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, MIDAMERICAN ENERGY COMPANY and ITC MIDWEST LLC, Proposed Intervenors.	Case No. CVCV060840 **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

Defendants file the following reply under Iowa Rule of Civil Procedure 1.431(5) in support of their motion to dismiss. The reply clarifies Defendant's motion-to-dismiss arguments—especially where Plaintiffs' resistance characterizes them incorrectly—and illustrates several important case-specific examples of the notion that "[i]n the law, . . . distinctions and nuances matter." *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 897 (Iowa 2015).

ARGUMENT

Mindful that a reply should not simply "reargue points made in the opening brief," Iowa R. Civ. P. 1.431(5), the following aspects of Plaintiffs' resistance deserve attention and rebuttal.

A. Many of Plaintiffs' Rhetorical Flourishes Are Empty.

1. *A remedy exists, but Plaintiffs are not entitled to it.* First, with respect to Plaintiffs' single-subject and title claims (Count I and Count II)—which comprise the meat of the lawsuit—this case does not involve a right without a remedy. (Plaintiffs' Resistance at 1.) Indeed, it doesn't

involve a "right" (in the civil-liberty sense) at all; the single-subject clause and title clause appear in article III of the Iowa Constitution, not article I where individual constitutional rights appear. *See* Op. No. 79–2–9, 1979 WL 21163, at *3 (Iowa Att'y Gen. Feb. 23, 1979) ("Article III, § 29 does not protect individual rights against government, a context in which more active vindication of constitutional protections is generally believed justified. Rather, it involves the internal processes of a coordinate branch of government.").

More importantly, however, this case does not lack a remedy. The available remedy is to invalidate the enactment—exactly what Plaintiffs seek to do. *See Green v. City of Cascade*, 231 N.W.2d 882, 887 (Iowa 1975) (noting the "general rule" that "an ungermane provision in an act renders the whole act void," and identifying circumstances under which only part of an act would be invalid). Whether Plaintiffs are entitled to that remedy, however, is a different question requiring an otherwise cognizable and justiciable claim—and *that* is what Defendants' motion to dismiss probes. Just as (in another context) an unsatisfying administrative remedy is not an inadequate remedy for exhaustion purposes, a remedy that is unavailable to specific Plaintiffs under the circumstances presented here does not mean in any textual, conceptual, logical, or legal sense that there is no remedy at all. *Cf. Keokuk Cty. v. H.B.*, 593 N.W.2d 117, 125 (Iowa 1999).

2. *Past cases naming agencies and officials did not <u>also</u> name the State.* The fact that past single-subject challenges *have* named state agencies and officials (Plaintiffs' Resistance at 35 n.14) does not mean they must be named in this case. All it indicates is that perhaps no litigant ever raised the issue before. *Cf. Rush v. Reynolds*, No. 19–1109, 2020 WL 825953, at *6 (Iowa Ct. App. Feb. 19, 2020) (concluding an individual legislator's previous challenge to a bill on single-subject grounds—that did not contain any discussion of standing—did not prevent defendants from contesting legislators' standing). And, more importantly, there's a key difference

between this case and every one of the past cases Plaintiffs cite: none of the past cases feature the "State of Iowa" in the caption or mention the "State of Iowa" as a separate or additional defendant. So, of course the agencies and officials in those cases were proper parties; there weren't any other parties against whom the court could grant relief. But here, the State of Iowa is essentially an umbrella that can still afford Plaintiffs the relief they seek (if they ultimately prevail). The Iowa Utilities Board, Geri Huser, Glen Dickinson, and Leslie Hickey are all "officers, agents, or employees" (Plaintiffs' Resistance at 35) of the State. There is no need to sue and name multiple Defendants like nesting dolls when the biggest doll (the State) subsumes them all.[1]

B. Plaintiffs Conflate Timeliness and Standing.

Defendants simply do not argue what Plaintiffs suggest: that the act cannot be challenged until after it has been published (Plaintiffs' Resistance at 1). This framing conflates timeliness with standing. The two inquiries are separate.

First is the question of timeliness. "The codification process . . . cuts off a right of constitutional challenge under Article III, section 29 if no one has lodged a challenge before codification is complete." *Tabor v. State*, 519 N.W.2d 378, 380 (Iowa 1994). And it frankly does not matter that a plaintiff might not suffer a cognizable injury before the deadline passes. Indeed, caselaw expressly contemplates that for some pieces of legislation, no challenge may be possible. Even though the time limitation can be "entirely fortuitous" in some circumstances, it is an

[1] Further, Plaintiffs' reference to *Ex parte Young* (Plaintiffs' Resistance at 34 n.13) is both irrelevant and unavailing. *Ex parte Young* authorizes injunctions directly against an official and not the State—when *that specific official* committed a constitutional violation. *See Lee v. State*, 844 N.W.2d 668, 675 (Iowa 2016) (explaining that *Ex parte Young* applies to "a state official who violates federal law"). Plaintiffs do not allege any of the specific officials they have named violated any constitutional provision—they assert the legislature did. Additionally, *Ex parte Young* is an exception to sovereign immunity—a defense not raised in this case. Although Plaintiffs acknowledge *Ex parte Young* arises in a very different context (Plaintiffs' Resistance at 34 n.13), that context has no comparative value here.

"inescapable conclusion" that follows from the codification window. *State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001). Notably, *Kolbet* considered and rejected a contention that closely resembles Plaintiffs' argument here; the challenger in *Kolbet* contended it was unfair to reject his single-subject claim as untimely because "he did not have standing to challenge the act until criminal charges were brought against him." *Id.* The Court rejected his assertion, because even though litigants can't (and generally don't) "challenge a statute until they are placed in a position in which the statute adversely affects them," *id.*, the interest in finality of legislation outweighs any rock-and-a-hard-place counterargument surrounding the timing of cognizable injury.

Along similar lines, it is helpful to understand just what the codification window is. Properly conceptualizing it disintegrates Plaintiffs' "veritable mountain of literature" (Plaintiffs' Resistance at 7 n.2) into a veritable molehill, because the codification window is not a time clock like a statute of limitations that first requires a claim to "accrue." Instead, it functions like a statute of *repose* by setting a point beyond which no further claims—even potentially meritorious ones—can be brought. "Statutes of repose are different from statutes of limitation, although they have comparable effects." *Hanson v. Williams Cty.*, 389 N.W.2d 319, 321 (N.D. 1986); *accord Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc.*, 507 N.W.2d 405, 408 (Iowa 1993). *Bob McKiness Excavating* explains the difference:

> A statute of limitations bars, after a certain period of time, the right to prosecute an accrued cause of action. By contrast, a statute of repose "terminates any right of action after a specified time has elapsed, regardless of whether or not there has as yet been an injury." . . . Under a statute of repose, therefore, the mere passage of time can prevent a legal right *from ever arising*.

Bob McKiness Excavating, 507 N.W.2d at 408 (emphasis added) (quoting *Hanson*, 389 N.W.2d at 321). *Kolbet* demonstrates that the codification window neatly fits the second category; it recognizes that a single-subject challenger may not be cognizably injured until after codification, but nonetheless concludes that challenge occurs too late. *See Kolbet*, 638 N.W.2d at 661.

Finally, the legislature's amendment of the word "issue" to "publish" in a statute assuredly means publish, and Defendants do not suggest otherwise. (Plaintiffs' Resistance at 19.) Defendants' argument is more nuanced: amending "issue" to "publish" suggests the legislature was staying out of the "codification" fray entirely by using a different verb.

The relevant event is "codification." *See State v. Mabry*, 460 N.W.2d 472, 475 (Iowa 1990) (concluding the rule "that codification of the challenged legislation cures a constitutional defect in title or subject matter" is "fair to all concerned," and adopting that rule in Iowa). The legislature was aware of that caselaw and nonetheless did not change the statute to say that a new volume shall be *codified* after every session. Thus, codification and publication must mean different things. In other words, the legislature was not addressing the applicable time period for claims under article III, section 29 (Plaintiffs' Resistance at 20) at all. It was addressing publication. The relevant event for timeliness purposes is still codification, as established by the Court. In effect, by changing "issue" to "publish," the legislature clarified that the Court incorrectly equated "codification" with "issuance" originally, and left development of what "codification" actually is for future cases.

Defendants' position, therefore, is that publication is irrelevant because it is not the same as codification. There is no dispute that the official publication date controls publication (Plaintiffs' Resistance at 21 & n.8)—but this case is not about publication. It's about codification, which is (1) different, and (2) the word the caselaw uses. Publication involves an official version; codification can involve an unofficial version. However, if the Court agrees with Plaintiffs that publication and codification are the same, then the claims are timely.

Regardless, the timeliness of a claim under article III, section 29 of the Iowa Constitution has nothing to do with whether and when a plaintiff suffers a particularized, cognizable injury.

The converse is also true: a plaintiff's standing to bring a lawsuit under article III, section 29 does not depend on whether they do so in a timely fashion. For example, in *Rush*, the plaintiffs filed their lawsuit one week after the Governor signed the bill, and perhaps even before the legislative session had ended. *See Rush*, 2020 WL 825953, at *2. Thus, there was no question that the *Rush* plaintiffs lodged their claims within the codification window. But that did not mean the plaintiffs' hypothetical future injuries conferred standing on them, or that the Court would make an exception given the limited codification window. *See id.* at *5–7. This case falls along the same lines. The Court should reject Plaintiffs' assertions to the contrary.

C. The Injuries Plaintiffs' Resistance Alleges Still Do Not Confer Standing.

Plaintiffs' Resistance asserts several different injuries and contends all of them are sufficiently imminent and particularized to confer standing. However, none of them are and none of them do—even if the claims are timely.

First, Plaintiffs contend that they "were deprived of the ability to participate in the legislative process" (Plaintiffs' Resistance at 2) or to "marshal . . . public opposition" to the bill (Plaintiffs' Resistance at 7) and that they, like all citizens, have an interest in ensuring constitutional compliance (Plaintiffs' Resistance at 7). But those are generalized grievances that, under Iowa law, are expressly not enough. The "vindication of the public interest in seeing that the legislature acts in conformity with the constitution" is "an admirable interest," but does not confer standing in Iowa—regardless of what cases in other jurisdictions have to say. *Godfrey v. State*, 752 N.W.2d 413, 424 (Iowa 2008); *accord Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 869–70 (Iowa 2005) ("[W]hen the only claim is nonobservance of the law, such claim affects only the generalized interest of all citizens. Any injury resulting from such nonobservance is abstract in nature and not sufficient for standing.").

It also resembles the claim of standing in *Rush*, where legislators asserted "the process of enacting [the bill] injured them" and "they were not afforded an opportunity to vote on [the bill] in a manner that complied with the Iowa Constitution." *Rush*, 2020 WL 825953, at *5. The court rejected that claim of standing because it was common to all legislators, not just those specific plaintiffs. *See id.* at *6 (noting the procedural injury was "not unique or personal to [the plaintiffs] but instead [wa]s true of all members of the Iowa legislature"). The same is true here; Plaintiffs' claim that they were deprived of the ability to participate in the legislative process—even assuming a violation occurred—is common to all constituents, not just these specific Plaintiffs.

Next, Plaintiffs contend they are "directly impacted" by the right of first refusal (ROFR) contained in the legislation. (Plaintiffs' Resistance at 2.) But, again like the plaintiffs in *Rush*, this assertion is too conjectural or hypothetical to generate standing. *See id.* at *5. It does not matter that the relevant non-governmental organizations' tariffs—if those documents are even properly before the Court—honor ROFRs created by state law. For Plaintiffs to be actually affected by the ROFR provision, a series of at least three events—and maybe more—would have to occur. First, an electric transmission project would have to be announced, initiated, or otherwise begun. Second, the tariff would have to honor a state ROFR. Third, an incumbent would actually have to exercise its ROFR. Plaintiffs may be able to establish the second step but not the first or third. It does not matter how likely the first and third events may appear to Plaintiffs; they simply aren't enough for standing because they require the Court to "endorse . . . theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 414, 133 S. Ct. 1138, 1150 (2013). A claim of injury that "relies on a highly attenuated chain of possibilities" cannot "satisfy the requirement that the threatened injury must be certainly impending." *Id.* at 410, 133 S. Ct. at 1148.

For example, Plaintiffs claim transmission approval is "expected as soon as 2021" (Plaintiffs' Resistance at 4) and that a future project is "forecasted" (Plaintiffs' Resistance at 18), but "expected" does not mean "imminent," and "forecasted" does not mean "underway." It is fair to say the plaintiffs in *Rush* expected and forecasted that appointed judicial nominating commissioners would "vote together and 'extinguish' the votes of all elected members," but that expectation was still conjectural and hypothetical no matter how likely the plaintiffs believed it to be. *Rush*, 2020 WL 825953, at *5. Additionally, just as these Plaintiffs contend they will be discouraged from participating in the Iowa market because of the statutory ROFR, a prospective judicial applicant asserted an imminent future injury when he "intend[ed] to apply for open [judicial] positions in the future but [wa]s discouraged because of politicization" in the nominating process. *Duff v. Reynolds*, No. 19–1789, 2020 WL 825983, at *3 (Iowa Ct. App. Feb. 19, 2020). That claim "concerning his future plans" was purely speculative and revealed no injury in fact. *Id.* The same is true here. Further, the fact that Duff had applied for judicial vacancies in the past demonstrated his ability and intent to apply for judicial vacancies was more than hypothetical, but that still wasn't enough. *See id.* Thus, Plaintiffs' assertion that their ability and intent to bid on electric transmission projects is more than hypothetical (Plaintiffs' Resistance at 9 n.4) is not enough either. Together, *Rush* and *Duff*—two recent cases specifically addressing single-subject and title claims under article III, section 29 of the Iowa Constitution—defeat Plaintiffs' claims in this case.

Finally, Plaintiffs claim that harm occurring in other states, involving other specific projects, governed by other statutes, means they have suffered cognizable harm (1) in Iowa, (2) from *this* statute. (Plaintiffs' Resistance at 11.) Even assuming that past lost business is a cognizable harm, Plaintiffs do not assert they have suffered any lost business *in Iowa*—only in

those other states. (Plaintiffs' Resistance at 10–11.) Further, the case upon which Plaintiffs rely for the proposition that past lost business is sufficient harm involved "unrebutted testimony," which would be inappropriate on a motion to dismiss. *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 444 (Iowa 1983). And despite identifying a competitive interest, that testimony only satisfied the first prong of standing; the plaintiff in *Iowa Bankers* came up short on the second prong because it "failed to show injury, or potential injury, as a result of" some of the rules the plaintiff was challenging. *Id.* As to the other rules, unrebutted testimony again established the actual harm, *see id.*, but testimony cannot do so in the procedural posture of this case. In short, *Iowa Bankers* does not afford Plaintiffs standing here.

Finally, Plaintiffs' assertion about the Minnesota statute is precisely the point: harm from the Huntley-Wilmarth line in Minnesota involved a specific transmission project, but Iowa's transmission market does not involve any similar pending project. And while Plaintiffs cite a federal case indicating likely future injuries are cognizable when they may result from affirmative criminal prosecution or agency enforcement proceedings (Plaintiffs' Resistance at 11–12), the ROFR statute involves neither of those. Plaintiffs will not have to defend themselves *against* any agency or criminal proceedings; they are purely playing offense.

Boiled down, each of Plaintiffs' asserted injuries is missing a necessary element of standing. The purported procedural injury is not speculative or hypothetical, but crucially, it is also not particularized. And the claim that Plaintiffs will be damaged by the statute's operation in the future *is* particularized, but is also speculative and hypothetical. Plaintiffs lack standing and the case must be dismissed.[2]

[2] Of course, should an electric transmission project become more than anticipation in the future, Plaintiffs would be able to reassert their equal protection claim. Only their claims under article III, section 29 of the Iowa Constitution would become barred by the codification window.

D. The ROFR Provision Functions Like the Provision in *Covington*.

Covington v. Reynolds provides another analogous illustration of the deficiencies in Plaintiffs' suit—this time on the ripeness question. And, as with standing, Plaintiffs' anticipation of how the statute will operate, even if it ultimately happens, is still just unripe anticipation at this stage.

In *Covington*, a statute appeared "clearly calculated to allow Medicaid providers to deny gender-affirming surgical procedures to transgender Iowans," but nothing prohibited the providers from *allowing* those claims. *Covington v. Reynolds*, No. 19–1197, 2020 WL 4514691, at *3. Plaintiffs contend that is the distinction, and that the ROFR provision is automatic (Plaintiffs' Resistance at 18)—but really, the ROFR provision functions similarly. It may be clearly calculated to afford incumbent providers the first opportunity to build new electric transmission projects, but as Plaintiffs recognize (Plaintiffs' Resistance at 3), an incumbent *can* decline to build a new project—even though Plaintiffs think it is unlikely they will do so. It allows, but does not mandate, incumbent providers to exercise a ROFR. So, Plaintiffs are not completely foreclosed from being assigned a transmission project (Plaintiffs' Resistance at 4); rather, they are only foreclosed *if* an incumbent actually exercises its ROFR. As in *Covington*, that feared outcome may seem likely, and may even have been the purpose of the legislation, but until a project occurs *and* an incumbent actually exercises the ROFR, the claims are not ripe. *Covington*, 2020 WL 4514691, at *3 (concluding that even though it seemed unlikely a provider would allow coverage for gender-affirming surgery, "any dispute is speculative until a denial occurs").

E. Plaintiffs' Exhibits 1–8 Are Improper for a Motion to Dismiss.

When considering and ruling upon the motion to dismiss, the Court must disregard and not take into account Plaintiffs' Exhibits 1 through 8. These exhibits include MISO and SPP tariffs,

and two declarations from an employee or representative of Plaintiffs. They are outside the pleadings and therefore not appropriate for a motion to dismiss. Evidence outside the pleadings is allowable for some pre-answer jurisdictional challenges (Plaintiffs' Resistance at 7 n.1), but Defendants raise standing and ripeness, which are closely related to jurisdictional challenges but are separate doctrines. *See Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 473 (Iowa 2004). Although the Iowa Supreme Court has said with respect to agency action that "standing is jurisdictional," *Northbrook Residents Ass'n v. Iowa State Dep't of Health*, 298 N.W.2d 330, 331 (Iowa 1980), this case is not a judicial review proceeding challenging agency action as *Northbrook* was. Further, that phrasing is imprecise; "the federal test for standing is based upon constitutional strictures"—which is why it is jurisdictional in federal cases—"while [Iowa's] rule on standing is self-imposed." *Alons*, 698 N.W.2d at 869. It is an open question whether prudential standing "would best be treated as nonjurisdictional." Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 Case W. Res. L. Rev. 413, 449 (2013). And if it is not jurisdictional, matters outside the pleading (except those appropriate for judicial notice)[3] should not be considered.

Motions to dismiss have "limited scope" and courts should consider extraneous facts "reluctantly," if at all. *Estate of Dyer v. Krug*, 533 N.W.2d 221, 223 (Iowa 1995). The Court considered extraneous facts in *Estate of Dyer* because both parties relied on them and they "generally confirm[ed] facts that [we]re already apparent from the allegations of the petition." *Id.* Further, the Iowa Supreme Court considered an objection waived when a "resistance to the motion to dismiss referred to and included various exhibits," and "[b]oth parties and the district court

[3] Plaintiffs' Exhibits 9 and 10 are appropriate for consideration on a motion to dismiss because, as public filings on other courts' dockets, they are open records subject to judicial notice. *See Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 194 (Iowa 2007).

referred to these documents" with "no mention . . . of judicial notice." *Ritz v. Wapello Cty. Bd. of Supervisors*, 595 N.W.2d 786, 788 n.1 (Iowa 1999). Here, Defendants object to the inclusion of Plaintiffs' Exhibits 1 through 8 and urge the Court to disregard them. *See id.* The motion to dismiss must be decided based only on "the allegations of the petition and . . . the concessions made" in the motion-practice pleadings. *Citizens for Responsible Choices*, 686 N.W.2d at 473.

CONCLUSION

Plaintiffs' resistance does not defeat the motion to dismiss. Accordingly, Defendants respectfully request that the Court grant Defendants' motion, assess all costs to Plaintiffs, and award any other relief 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 7th day of December, 2020:

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