under the State's hypothesized scenario, Plaintiffs only could compete for those projects the incumbent deems less attractive—surely a serious disadvantage.

(Iowa 2012); *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 444-45 (Iowa 1983); *see also Texas Cable & Telecomm. Ass'n v. Hudson*, 265 F. App'x 210, 217-18 (5th Cir. 2008) (noting competitive injury and unequal treatment in opportunities are concrete injuries). Injury occurred through passage of the law, and projects are imminent—numerous authorities support needed transmission in Iowa within the next year. *See* Pl.'s Resistance to Def.'s Mot. to Dismiss, at 11-12.[3] The lack of specific projects underway does not hamper this analysis, given the likelihood they will occur, and Plaintiffs' intent—absent operation of Division XXIII—to compete for them. Pl.'s Resistance to Def.'s Mot. to Dismiss, at 12-13;[4] *see Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 457 (Iowa 2013). Indeed, if projects were not to occur or intended, there would be no need for Division XXXIII at all.

This is particularly true where, as here, when a project arises, it will be too late: Once a transmission project subject to Division XXXIII is approved by a federal authority, it is

[3] Indeed, just this week, MISO's System Planning Committee released its Long Range Transmission Planning map, which indicates near-term testing of routing solutions and identifies areas of anticipated build-out, each spanning across Iowa. Ex. 26, at 11-12. MISO posits initial project recommendations will occur in 2021—likely while this litigation is ongoing. Ex. 26, at 13.

[4] The State claims the Court should not consider Plaintiffs' exhibits submitted with the Motion to Dismiss. This is inaccurate, as questions of justiciability may rely on matters outside the pleadings when the moving party mounts a factual challenge. *See Citizens for Responsible Choices v. Shenandoah*, 686 N.W.2d 470, 473 (Iowa 2004) (finding that, although evidentiary showing not required, "'affidavits and other evidentiary showings' could be used in support of and in resistance to 'preanswer jurisdictional challenges'" and listing ripeness and standing); *see also St. Louis Heart Ctr., Inc. v. Nomax, Inc.*, 899 F.3d 500, 503 (8th Cir. 2018) ("Nomax's motion to dismiss challenged the factual basis for subject matter jurisdiction, and the district court thus properly considered both the complaint and testimony and exhibits that are outside the pleadings."); *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112 (9th Cir. 2009) ("In support a motion to dismiss under Rule 12(b)(1), ... It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." (citations omitted)). If the State alleges it makes merely a facial challenge, Plaintiffs indisputably alleged injury (Pet. ¶ 35), as detailed in their Resistance.

automatically assigned to the incumbent provider—without opportunity to compete by Plaintiffs. Ex. 13, at 101; Ex. 15, at 162; *see also Adams v. Watson*, 10 F.3d 915, 924 (1st Cir. 1993) (finding although injury may take "years to materialize," "[o]nce realized, ... [the] newfound competitive edge would likely continue for an extended period" and "it could hardly be thought that ... action likely to cause harm cannot be challenged until it is too late") (quoting *Rental Housing Ass'n of Greater Lynn, Inc. v. Hills*, 548 F.2d 388, 389 (1st Cir. 1977)); *see also Texas Cable & Telecomm. Ass'n*, 265 F. App'x at 217; *Nichols v. Markell*, 2014 WL 1509780, at *13-16 (D. Del. Apr. 17, 2014). This automatic assignment distinguishes this case from authority the State cites: *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 472 (Iowa 2004). There, citizens challenged a proposed public improvement project intended to be financed by revenue bonds, alleging such bonds, *if* issued, would violate a statute. *Id.* The district court dismissed the plaintiffs' claims for lack of standing and ripeness. *Id.* The Iowa Supreme Court affirmed, holding plaintiffs' claims unripe because the issuance of the bonds—the challenged action—had not yet occurred. *Id.* at 473. The Court further concluded plaintiffs did not have standing because the bonds' issuance did not injure plaintiffs; rather, their injury occurred through the project financed. *Id.* at 475. Unlike the issuance of the bonds, here the challenged procedural action—the passage of Division XXXIII of H.F. 2643—*has* occurred. Moreover, Division XXXIII directly harms Plaintiffs, as Plaintiffs allege injury to their competitive interests and opportunity to compete, injuries occurring automatically by Division XXXIII's operation.

The State's suggestion that Plaintiffs' harm is "one step removed" from harm inflicted by Division XXXIII is confounding. Division XXXIII expressly grants Plaintiffs' competitors an unlawful advantage in the electric transmission market, and deprives Plaintiffs of their ability to

compete in the first instance through regional transmission organization processes.[5] Even if harm *was* one step removed, however, this presents no issue for the standing or ripeness analyses. Iowa requires only that the injury be "fairly traceable" to the unconstitutional government action. Indeed, in *Sierra Club Iowa Chapter v. Iowa Department of Transportation*, 832 N.W.2d 636, 648 (Iowa 2013), decided *after* *Citizens for Responsible Choices*, the Iowa Supreme Court held a case was ripe for review when an association challenged a highway project in an agency's "five-year plan," despite that the "actual building of the highway may be contingent on future funding." *Id.* at 649; *see also Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (finding argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which defendant's actions are the very last step in the chain of causation"). Plaintiffs are injured by deprivation of their rights, and their claims are ripe for adjudication.

2. Substantial Damages Will Result Unless Injunction is Granted.

Apart from whether they have suffered, or will suffer, imminent injury in a justiciability sense, the State makes little argument on irreparable harm. Indeed, in the context of enforcing an unconstitutional statute, the question of irreparable harm is "inextricably intertwined" with questions of standing and ripeness. *N.Y. State B. Ass'n v. Reno*, 999 F. Supp. 710, 715 (N.D.N.Y.

[5] The State seemingly labors under the assumption that once a project arises, an incumbent may turn the project down, therefore, no harm will occur. Not only is this unlikely as a practical matter (*S. Carolina Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 72 (D.C. Cir. 2014)), but the State misunderstands the nature of the harm. Even if allowed to *later* compete for the project through processes contemplated by the Iowa Utilities Board once an incumbent declines, the harm Plaintiffs allege is the differing treatment and competitive advantage in the first instance. *Cf. Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utilities*, Order No. 1000, 136 FERC ¶ 61051, at ¶¶ 251, 76 Fed. Reg. 49,842 (2011) (noting commentators argued for a 90-day right of first refusal, which FERC ultimately rejected). Additionally, Plaintiffs lose the ability to compete through regional transmission organization-approved processes (which they secured through their membership), and instead must go through the Iowa Utilities Board.

1998); *see also City of S. Miami v. Desantis*, 408 F. Supp. 3d 1266, 1306 (S.D. Fla. 2019); *Rocket Acg. Corp. v. Ventana Med. Sys., Inc.*, 2007 WL 2422082, at *5 (D. Ariz. Aug. 22, 2007). For example, in *Association for Fairness in Business v. New Jersey*, companies alleged competitive injury based on a set-aside program that forced them to compete on an unfair playing field for bidding on contracts. 82 F. Supp. 2d 353, 363-64 (D.N.J. 2000). The court found irreparable harm established, noting inquiry was "nearly identical" to actual injury required for standing. *Id.* at 357. The court elaborated its conclusion was "buttressed by [the] finding that the set-aside program is unconstitutional," as "an alleged unconstitutional infringement will often alone constitute irreparable harm." *Id.* (quoting *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997)).

Here, Plaintiffs have alleged concrete injuries in deprivation of their opportunity to compete for projects expected in 2021 and harm to their competitive interests. Yet, in addition, the State does not contest success on the merit of one of Plaintiffs' constitutional claims (as discussed further, *infra*), and Plaintiffs show likelihood of success on the other two. Infringement of a constitutional right is enough to establish irreparable harm. *Free the Nipple-Ft. Collins v. City of Ft. Collins*, 916 F.3d 792, 806 (10th Cir. 2019) ("[I]n the context of constitutional claims, the principle collapses the first and second preliminary-injunction factors, equating likelihood of success on the merits with a demonstration of irreparable injury."); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Ezell v. City of Chi.*, 651 F.3d 684, 699 (7th Cir. 2011); *Dubon Miranda v. Barr*, 463 F. Supp. 3d 632, 650 (D. Md. 2020); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 1 F. Supp. 2d 958, 963 (S.D. Iowa 1998); *Stoner McCray Sys. v. City of Des Moines*, 78 N.W.2d 843, 850-51 (Iowa 1956).

3. There Are No Adequate Alternative Remedies Available.

Finally, the State does not suggest there are other remedies available with respect to an injunction on enforcement of Division XXXIII. Yet with respect to rulemaking, the State suggests Plaintiffs will not suffer irreparable harm because alternate remedies are available. Rather than suggesting remedies are available "at law" (as is ordinarily considered), the State's argument is similar to one of exhaustion—it suggests Plaintiffs must challenge rules through administrative procedures. But no administrative procedure can afford the relief Plaintiffs seek; administrative procedures cannot rule an underlying enabling statute is unconstitutional. *See Quaker Oats Co. v. Main*, 779 N.W.2d 494 (Iowa Ct. App. 2010) (noting in administrative action, "[t]he commissioner did not address a constitutional challenge Main raised to the statute," as administrative agencies could not decide constitutional issues)*; see also Tindal v. Norman*, 427 N.W.2d 871, 872-73 (Iowa 1988) ("Here, the plaintiff challenges the facial constitutional validity of the statute under which the defendant was proceeding."); *Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 836 (Iowa 1979) ("Agencies cannot decide issues of statutory validity .... [T]he administrative remedy is 'inadequate.'"); *Matters v. City of Ames*, 219 N.W.2d 718, 719-20 (Iowa 1974).

Additionally, if forced to challenge rulemaking during the pendency of this action through administrative procedures, Plaintiffs will suffer irreparable harm "from the administrative litigation delay." *Salsbury Labs.*, 276 N.W.2d at 837. During the pendency of this litigation, agency rulemaking will proceed, but Plaintiffs will lose the ability challenge rules on at least two constitutional bases herein alleged, as Division XXXIII will be published. *State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001) ("Once a bill is codified, any constitutional defect relating to either the title requirement or the single-subject requirement of article III, section 29 is cured."). If allowed to proceed, the same irreparable harm occasioned by enforcement of Division XXXIII

itself will result. The MISO and SPP regional transmission organization tariffs state they will "comply with Applicable Laws **and Regulations** granting a right of first refusal to a Transmission Owner." Ex. 13, at 101; Ex. 15, at 162 (noting if using competitive process violates "relevant law," it will not be used). Thus, when a federally approved project arises, if administrative rules are in place, it will be *automatically* assigned to the incumbent owner by operation of the rules, harming Plaintiffs and depriving them of constitutional rights. As such, Plaintiffs require both an injunction against enforcement of Division XXXIII of H.F. 2643, as well as an injunction on rulemaking by administrative agencies.

B. The State Does Not Dispute Plaintiffs Are Likely to Succeed on the Single-Subject Violation, and Plaintiffs Establish Likelihood of Success on the Title and Article I, Section 6 Challenges.

Not only have Plaintiffs demonstrated a likelihood of concrete, substantial injury in absent injunction, but they also establish a likelihood of success on their constitutional claims. Notably, other than repeating its standing and ripeness arguments, the State does *not* suggest it bears any likelihood of success on Count I, the single-subject clause challenge. Instead, the State focuses its energies on the merit of Counts II and III, the title and equal protection and privileges and immunities clause challenges. The State's lack of resistance on the merit of the single-subject challenge in this context is telling—a constitutional violation occurred. Nonetheless, given the State's lack of resistance, Plaintiffs will similarly confine their discussion on the merits to Counts II and III.

1. H.F. 2643's Title Fails to Provide Fair Notice of Division XXXIII.

The State's arguments with respect to Count II do not tip the balance on Plaintiffs' likelihood of success. Although the State points to generalized notions of evaluating the title liberally, it fails to put forth the *actual* standard a title must meet under Article III, Section 29. To

be constitutional, the title must afford the reader "fair notice of a provision in the body of the act." *State v. Iowa Dist. Court*, 410 N.W.2d 684, 688 (Iowa 1987); *Western Int'l*, 396 N.W.2d at 365. In other words, the court must examine "whether anyone reading the title of an act could reasonably assume that the reader would be apprised of all its material provisions." *Iowa Dist. Ct.*, 410 N.W.2d at 687 (quoting *Western Int'l*, 396 N.W.2d at 365). "If reasonable guidance with respect to the act's material provisions is not provided by the title, that basic purpose of the title requirement (prevention of surprise and fraud) may be frustrated." *Taylor*, 557 N.W.2d at 527. Here, tellingly, the title remained exactly the same both before and after the amendment adding Division XXXIII, begging the question how the title possibly would signal Division XXXIII's presence.

The title of H.F. 2643 merely states that it "Provid[es] for Legal and Regulatory Responsibilities, [and] Provid[es] for Other Properly Related Matters." As detailed in Plaintiffs' Resistance to Defendants' Motion to Dismiss, there are limits to how broad a title may be and still adhere to the "fair notice" requirement. When, as here, a title could describe "most, if not all, legislation passed by the general assembly," it cannot be said to provide fair notice of the material provisions therein. *See St. Louis Health Care Network v. State*, 968 S.W.2d 145, 148 (Mo. 1998); *see also Western Int'l*, 396 N.W.2d at 365 (invalidating a bill with title "code corrections bill altering current practices" because it did not "enlighten the reader as to what practices were being changed"); *Taylor*, 557 N.W.2d at 526 (rejecting state's position when "any weapons law" could have been encompassed). Authority relied upon by the State is not to the contrary; in each case, the title mentioned the material provision either by code section or by topic or the dispositive issue was not based on the title clause. *See* Pl.'s Resistance to Def.'s Mot. to Dismiss, at 33; *see also Burlington & Summit Apts. v. Manolato*, 7 N.W.2d 26, 28 (Iowa 1942) (title providing for

"penalties for violation thereof" for housing codes fairly encompassed penalty stating no rent could be collected); *Rush v. Reynolds*, 2020 WL 82593, at *12 (Iowa Ct. App. Feb. 19, 2020) (finding no standing, but nonetheless stating title providing for "Regulatory Responsibilities" was a "vague categorical description that do[es] no disclose specific subject matters of various divisions of the bill"). "Not even the presumptions in favor of constitutionality in which [courts] indulge are enough to show where the subject of [Division XXXIII] is 'expressed in the title.'" *State v. Nickelson*, 169 N.W.2d 832, 837 (Iowa 1967).

2. Division XXXIII Treats Similarly Situated Electric Transmission Providers Differently Without a Realistically Conceivable Reason for Doing So.

The State's arguments based on Article I, Section 6 of the Iowa Constitution fare no better. As detailed in Plaintiffs' Resistance to Defendants' Motion to Dismiss, although the State alleges incumbent and non-incumbent entities are not "similarly situated," its analysis crumples when viewed, as this Court must, "with respect to the purposes of the law." *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009). For federally approved transmission projects at issue in Division XXXIII, the State's allegation that incumbent providers are "already subject to regulation by the IUB," is a distinction without a difference. *See* Pl.'s Resistance to Def.'s Mot. to Dismiss, at 27-28. *Both* incumbent and nonincumbent entities must adhere to the *same* IUB processes. Iowa Code § 478.2 (noting "any person authorized to transact business in the state," including both incumbent and nonincumbent entities, must file for franchise); *see also* Iowa Code ch. 478 (failing to distinguish between incumbents and non-incumbents); Iowa Admin. Code r. 199-11.3 (same); Iowa Admin. Code r. 199-11.5 (same). Similarly, with respect to reliability, both incumbents and nonincumbents are subject to the *same* benchmark standards set by FERC, regional transmission organizations and the IUB. Pl.'s Resistance to Def.'s Mot. to Dismiss, at 28-29; *see also* Amicus Curiae Br. of Former FERC Chairman Wellinghoff at 6-7, *LSP Transmission Holdings, LLC v.*

Sieben, et. al., No. 20-641 (2020). Indeed, removing any distinction in reliability was one of the considerations of the Federal Regulatory Energy Commission in enacting Order 1000 to remove federal rights of first refusal for certain federally approved projects. *S. Carolina Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 73 (D.C. Cir. 2014); *see also Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utilities*, Order No. 1000, 136 FERC ¶ 61051, at ¶¶ 266-67, 76 Fed. Reg. 49,842 (2011). Not only are incumbent and nonincumbent entities similarly situated with respect to these concerns, but any distinction between them is arbitrary and irrational. *See Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004).

Nor are the other purported policy reasons behind Division XXXIII's classification credible. The State's reliance on a generalized "police power" alone cannot justify an unconstitutionally discriminatory law. *Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.*, 58 F.2d 593, 598 (8th Cir. 1932); *State v. Osborne*, 154 N.W. 294, 301 (Iowa 1915) ("The police power is not superior to the Constitution...."). Where no public interest is served, but rather, the legislation only stands to benefit a particular class, there is no valid exercise of police power. *See Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 177 (Iowa 2004) (quoting *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (Iowa 1995)). Nor can purported legislative interests to "encourage development of coordinated statewide 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) suffice when the projects in question are not "at retail," they are wholesale, and the State does not plan wholesale projects, including whether projects are duplicative. *See* Pl.'s Resistance to Def.'s Mot. to Dismiss, at 26-27; Amicus Curiae Br. of Former FERC Chairman Wellinghoff at 5-6, *LSP Transmission Holdings, LLC v. Sieben et. al.*, No. 20-641 (2020). Finally, the State's interest in removing alleged uncertainty following Order 1000 finds no basis in fact,

given processes established and implemented by regional transmission organizations since 2011 provide intricate procedures for transmission provider selection. *See* Pl.'s Resistance to Def.'s Mot. to Dismiss, at 29. Because no policy reasons advanced by the State are credible, the State fails to show Plaintiffs are unlikely to succeed on the merits.

C. The Balance of Harms Favors Injunctive Relief Given the State Has No Interest In Rulemaking or Enforcement of Unconstitutional Legislation.

Finally, the State suggests issuing a temporary injunction will "result in more harm than it will prevent"; however, the State fails to make *any* argument of harm resulting from enjoining rulemaking or enforcement. The balancing of harms is comparative, examining the relative harm of granting or denying injunctive relief upon the parties and the public. *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001); *see also Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991) (considering the public interest in balance of harms analysis). As detailed above, Plaintiffs suffer, and will continue to suffer, harm to their business interests and competitive opportunities by enactment and operation of Division XXXIII. On the other hand, the *only* harm the State alleges is with respect to enjoining publication of Division XXXIII, which, as discussed above, is unnecessary in light of the State's concession. When a non-movant alleges *no* harm that will come to it from entry of a temporary order, the balance obviously weighs in favor of the moving party. *See Bear v. Kautzky*, 305 F.3d 802, 805 (8th Cir. 2002) (concluding balance "tips in plaintiffs' factor because the defendants presented no evidence ... during the pendency of these proceedings would cause harm at ISP"); *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (finding when non-movant acknowledged "it would suffer no harm if the preliminary injunction were reinstated," factor weighed in favor of injunction).

Additionally, because a "State has no interest in enforcing laws that are unconstitutional," an injunction "preventing the State from enforcing the [the challenged statute] does not irreparably harm the State." *Pavek v. Simon*, 467 F. Supp. 3d 718, 762 (D. Minn. 2020) (alteration in original) (quoting *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1322 (E.D. Ark. 2019)); *Doe v. Miller*, 216 F.R.D. 462, 471 (S.D. Iowa 2003). When, as here, the State is a defendant to the action, the "balance of harms and the public interest merge." *Association of Equip. Mfg. v. Burgum*, 2017 WL 8791104, at *11 (D.N.D. Dec. 14, 2017), *aff'd*, 932 F.3d 727 (8th Cir. 2019) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Contrary to the State's suggestion, harm to the public <u>is</u> relevant to propriety of injunctive relief, including in Iowa courts. *Riter v. Keokuk Electro-Metals Co.*, 82 N.W.2d 151, 159-60 (Iowa 1957); *see also City of Cedar Rapids v. Cach*, 299 N.W.2d 656, 660 (Iowa 1980); *Inc. Town of Carter Lake v. Anderson Excavating & Wrecking Co.*, 241 N.W.2d 896, 903 (Iowa 1976); *A.D., L.L.C. v. 2004 SC Partners, L.L.C.*, 2014 WL 6680884, at *10 (Iowa Ct. App. Nov. 26, 2014).

"It is always in the public interest to prevent the violation of constitutional rights." *Doe*, 216 F.R.D. at 471 (citation omitted); *Rutledge*, 397 F. Supp. 3d at 1322-23. Moreover, as detailed in Plaintiffs' Resistance to Defendants' Motion to Dismiss, Division XXXIII's anticompetitive purpose means the public will bear the higher cost of incumbent projects not subject to competitive selection. *See General Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 321 (8th Cir. 2009) (public interest in competition); *Outcomes Pharm. Heath Care, L.C. v. Nat'l Cmty. Pharmacists Ass'n*, 2006 WL 3782905, at *15 (S.D. Iowa Dec. 22, 2006). Because the harm to Plaintiffs and the public is great, while harm to the State is either nonexistent or comparatively little, the balance of harms favors injunction.

II. GIVEN THE CONSTITUTIONAL CONSIDERATIONS AT ISSUE, A NOMINAL BOND IS APPROPRIATE.

Finally, the State suggests this Court should require Plaintiffs to post a bond. Iowa Rule of Civil Procedure 1.1508 states,

> The order directing a temporary injunction must require that before the writ issues, a bond be filed, with a penalty to be specified in the order, which shall be 125 percent of the probable liability incurred. Such bond with sureties to be approved by the clerk shall be conditioned to pay all damages which may be adjudged against the petition by reason of the injunction.

Id. The purpose of the bond is to "indemnify the person enjoined or restrained from damage through the use of the writ." *PIC USA v. N. Carolina Farm P'ship*, 672 N.W.2d 718, 727 (Iowa 2003). Thus, the amount of the bond is based on damage the enjoined party (here, the State) stands to suffer as a result of the injunction at issue. *See id.*[6]

Yet, the State fails to come forward with any evidence in support of what amount in damage it may incur if injunction is granted. In fact, as previously noted, the State's only evidence offered relates to potential damages incurred from delaying publication, which, as noted above, need not be enjoined in light of the parties' agreement. *See supra*, at 1-2. When no evidence is put forth regarding the appropriate amount of bond, courts generally set a nominal amount. *See N & N Sanitation, Inc. v. City of Coralville*, Johnson Cty. No. LACV59890, 1999 WL 34758814 (Iowa Dist. Ct. 1999) (finding "nominal bond" to be appropriate when "no evidence produced by either party"). This is particularly true for actions where plaintiffs seek to vindicate important constitutional rights. *Dr. John's, Inc. v. City of Sioux City*, 305 F. Supp. 2d 1022, 1043-44 (N.D.

[6] Those not subject to the injunction lack standing to complain about it, and any harm to third parties is not appropriately considered by the Court when setting bond. *Ungar v. Arafat*, 634 F.3d 46, 53 (1st Cir. 2011); *Wimbledon Fund, SPC (Class TT) v. Graybox, L.L.C.*, 2015 WL 12860486, at *3 (C.D. Cal. Oct. 20, 2015); *Puerto Rico v. Price Common*, 342 F. Supp. 1311, 1312 (D.P.R. 1972).

Iowa 2004) ("[R]equiring a bond to issue before enjoining potentially unconstitutional conduct by a government entity simply seems inappropriate, because the rights potentially impinged by the governmental entity's actions are of such gravity that protection of those rights should not be contingent upon ability to pay."); *see also Abdullah v. Cty. of St. Louis*, 52 F. Supp. 3d 936, 948 (E.D. Mo. 2014) (setting bond at $100 "[g]iven the constitutional issues at stake"); *Donohue v. Mangano*, 886 F. Supp. 2d 126, 163 (E.D.N.Y. 2012) (waiving bond "given the important potential constitutional issues" and collecting cases).

Indeed, in a recent ruling by the Johnson County Iowa District Court alleging a single-subject challenge, the court found a bond of $500 appropriate, stating, "The Court finds that the amount should be nominal, as the 'probable liability' to be incurred in this case seems essentially to be the costs of the action, i.e., court costs and filing fees." Ex. 27, at 16. Similarly, here, there is no probable damage to be incurred by the State in simply delaying rulemaking and enforcement of Division XXXIII's unconstitutional provisions. *Sak v. City of Aurelia*, 832 F. Supp. 2d 1026, 1048 (N.D. Iowa 2011) (setting bond amount at $1 for enjoining of city ordinance); *United Food & Commercial Workers Loc. 99 v. Brewer*, 817 F. Supp. 2d 1118, 1128 (D. Ariz. 2011) (waiving bond when "[t]here is no realistic likelihood that Defendants will be harmed by being enjoined from enforcing a law that constitutes ... [a] violation of the First Amendment on its face"); *Dr. John's, Inc.*, 305 F. Supp. 2d at 1043-44 (waiving bond for enjoining of city ordinance). Only a nominal bond is appropriate.

Respectfully submitted,

BELIN McCORMICK, P.C.

/s/ Michael R. Reck

Charles F. Becker AT0000718
Michael R. Reck AT0006573
Erika L. Bauer AT0013026
666 Walnut Street, Suite 2000
Des Moines, IA 50309-3989
Telephone:(515) 283-4645
Facsimile: (515) 558-0645
Email: cfbecker@belinmccormick.com
mrreck@belinmccormick.com
elbauer@belinmccormick.com
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify on December 10, 2020, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System. A copy was also served upon the parties to this action by:

U.S. Mail ✓ Email

David M. Ranscht
Benjamin Flickinger
Assistant Attorney General
1305 E. Walnut Street, 2nd Floor
Des Moines, IA 50319
Email: David.ranscht@ag.iowa.gov
ben.flickinger@ag.iowa.gov
Attorneys for Defendants

Bret A. Dublinske
Lisa M. Agrimonti
Fredrikson & Byron, P.A.
505 East Grand Avenue, Suite 200
Des Moines, IA 50309
Email: dbublinske@fredlaw.com
lagrimonti@fredlaw.com
and

Amy Monopoli
ITC Holdings Corp.
27175 Energy Way
Novi, MI 48377
Email: amonopoli@itctransco.com
Attorneys for Intervenor ITC Midwest LLC

Stanley J. Thompson
Davis Brown Law Firm
215 - 10th Street, Suite 1300
Des Moines, IA 50309
Email: stanthompson@davisbrownlaw.com
Attorneys for Intervenor MidAmerican Energy Company

Signature: */s/ Shannon Olson*