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, MIDAMERICA ENERGY COMPANY and ITC MIDWEST LLC, Intervenors.	)	CASE NO. CVCV060840 **COMBINED REPLY TO INTERVENORS MIDAMERICAN ENERGY COMPANY AND ITC MIDWEST'S RESISTANCES TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION**

Plaintiffs LS Power Midcontinent, LLC and Southwest Transmission, LLC, by and through the undersigned, hereby file the following Combined Reply to Intervenors MidAmerican Energy Company and ITC Midwest's (hereinafter collectively, "Intervenors") Resistances to Plaintiffs' Motion for Temporary Injunction, stating as follows:

At issue in this case are the events of June 14, 2020, and whether they comply with Iowa Constitution Article III, Section 29. As previously noted, this is not the first time the events of that night have reached an Iowa District Court. Indeed, yet another bill with the same failing already has been enjoined by Judge Mitchell Turner to avoid running afoul of the Constitution and to ensure respect for the law. Ex. 26. The same result is required here to ensure the Legislature adheres to our Constitution. Intervenors' briefs do not alter the necessary result on Plaintiffs' temporary injunction motion. Plaintiffs remain likely to succeed on their single-subject challenge and Article I, Section 6 claims. Because irreparable harm is assumed when the Constitution is violated, an injunction is warranted.

I. PLAINTIFFS REMAIN LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. H.F. 2643 is Not a Single-Subject Bill and Thus, Violates Article III, Section 29 of the Iowa Constitution.

H.F. 2643 is *not* a single-subject bill. Recognizing any argument to the contrary was specious, the State, other than contesting standing, did *not* dispute Plaintiffs were likely to succeed on the merit of their single-subject challenge. *See* Pl. Reply in Supp. of Mot. for Temporary Inj., 10. Intervenors apparently disagree. They claim H.F. 2643—a bill addressing, among other things, appropriations, civil trial locations (Division V), code corrections (Division XV), zoning (Division XXIX), search warrants (Division XXVIII), absentee ballots (Division XXXI), the Regents' ability to hire an attorney (Division XXXII) and a right of first refusal for electric transmission lines (Division XXXIII)—has a single subject. In so doing, Intervenors rely on *Miller v. Bair*, 444 N.W.2d 487, 490 (Iowa 1989), to suggest that, because all provisions of the bill relate generally to the catch-all "legal and regulatory responsibilities," the Constitution's single-subject command is not violated. They further suggest, because a predecessor to Division XXXIII was in a study bill (on which a hearing was never held), there was no surprise. Because Intervenors' positions are deficient in multiple respects, Plaintiffs remain likely to succeed on their single-subject challenge.

1. "Legal and Regulatory Responsibilities" Is Not a Valid Single-Subject, Lest We Eviscerate the Purpose of Article III, Section 29.

First, to state the subject of a bill is "legal and regulatory responsibilities" is equivalent to saying the subject of the bill is "laws." "Were [this Court] to conclude that the many obviously discordant provisions contained in [H.F. 2643] are nonetheless related because of a tortured connection to a vague notion..., [this Court] would be essentially eliminating the single subject as a meaningful constitutional check on the legislature's actions." *Johnson v. Edgar*, 680 N.E.2d

1372, 1380-81 (Ill. 1997). This Court must look for a "purpose" within the legislation to which all matters must be connected "either logically or in popular understanding." *See State v. Mabry*, 460 N.W.2d 472, 474 (Iowa 1990) (noting proper analysis is to "search for (or eliminate the presence of) a single purpose toward which the several dissimilar parts of the bill relate" (citation omitted)). Yet the Court must be reasonable hypothesizing a unifying topic, as "no two subjects are so wide apart that they may not be brought into a common focus, if the point of view be carried back far enough." *Commonwealth of Pa. v. Neiman*, 84 A.3d 603, 612 (Penn. 2013). Such an approach would render the single-subject clause meaningless. When a reasonable view is taken of H.F. 2643's provisions, there is no unifying purpose of the legislation.

For example, in *Reedy*, the Illinois Supreme Court found a bill containing legislation related to (1) basic duties and jurisdiction of law enforcement officials, (2) the burden of proof for an insanity defense, (3) civil and criminal rules related to cannabis and forfeiture proceedings, (4) truth-in-sentencing law and (5) rules for perfecting hospital liens, violated a single-subject clause. *People v. Reedy*, 708 N.E.2d 1114, 1119 (Ill. 1999). The State argued all provisions were related to "governmental matters." *Id.* The Illinois Supreme Court rejected such argument, concluding, "To say that such a 'connection' satisfies the single subject rule strains credulity.... The permitted use of such a sweeping and vague category to unite unrelated measures would render the single subject clause of our constitution meaningless." *Id.* Similarly, if this Court is to give any meaning to the single-subject clause, "legal and regulatory responsibilities"—a vague category that could encompass virtually all legislation[1]— cannot pass muster. *See id.* (finding "civil remedies" topic

[1] Indeed, in *Rush v. Reynolds*, an unpublished case primarily relied upon by the State, the Iowa Court of Appeals highlighted that "legal and regulatory responsibilities" is a "vague categorical description[] that [does] not disclose specific subject matters of the various divisions of the bill." 2020 WL 825953, at *12 (Iowa Ct. App. Feb. 19, 2020).

too broad); *see also People v. Olender*, 854 N.E.2d 593, 603 (Ill. 2005) (finding "governmental regulation" subject too vague, as "any legislative action could fit within the broad category"); *Harbor v. Deukmejian*, 742 P.2d 1290, 1100-01 (Cal. 1987) (en banc) (finding "fiscal affairs" is a subject of "excessive generality" that "a substantial portion of the many thousand statutes adopted during each legislative sessions could be included" and would "read out" single-subject clause).

Even accepting "legal and regulatory responsibilities" as a valid purpose, many of H.F. 2643's provisions do not connect logically to it. H.F. 2643 began as a measure to make appropriations, a primarily legislative function which entails no legal or regulatory responsibility. *See* Ex. 10; *see also* Iowa Code § 3.4; *Rants v. Vilsack*, 684 N.W.2d 193, 202-03 (Iowa 2004). Nor do the following provisions specify any specific legal or regulatory duties: Division I (providing appropriation to legislative agencies with no corresponding duty); Division X (relating to county hospital funding); Division XVIII (making appropriation for nonpublic school concurrent enrollment); Division XXVI (repealing applicability of hemp regulation and creating retroactive applicability); and Division XV (making code corrections). *See* Ex. 10. Division XXXIII, providing a right of first refusal to incumbent transmission entities, grants a substantive right: "An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan...." Ex. 10, at 52.[2] In short, there is no reasonable argument the bill in question's single purpose was "legal and regulatory responsibilities" or that it covers only one subject as the Constitution requires.

[2] Tangential agency action (such as allowing rulemaking) does not make the purpose of the legislation a "legal" or "regulatory" responsibility. Indeed, in *Taylor*, the Iowa Supreme Court rejected a similar argument where the State attempted to argue that because a provision contained a "weapons" provision and weapons could affect juveniles, it was in some "reasonable sense auxiliary to" juvenile justice. *See State v. Taylor*, 557 N.W.2d 523, 525 (Iowa 1996).

Bair is not to the contrary. At issue in *Bair* was legislation whose primary purpose was to "promote economic development," through economic incentives (such as allowing private sale of wine and removing applicable taxes and tax credits) and revenue adjustments. 444 N.W.2d at 490. The legislation was not an end-of-year budget bill, where the dangers of logrolling are particularly acute, but was substantive policy legislation. *See id.* The Court approved *taxing* and *police powers* in a bill to promote economic incentives, not substantive policy (and code corrections) within an appropriations measure. *Compare Bair*, 444 N.W.2d at 490, *with* The Honorable Joseph Coleman, Office of the Attorney Gen. Op. No. 75-6-7 (Iowa June 18, 1975) ("These latter sections are an entirely different subject matter, wholly unrelated to the appropriations, and violate the aforementioned constitutional provision against an act embracing more than one subject."); *and Giles v. State*, 511 N.W.2d 622, 625 (Iowa 1994) ("[I]ncorporating such a [substantive] change in a code correction bill violates the single subject requirement of the Iowa Constitution."). *Bair* simply is not on point.

2. Surprise and Fraud are Otherwise Evident in the History of H.F. 2643.

Ultimately, what happened with Division XXXIII strikes at the heart of what the single-subject clause is designed to prevent. The single-subject clause intends to "force each legislative proposal to stand on its own merits" and aims to prevent "undesirable riders." *Godfrey v. State*, 752 N.W.2d 413, 426 (Iowa 2008). Yet, here, we have a provision whose predecessors failed—twice—to pass on their own merits attached in the early morning hours on the final day of the legislative session to an omnibus appropriations bill. *See, e.g.*, *State ex rel. Stephan v. Carlin*, 631 P.2d 673 (Kan. 1981). The single-subject clause intends to prevent fraud and surprise by legislators and members of the public, yet, here, at least three legislators and an interested party were shocked at Division XXXIII's inclusion. *Taylor*, 557 N.W.2d at 525; Ex. 2 at 29, 30-31; Ex.

1, Zumbach Decl. ¶ 8; Ex. 4, Stegner Decl. ¶ 38; Ex. 21, Boulton Decl. ¶ 8; Ex. 30, Bisignano Decl. ¶ 8. The single-subject clause is designed to ensure each legislator can "better understand and more intelligently debate the issues presented" and "keep citizens informed of legislation being considered." *Taylor*, 557 N.W.2d at 525; *see also People v. Cervantes*, 723 N.E.2d 265, 266-67 (Ill. 1999) (quoting *Reedy*, 708 N.E.2d at 1114). Yet, here, legislators revealed during debate that they did not understand the scope or effect of the Division XXXIII, and the public had little opportunity to weigh in during the mere 12 hours between 1:35 a.m. and Division XXXIII's passage. Ex. 2 at 21, 30-31.

Trying to contradict these facts, Intervenors suggest legislators' affidavits cannot be considered. They also argue that, because the public had notice of a *different* provision containing a right-of-first refusal (that *died* after failing to be scheduled for hearing in committee), the public also should be deemed to have had notice of *this* provision, first proposed on the Senate floor at 1:35 a.m. and passed approximately 12 hours later that same day. Neither argument is persuasive. Indeed, if anything, the prior failed acts suggested to the public the matter was dead—not that it would be revived in an improper bill in the middle of the night the last day in appropriations. Nor does any such argument change the fact H.F. 2543 was *not* a single subject bill, as the Constitution requires.

First, Intervenors' argument affidavits cannot be considered misunderstands the law. It is correct legislator affidavits are of little help in determining intent of an entire legislative body (for instance, in an equal protection claim or for statutory construction), as their authority suggests. *See AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 36 (Iowa 2019) (equal protection); *Rhoades v. State*, 880 N.W.2d 431, 447 (Iowa 2016) (statutory interpretation); *Consolidated Freightways Corp. of Del. v. Nicholas*, 137 N.W.2d 900, 905 (Iowa 1965) (statutory

interpretation); *Tennant v. Kuhlmeier*, 120 N.W. 689, 690 (Iowa 1909) (statutory interpretation).[3] Here, however, Plaintiffs did *not* submit affidavits speaking to intent of an entire legislative body. Rather, the legislative affidavits detail particular legislators' surprise; background on legislative processes and bill history of H.F. 2643. Exs. 1, 21. Legislator affidavits *are* competent evidence for such purposes. *See Rhoades*, 880 N.W.2d at 447 ("On occasion, we have stated that a court may consider affidavits from legislators describing the factual background of legislation."); *Bair*, 444 N.W.2d at 488 ("Also filed in support of the motion for summary judgment were three legislators' affidavits which described the background of legislation."); *Backus v. South Carolina*, 857 F. Supp. 2d 553, 563 (D.S.C.), *aff'd*, 568 U.S. 801 (2012) (considering legislator affidavits regarding "personal ... experiences"); *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996) (considering personal opinions of legislators regarding feasibility of redistricting). For instance, in the recent case of *Planned Parenthood of the Heartland, Inc. and Jill Meadows v. Reynolds*, the Iowa District Court for Johnson County found a legislator affidavit competent evidence of surprise. Ex. 26 at 14 ("no doubt that, at a minimum, the legislator who has provided an affidavit on behalf of Petitioners was surprised by the Amendment."); *compare* Ex. 28 (affidavit filed in *Planned Parenthood*), *with* Exs. 1, 4, 21.

Even in absence of the affidavits offered, however, this Court may (and should) consider the bill's legislative history, including floor debate, showing impermissible logrolling occurred. *See, e.g.*, *Olender*, 854 N.E. at 599 (considering floor debate regarding logrolling). Although the legislature may suspend its procedural rules, this does not mean (and no Iowa court holds) that a

[3] In *Lee Enterprises, Inc. v. Iowa State Tax Commission*, the Iowa Supreme Court noted, in the background of the case, that an objection was sustained to legislator testimony on inadequate consideration by the legislature. 162 N.W.2d 730, 734 (Iowa 1968). Yet the admissibility on appeal was not before the Court, and legislators herein offer personal testimony, not testimony as to the entire body.

particular measure's history may not be considered in analyzing Article III, Section 29 claims. *See e.g.*, *Rush*, 2020 WL 825953, at *9 ("The legislature may suspend enforcement of its rules, but may not ignore or suspend the Iowa Constitution."). Legislative history shows Division XXXIII had never been seen or vetted in its entirety—it contained language entirely absent from previous right-of-first-refusal legislation (such as a 90-day notice period and process for another entity being allowed to construct). *Compare* Exs. 5, 6, *with* Ex. 10 at 52-54. Even legislation similar to Division XXXIII failed to make it through a full committee process of both chambers. *See* Answer of ITC Midwest LLC, ¶ 14 (admitting subcommittee never met on H.S.B. 540, it never advanced beyond subcommittee and it ultimately died without further consideration); and ¶ 15 (admitting that during the preceding legislative session, right-of-first refusal language was stricken from S.F. 2311 when considered by the House); *see Patrice v. Murphy*, 966 P.2d 1271, 1273 (Wash. 1998) (finding impermissible rider when "[t]he day before the bill was voted on and approved," language from a bill which died in subcommittee inserted); *Linndale v. State*, 19 N.E.3d 935, 940-41 (Ohio Ct. App. 2014) (finding logrolling when measure "taken from another bill that was stuck in committee and added at the last minute").

Intervenors imply that because the Senate appropriations committee[4] voted to recommend passage of H.F. 2643 on June 13, 2020 (prior to introduction of the amendment containing Division XXXIII on the floor), this is equivalent to the full committee process. MidAmerican Energy Co. Br. at 5. This is neither accurate nor relevant. The Senate appropriations committee met for a grand total of ten minutes to consider H.F. 2643. MidAmerican Energy Co., Ex. F at 46. This is a far cry from a full committee process where testimony from interested members of the public, or

[4] Notably, former right-of-first refusal measures had been assigned to the Commerce committees of respective chambers, and Division XXXIII contains no appropriation.

experts in electric transmission, could be received. Nor does it address the single-subject problem: a Committee meeting, even if it had been fulsome, cannot approve of multi-subject legislation in violation of the Constitution.

Legislative debate further confirms logrolling. Contrary to Intervenors' suggestion, multiple legislators expressed surprise at Division XXXIII's inclusion in the budget bill: "I don't think many of at least my colleagues on this side of the aisle saw [Division XXXIII] coming." Ex. 2 at 18; *see also* Ex. 2 at 30-31. Other statements evince confusion, even by the bill's sponsor, on Division XXXIII's effect and its legislative history. Ex. 2 at 18-19, 28, 29-30 (testimony of Senator Brietbach, inaccurately suggesting Division XXXIII had been passed by the House in the current session and inaccurately describing the effect of its provisions).[5] Although Intervenors take issue with this testimony because one legislator mistakenly commented MidAmerican was "not a supporter" of Division XXXIII, this merely confirms Plaintiffs' point: due to the manner of Division XXXIII's late-night presentation and passage, legislators were not aware of where interested parties stood. Ex. 2 at 29; *see also* Ex. 2 at 31 ("[A]nd my utility is saying, what is this?"). Had logrolling not occurred, they would have known.

Finally, Intervenors' improperly conflate notice of Division XXXIII of H.F. 2643 (presented at 1:35 a.m. on the floor of the Senate and passed mere hours later, at 5:47 a.m. in the

[5] Intervenors hurl accusations at Plaintiffs on this point, stating Plaintiffs "inaccurately parse[] the comments of Senator Breitbach" and are "misleading." Intervenors then summarily declare (without quoting the record) Senator Breitbach was accurate in his statements. Plaintiffs in their briefing quoted Senator Breitbach and provided the Court with the entire transcript of the Senate floor debate. Specifically, Senator Breitbach indicated, multiple times, that he believed a right of first refusal had been passed in the House, but had not made it through the funnel. Ex. 2 at 28, 29-30. Yet no bill, not even Division XXXIII's predecessors, *ever* made it through the House committee process. Senator Brietbach also inaccurately represented Division XXXIII involved projects being "open for bids," and then an entity with a right-of-first refusal could match the price. Ex. 2 at 18-19. This is <u>*not*</u> the procedure provided by Division XXXIII. Accusations of misrepresentation do not substitute for actual facts.

Senate and 1:07 p.m. in the House) with H.S.B. 540 (the House study bill never scheduled for committee hearing), suggesting notice of one equals opportunity to comment on the other. Such reasoning is flawed, not only because one bill does not equal another, but also because H.S.B. 540 was never scheduled for hearing, thus *no* members of the public had the opportunity to present their views through a public process. *See* Answer of ITC Midwest LLC ¶ 14 (admitting subcommittee never met on H.S.B. 540, it never advanced beyond subcommittee and it ultimately died without further consideration). Contrary to Intervenors' suggestion, the history of the two measures underscores that, *had* the public and interested parties received proper opportunity to weigh in (even informally), the right of first refusal would not pass on its own merit. On H.S.B. 540, interested parties met informally with legislators to express concern. Ex. 4, Stegner Decl. ¶¶ 36-37. As a result, no action was taken, and the measure died. *Id.* In contrast, there was virtually no opportunity—even informally—to meet with legislators and make views known on Division XXXIII. Indeed, as Intervenors' exhibits highlight, **no** interested parties were able to file "for" or "against" lobbying statements *before* H.F. 2643 passed in the Senate. MidAmerican Energy Co. Br., Ex. B. Even for those lobbyists who were eventually able to file their positions, the earliest was a mere hours before the bill's presentation in the House, and 24 lobbyists were able to file only ***after*** H.F. 2643 passed both chambers. MidAmerican Energy Co. Br., Ex. B. This, surely, does *not* show the public was appropriately apprised. Nor does the Constitution say Article III, Section 29 can be violated as long as at least someone catches the mischief. A bill without a single subject violates the Constitution.

B. Plaintiffs Remain Likely to Succeed on Their Article I, Section 6 Challenges.

Intervenors dispute Plaintiffs are likely to succeed on their Article I, Section 6 challenges. They fault Plaintiffs for focusing on the threshold issue of whether Article III, Section 29 was

violated. The Article III, Section 29 issue is a straightforward one. Correctly resolving this issue negates the need to explore the more complex Article I, Section 6 issues where expert testimony, further discovery and a thorough understanding of electric transmission law may aid the ultimate decision. Faulting Plaintiffs for focusing on threshold issues, where focus *should* be, is misplaced. Regardless, Intervenors are wrong regarding Article I, Section 6 as well. Intervenors' argument on Article I, Section 6 largely repeats the State's arguments: (1) that incumbent and non-incumbent entities are not similarly situated because one is an incumbent and one is not; (2) that challenges to *different* State's right-of-first refusal statutes under *different* constitutional provisions (at least one of which is on appeal) have not succeeded; and (3) that there are illusory distinctions regarding rate regulation and reliability concerns. Plaintiffs will do their best to address Intervenors' arguments without repeating prior briefing.

1. Incumbent and Non-Incumbent Entities Are Similarly Situated With Respect to the Law's Purposes.

Intervenors' first argument—that incumbents are not similarly situated to non-incumbents with respect to building and maintaining electric transmission lines—suffers many of the same deficiencies as the State's similar arguments, with one notable difference. Intervenors craft a "similarly situated" argument by comparing non-incumbents with just one entity, ITC Midwest, stating, because ITC went through an Iowa Utilities Board ("IUB") approval process, it is not similarly situated to Plaintiffs. ITC Midwest LLC Br. at 5-6. Intervenors' analysis is flawed. The "similarly situated" inquiry does not analyze individual comparisons from one party to another, for "[t]he similarly situated requirement cannot possibly be interpreted to require plaintiffs to be identical in every way to people treated more favorably by the law." *Varnum v. Brien*, 763 N.W.2d

862, 882 (Iowa 2009).[6] Instead, a proper equal protection analysis looks to the classification made by the law, determining whether plaintiffs, on one side, are similarly situated to *the group* identified on the other "with respect to the purposes of the law". *Clayton v. Iowa Dist. Court*, 907 N.W.2d 824, 828 (Iowa Ct. App. 2017) ("The 'threshold' test in any equal protection analysis is to determine whether plaintiff is in fact similarly situated to the class of persons receiving differential treatment."); *Varnum*, 763 N.W.2d at 883 (finding "plaintiffs are similarly situated compared to heterosexual persons"); *see also, e.g*, *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 859 (Iowa 2015) ("The first step of [analyzing] an equal protection claim is to identify the classes of similarly situated persons singled out for different treatment.").

Here, individualized comparisons between ITC Midwest and Plaintiffs do not relate to the law's purpose. The necessity of IUB approval for ITC Midwest's activities was **not** due its incumbency status, or even its intent to operate transmission lines. Rather, the necessity of IUB approval was triggered by Iowa Code Sections 476.76 and 476.77 because ITC Midwest "intended to acquire a substantial part of a public utility's assets." *See In re Interstate Power & Light Co.*, 260 P.U.R.4th 249 (Iowa IUB Sept. 20, 2007). Plaintiffs, if they chose to purchase assets of a public utility, would have to go through the *exact same process*—regardless of whether Division XXXIII of H.F. 2643 is in operation. *See* Iowa Code §§ 476.76, .77. Likewise, not all incumbent transmission entities as defined by Division XXXIII have been through such a process—again, unless they chose to purchase assets. Thus, the alleged difference presents no difference because

[6] Indeed, this *has* to be the case. If the law were otherwise, myriad distinctions could be drawn between individual parties that have no relation to the law being tested. For instance, ITC Midwest's logo uses blue in its color scheme, while Plaintiffs' does not. Is this, too, a basis for distinction between them? Surely not. "No two people or groups of people are the same in every way, and nearly every equal protection claim could be run aground onto the shoals on a threshold analysis if the two groups needed to be a mirror image of one another. Such a threshold analysis would hollow out the constitution's promise of equal protection." *Varnum*, 763 N.W.2d at 883.

it is not tied to the purposes of Division XXXIII; it is tied to ITC Midwest's choice to purchase assets. ITC Midwest compares itself to Plaintiffs, not one class to the other. It's akin to someone in Iowa City saying a distinction with Cedar Rapids is acceptable because he's tall and a particular person in the other city is short. Because it is not a common trait of the class, it's not a proper comparison.

Under the *correct* analysis—examining the difference between incumbent and non-incumbent entities with respect to the law's purpose—there is no meaningful distinction. Each entity—regardless of whether incumbent or non-incumbent—is subject to the same IUB processes when seeking to construct or maintain an electric transmission line under chapter 478. Iowa Code § 478.2 ("**[A]ny person** authorized to transact business in the state ... may file a verified petition asking for a franchise to erect, maintain, and operate a line or lines for the transmission, distribution, and sale of electric current."). Each entity—regardless of whether incumbent or non-incumbent—must show the IUB 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 § 478.3. Each entity—regardless of whether incumbent or non-incumbent—is subject to IUB and FERC oversight under the *identical* safety, reliability and maintenance standards. *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61051, ¶ 266, 76 Fed. Reg. 49,842 (2011); 18 C.F.R. § 39.2; Iowa Code § 478.19; Iowa Admin. Code r. 199-11.9, 199-25. And, most importantly, each entity must meet qualification standards under MISO and SPP tariffs ensuring they have the technical and financial capabilities to be able to build and maintain projects. Ex. 14 at 14-21; Ex. 13 at 150-66.

Indeed, the only difference between incumbent and non-incumbent entities is the basis for the distinction itself: that one presently operates electric transmission lines and facilities in Iowa, while the other does not. *Varnum*, 763 N.W.2d at 883 ("In considering whether two classes are similarly situated, a court cannot simply look at the trait used by the legislature to define a classification under a statute and conclude a person without that trait is not similarly situated to persons with the trait."). Given that the Iowa Supreme Court "cautioned against making intricate distinctions between purported classes of similarly situated individuals," incumbent and non-incumbent entities are similarly situated under the law. *LSCP*, 861 N.W.2d at 860; *Qwest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 561 (Iowa 2013).

2. Any Attempted Distinction Between Incumbent and Non-incumbent Entities with Respect to Rate Regulation Is Irrational.

Intervenors next contend the legislature, when enacting Division XXXIII, may have intended to distinguish between rate-regulated utilities, who have additional oversight by the IUB in rate-setting and responsiveness to the retail customers, and non-rate regulated utilities. ITC Midwest LLC Br. at 5-6, 6-7. They argue, without evidence, that "many incumbents [are] regulated utilities," and point to cases holding rate-regulated utilities are not similarly situated to independent transmission entities under the Commerce Clause. ITC Midwest LLC Br. at 6. As an initial matter, challenges to ***different*** States' statutes under ***different*** constitutional provisions (at least one of which is currently on appeal) are of marginal assistance at best. Pls.' Resistance to Mot. to Dismiss at 30-31. Iowa employs a stricter standard in its Article I, Section 6 rational basis analysis than do other states, requiring a "realistically conceivable" policy reason for the classification. *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) [hereinafter "*RACI*"]. "To be realistically conceivable, the [statute] cannot be 'so overinclusive and underinclusive as to be irrational." *Residential & Agri. Advisory Comm., LLC v. Dyersville City*

Council, 888 N.W.2d 24, 50 (Iowa 2016) (quoting *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 459 (Iowa 2013)). Additionally, the relationship between the classification and its goal cannot be "so attenuated as to render the distinction arbitrary or irrational." *RACI*, 675 N.W.2d at 7.

Any purpose to distinguish between rate-regulated and independent entities in the building and maintenance of electric transmission lines does not meet these standards. Retail rate-regulation has little relation to electric transmission, which occurs in the *wholesale* electric market with rates of return set by the FERC.[7] MidAmerican Energy Co. Br., Ex. I, Rowley Aff. ¶ 5. Moreover, a distinction between rate-regulated and independent transmission companies is ***not the distinction the statute drew!*** Instead, Division XXXIII grants a preference *not* just to rate-regulated public utilities that sell electricity at retail, but to *all* incumbent transmission entities in Iowa, including cooperatives, independent transmission companies or municipal corporations. *See* Ex. 10 at 52-53. Indeed, ITC Midwest, an intervenor in this action, is **not** a rate-regulated utility; it is an independent transmission provider, ***just like Plaintiffs***. *See In re Interstate Power & Light Co.*, 260 P.U.R.4th 249 (Iowa IUB Sept. 20, 2007). Yet, ITC Midwest is among the favored incumbents who benefit, while Plaintiffs are disfavored. When Intervenor MidAmerican Energy Company suggests that "local electric distribution utilities have limited ability to force an independent transmission provider to be responsive to local retail customer concerns," it describes ITC Midwest, which still receives the law's benefits![8] MidAmerican Energy Co. Br., Ex. I,

[7] There is no need for a retail electricity distributor to build regional transmission lines to be able to continue servicing its retail customers. The transmission lines will be every bit as available to retail distributors if they are built by an independent transmission company.

[8] Discovery, of course, will disclose additional levels of over- and under-inclusiveness, as Plaintiffs will seek information from IUB as to the overlap between rate regulation and incumbents.

Rowley Aff. ¶ 6. Where, as here, a classification is severely over-inclusive and not tied to the purpose advanced, the statute cannot withstand rational basis review. *RACI*, 675 N.W.2d at 7-8.

3. There Are No Legislative Facts Supporting Any Plausible Justification for Treating Incumbent Entities and Non-Incumbent Entities Differently.

Intervenors' final arguments related to policy reasons for the law fare no better. Intervenors' hypothetical reasons justifying Division XXXIII largely echo those the State earlier advanced. That is, Intervenors state the legislature may have feared disruptions in service or may have believed incumbent providers were more reliable than non-incumbents and wanted to continue the status quo. Yet, to be plausible, an explanation must be credible and have a basis in fact. *RACI*, 675 N.W.2d at 7. There must be some legislative facts available that could have been considered true by the governmental decisionmaker in making the classification. *Id.* at 8. Intervenors, like the State, have pointed to *no* legislative facts indicating incumbents have a greater likelihood of providing reliable service in the building and maintenance of electric transmission lines than non-incumbents. Indeed, Plaintiffs have a long, successful track record.

Instead, available facts lead to the conclusion that only qualified, capable entities—whether incumbent or not—are designated by MISO or SPP to build, own and maintain electric transmission projects. *See* Ex. 13 at 7; Ex. 14 at 121-136. To address reliability concerns, Order 1000 required regions to adopt qualification and evaluation criteria ensuring the designated developer has the technical and financial ability to construct, own and operate the selected project, and the selected project will meet the region's identified needs. *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61051, ¶¶ 323, 328, 76 Fed. Reg. 49,842 (2011). MISO and SPP found Plaintiffs to be qualified developers. Order 1000 also required regions to establish criteria to reevaluate a delayed project so the delay does not interfere with continued reliability and service. *Id.* ¶ 329. Finally, as

previously noted, once a project is in service, incumbents and non-incumbents are subject to the same state and federal reliability standards. *Id.* ¶ 266; *see also* 18 C.F.R. § 39.2; Iowa Code § 478.19; Iowa Admin. Code r. 199-11.9, 199-25.

It is worth noting that Intervenor ITC Midwest's tune has significantly changed on this issue. Indeed, when it completed its asset purchase before the IUB, notably at the time as a *non*-incumbent entity, it argued "that the proposed transmission sale would enhance the ability of IPL [a retail provider] to provide safe, reasonable, and adequate service to its customers, *with no detrimental impacts on utility operations or IPL customers*." Indeed, it urged "system reliability would be *enhanced* because ITC Midwest LCC is an **experienced independent transmission entity** with a single focus—the planning, construction, maintenance, and operation of the transmission system." *In re Interstate Power & Light Co.*, 260 P.U.R.4th 249 (Iowa IUB Sept. 20, 2007) (emphasis added). The Board agreed, stating, "ITC Midwest's singular focus on transmission, safe, reasonable, and reliable service should not be impaired, but instead enhanced." *Id.* The Board, contrary to being concerned with preservation of the status quo, welcomed the role of federal regional transmission organizations:

> With the evolution of the MISO process and the Organization of MISO States, commonly referred to as OMS, the Board has adequate forums to make[] its views on regional transmission issues heard. The proposed transmission sale may even enhance the Board's ability to influence the regional debate, because ITC Midwest and its parent and various subsidiaries have a more regional view on transmission than did IPL, particularly with respect to economic projects that could be beneficial to solve regional concerns with congestion and power flow. Also, the Board has never shied away from participation in federal regulatory proceedings to articulate positions that benefit Iowa's ratepayers and citizens. The Board expects to be active in FERC proceedings involving ITC Midwest to the extent necessary to protect Iowa's interests.

Id. The same expectation would be true regarding the IUB's involvement for *any* independent transmission provider.

Finally, Intervenors contend the Legislature may have wanted to benefit from a "quick resolution" of reliability problems by merely assigning a project to an incumbent rather than employing competitive bidding. Yet FERC, and the MISO and SPP tariffs, already <u>allow</u> a right of first refusal for local projects, and Order 1000 recognizes an incumbent may propose a local project to resolve a reliability need. *Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilitie*s, Order No. 1000, 136 FERC ¶ 61051, ¶ 63, 262, 76 Fed. Reg. 49,842 (2011); *see also* Ex. 29; Ex. 13 at 102 (providing MISO's Baseline Reliability Projects, projects needed solely for reliability, are ineligible for selection through a competitive process). Moreover, for reliability projects in MISO or SPP, there is a three-year competition exemption—meaning reliability projects needed within three years are not subject to competitive processes. Ex. 13 at 112-14; Ex. 29. Thus, using Iowa's right-of-first refusal as a "quick resolution" tool has no basis in fact, as FERC already addressed that issue through its exception. Regardless, mere convenience in assigning a project, rather than treating every similarly situated person equally, does not justify an otherwise irrational distinction. *Tassian v. People* (Colo. 1987) (en banc) ("Administrative convenience, by itself, does not constitute a valid basis for the imposition of disparate treatment upon persons who, with respect to the activity in question, are basically in the same position as others who are not singled out for different treatment.").

II. VIOLATING THE CONSTITUTION ALWAYS CREATES IRREPARABLE HARM.

Intervenors' final point contests irreparable harm. Intervenors' argument is interesting, because, to have standing[9] to enter this suit, Intervenors had to, as a matter of law, establish that

[9] During the hearing on the motions for intervention, the State argued standing to intervene as a defendant was different than the Article III standing required to proceed as a plaintiff in a case. Courts, including those in Iowa and the Eighth Circuit, disagree. *See DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 282, 289 (Iowa 2017) (analyzing standing for intervenor); *Llewellyn v. Iowa*

their injury was not "remote or conjectural," but was instead direct and imminent. *In Interest of A.G.*, 558 N.W.2d 400, 403 (Iowa 1997); *see also F.T.C. v. Johnson*, 800 F.3d 448, 451 (8th Cir. 2015) (denying intervention when injury was not "actual or imminent"). Thus, to intervene, the Intervenors legally had to show a presently existing controversy—which they somehow now seem to deny.[10] Perhaps more importantly, however, Intervenors ignore the issue presented involves a constitutional violation. Where, as here, there is a likelihood a constitutional prohibition is violated, all other factors favor an injunction because a Court ***never*** can tolerate disregarding the Constitution. Intervenors ignore this critical distinction.

It is well established that, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Obama for Am. v. Husted,* 697 F.3d 423, 436 (6th Cir. 2012)

State Commerce Comm'n, 200 N.W.2d 881, 884-85 (Iowa 1972) (holding potential intervenor "must have standing or interest sufficient to maintain" the action and may not rely on another party's "standing to justify its own participation"); *United States v. Metro St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009) ("[A] party seeking to intervene must establish Article III standing in addition to the requirements of Rule 24."); *Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996) (holding party must show standing to intervene and defend federal regulation plaintiff sought to enjoin). "The standing inquiry for any intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316-17 (D.C. Cir. 2015); *see also Deutsche Bank Nat'l Tr. Co. v. F.D.I.C.*, 717 F.3d 189, 193 (D.C. Cir. 2013). Here, Intervenors alleged they were interested in the litigation due to "the right to build a new line" and because "[t]he outcome of this matter will impact MEC's ability to construct, own and maintain transmission lines that connect to its facilities." ITC Midwest LLC Appl. for Intervention, ¶ 6; MidAmerican Energy Co. Appl. to Intervene, ¶ 13. The upcoming "new lines" in question giving Intervenors the requisite interest to intervene are the very same projects Plaintiffs' point to, on which they are deprived of the opportunity to compete. Because Intervenors have standing, Plaintiffs must as well.

[10] Having succeeded on their argument, Intervenors cannot now recant and claim there is no harm. *State v. Duncan*, 710 N.W.2d 34, 43 (Iowa 2006) ("We generally will not permit litigants to assert contradictory positions at different stages of a lawsuit to advance their interests." (quotation omitted)).

(quoting *Jones v. Caruso,* 569 F.3d 258, 265 (6th Cir. 2009)); *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, 459 F. Supp. 3d 847, 855 (E.D. Ky. 2020) ("The likelihood of success on the merits is largely determinative in constitutional challenges like this one"). "[W]here a plaintiff demonstrates a likelihood of success on a claimed constitutional violation, a preliminary injunction is nearly always appropriate." *Caspar v. Snyder*, 77 F. Supp. 3d 616, 623 (E.D. Mich. 2015). Indeed, showing a constitutional violation ***mandates*** a finding of irreparable harm:

> [W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. In other words, the first factor of the four-factor preliminary injunction inquiry—whether the plaintiff shows a substantial likelihood of succeeding on the merits—should be addressed first insofar as a successful showing on the first factor ***mandates*** a successful showing on the second factor—whether the plaintiff will suffer irreparable harm.

American Civil Liberties Union of Ky. v. McCreary Cty., 354 F.3d 438, 445 (6th Cir. 2003) (emphasis added), *aff'd sub nom.*, 545 U.S. 844 (2005).

The point is simple, but fundamental. In a nation and state governed by a Constitution, "any constitutional violation ***is*** an irreparable harm." *McGuire v. Carey*, 2020 WL 4353174, at *4 (D. Nev. July 29, 2020) (emphasis added); *Ward v. New York*, 291 F. Supp. 2d 188, 196 (W.D.N.Y. 2003). Indeed, it should go without saying that, "[o]f course, it is always in the public interest to enjoin the violation of citizens' constitutional rights...." *Davis v. Detroit Downtown Dev. Auth.*, 2017 WL 11318204, at *4 (E.D. Mich. June 19, 2017). Defendants cannot reasonably assert they are harmed in any legally cognizable way by being enjoined from committing constitutional violations. Thus, as a matter of law, "if the Plaintiffs show a likelihood of success on the merits, then they also can show irreparable harm, no adequate remedy at law, and that the balance of harms and public interest favor an injunction." *Hodgkins v. Peterson*, 2004 WL 1854194, at *5 n.10

(S.D. Ind. July 23, 2004). In short, where a Constitutional provision is at issue, Intervenors' argument that "it is okay to allow a Constitutional violation because...," rings hollow and must fail. Indeed, the events of the wee hours of June 14, 2020, *already* made it to court, resulting in a preliminary injunction in Iowa District Court by Judge Mitchell Turner for violating Article III, Section 29—the very challenge lodged here. Ex. 26 The same conduct toward Plaintiffs demands no less.

Further, Intervenors acknowledge projects are likely to occur, even within the next year, while this case is pending. *See* ITC Midwest LLC Br., Ex. A, Jeffrey Eddy Aff. ¶¶ 9-10. The purpose of an injunction is to "maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation." *Atlas Mini Storage, Inc. v. First Interstate Bank of Des Moines, N.A.*, 426 N.W.2d 686, 689 (Iowa Ct. App. 1988) (quoting *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985)). An injunction is appropriate to preserve the status quo "[w]here, *during the litigation*, it appears a party is doing, procuring or suffering to be done, or threatens or is about to do, an act violating the other party's right respecting the subject of the action and tending to make the judgment ineffectual." Iowa R. Civ. P. 1.1502(2). Here, a project subject to the right-of-first refusal provision is likely to occur in 2021 and, in absence of injunction, Plaintiffs will be foreclosed by an unconstitutional law from competing for it. This meets the imminence required for injunctive relief. *Pavek v. Simon*, 467 F. Supp. 3d 718, 754-55 (D. Minn. 2020) ("That the 2020 General Election is months away does not undercut the undisputed evidence showing that absent an injunction, the harm is nearly certain to occur."); *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012) (approving of injunction on action months away when likely to take place during litigation, stating, "Plaintiffs need only demonstrate that absent a preliminary injunction, '[they] are likely to suffer irreparable harm before a decision on the merits

can be rendered.'" (citation omitted)); *see also Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1260-61 (10th Cir. 2003) (finding irreparable harm when there was "no indication" of final judgment on the merits before harm occurred).

Although Intervenors suggest harm is not imminent because Plaintiffs have not yet bid on an Iowa project (while acknowledging there has been no opportunity to do so), they cannot reasonably dispute that numerous sources both from MISO and SPP show projects are likely in the near term. Exs. 20, 22, 25, 27. Plaintiffs have taken concrete, financial steps—including the time, cost and labor to become a qualified entity through SPP and MISO processes—showing they intend to compete on such projects. *See* Pls.' Resistance to Mot. to Dismiss, at 8-9. Indeed, if Defendants and Intervenors truly believe no projects will be approved during the pendency of this litigation, why resist an injunction? There surely is no harm in granting one to enforce the rule of law and the balance of harms strikingly favors doing so.

Finally, Intervenors' suggestion addressing constitutional violations can be deferred and revisited later not only is contrary to the law but the facts. As described in Plaintiffs' Reply and admitted by Jeffrey Eddy, once a project arises, it will be ***automatically*** ***assigned*** to the incumbent entity to elect whether it wishes to build and maintain it. ITC Midwest LLC Br., Ex. A, Jeffrey Eddy Aff. ¶¶ 9-10; Pls.' Reply in Supp. of Mot. for Temporary Inj., at 5-6. At that point, the harm is complete and irreparable. "Damocles's sword does not have to actually fall on [Plaintiffs] before the court will issue an injunction." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8-9 (D.C. Cir. 2016); *see also Iowa Utilities Board v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996) (finding temporary relief justified when in absence of it, right will be "irretrievably lost"); *Pavek*, 467 F. Supp. 3d at 754 (finding preliminary relief appropriate since once harm occurred "there can be no do-over and no redress"). Although Intervenors allege harm will not occur unless the

incumbent declines to construct the line (leaving Plaintiffs with only rejected projects), Intervenors misapprehend the nature of the injury, which is the application of an unconstitutional law and deprivation of an equal opportunity to compete for the project from the get-go. *See Horsfield Materials*, 834 N.W.2d at 457; *Northeast Fla. Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 667 (1995).

Ultimately, despite the importance of the issues, this case is simple. The questions presented are (1) whether a title that was the same before and after the provision at issue was added alerts the public the provision was added to an appropriations bill in the dead of night after twice being rejected when pursued appropriately, and (2) whether an act that covers myriad subjects satisfies the constitutional requirement that it cover just one. These are legal issues. *Kansas Nat'l Educ. Ass'n v. State*, 387 P.3d 795, 802-03 (Kan. 2017) ("The one-subject rule violation KNEA asserts is a pure question of law. No additional facts need to arise or be developed for the court to resolve it."). If reading the Act shows the title did not illustrate it contained the provision at issue or that multiple subjects are more than one, an injunction is mandated to ensure respect for our Constitution.[11]

[11] To the extent Intervenors raise the issue of bond, this point was addressed in Plaintiffs' Reply in Support of Motion for Temporary Injunction, at 16-17. But, again, stopping a Constitutional violation does not require a large bond. *River Oaks Mgmt., LLC v. Brown*, 2007 WL 2571909, at *9 (W.D. Ky. Sept. 4, 2007) ("Bond will be fixed at one dollar ($1.00).").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on January 25, 2021, 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:

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