IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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| LS POWER MIDCONTINENT, LLC; and SOUTHWEST TRANSMISSION, LLC,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF IOWA; IOWA UTILITIES BOARD; GERI D. HUSER; GLEN DICKINSON; and LESLIE HICKEY,<br><br>Defendants,<br><br>MIDAMERICAN ENERGY COMPANY and ITC MIDWEST LLC,<br><br>Proposed Intervenors. | Case No. CVCV060840<br><br>**DEFENDANTS' SUPPLEMENTAL BRIEF** |

Defendants file the following supplemental brief in accordance with the Court's indication at the January 29, 2021, hearing that the record would be left open through February 5, 2021.

## ARGUMENT

Some defenses are waived if not contained in a pre-answer motion, but "lack of jurisdiction over the subject matter or failure to state a claim upon which relief may be granted" are not among them. Iowa R. Civ. P. 1.421(4). Accordingly, while Defendants did not originally brief whether Count I of Plaintiffs' petition fails to state a claim, it is permissible under the rules to do so now after raising that issue at the January 29 hearing on the motion to dismiss.

### A. Count I of Plaintiffs' Petition Does Not State a Claim.

The Iowa Supreme Court "has repeatedly stated that the 'one-subject' requirement must be liberally construed and should not be employed to embarrass legislation or hamper the Legislature." Op. No. 79–2–9, 1979 WL 21163, at *2 (Iowa Att'y Gen. Feb. 23, 1979); *see also*

Op. No. 85–5–1, 1985 WL 68969, at *1 (Iowa Att'y Gen. May 1, 1985) ("[C]ourts traditionally have been reluctant to void legislation on the grounds that the General Assembly violated constitutional provisions which structure the legislative process."). This deference is important because "[t]he term 'subject' is inherently vague," there is "no uniform, mechanical formula which can be developed for characterizing the subject (or subjects) of a particular bill," and a mechanical formula, if applied rigidly, "could produce ludicrous results." Op. No. 79–2–9, 1979 WL 21163, at *2. In other words, article III, section 29 of the Iowa Constitution "does not readily generate judicially manageable standards of review." *Id.*

A 1975 Attorney General opinion illustrates the problem. In 1975, then-Attorney General Turner opined that a bill containing appropriations to several departments would not pose a single-subject problem, and neither would a bill combining appropriations to *one* department with changes "in the substantive law relating to" that department. Op. No. 75–6–7, 1975 WL 368761, at *3 (Iowa Att'y Gen. June 18, 1975). Attorney General Turner further opined, however, that mixing substantive law for one department alongside an appropriation to that department *and* appropriations to other departments was impermissible. *Id.* at *4.

But using a department as a cutoff line has arbitrary consequences, because some departments in state government are wide-ranging and address, enforce, or administer programs through several different agencies across many different subjects. For example, the department of commerce "has primary responsibility for business and professional regulatory, service, and licensing functions," Iowa Code § 7E.5(1)(*f*), and includes such seemingly disparate subjects as banking, utilities, insurance, and alcoholic beverages. *See id.* § 546.2(3). Under the 1975 opinion, however, appropriating money to the alcoholic beverages division and including substantive utilities law in the same bill is permissible under the single-subject clause because those two things

are both expressly, statutorily, part of one department: the department of commerce. Similarly, a hypothetical bill combining appropriations to the department of education and college student aid commission with substantive tax credits available to educators might contravene the 1975 opinion because it involves appropriations to one department (the department of education) and substantive law for a different department (the department of revenue)—and yet it could hardly be said that such a bill did not involve the single subject of education.

The 1975 opinion does not acknowledge the possibility that state government could be properly organized in this fashion or that a single subject can span across multiple state departments, and that legislation could correspondingly comply with article III, section 29. It therefore provides an example of the notion that Attorney General opinions receive "respectful consideration" but are not binding. *First Iowa State Bank v. Iowa Dep't of Natural Res.*, 502 N.W.2d 164, 167 (Iowa 1993). In *First Iowa State Bank*, the Court rejected the legal conclusion found in an Attorney General opinion and reached an opposite one. *See id.* The Court's ability to do so again here is indisputable, because courts—and not attorney general opinions, as valuable, earnest, and well-researched as they are—"remain the final arbiters of the meaning of the Iowa Constitution." *Redmond v. Ray*, 268 N.W.2d 849, 852 (Iowa 1978).

Under article III, section 29, the proper analysis is highly deferential. *See* Op. No. 79–2–9, 1979 WL 21163, at *3 ("[S]ignificant judicial deference is suggested by the nature of the constitutional requirement."); *see also* Op. No. 85–5–1, 195 WL 68969, at *3 ("[T]he courts, for sound institutional reasons, have not insisted on the ideal in reviewing challenges under Article III, § 29."). Because article III, section 29 involves "the internal processes of a coordinate branch of government," the Court need only "search for a minimal unity of purpose." Op. No. 79–2–9, 1979 WL 21163, at *2–3. The Court must "search for (or…eliminate the presence of) a single

purpose" in the legislation. *Miller v. Bair*, 444 N.W.2d 487, 490 (Iowa 1989). The verb "search" is important because it (1) was not part of the caselaw when the 1975 opinion was written, and (2) demonstrates the level of deference the Court must apply and the expansive view it must take of a "subject." One federal judge phrased the inquiry colorfully:

> [P]laintiffs essentially argue that the Iowa legislature changed a law regarding apples improperly by sticking the change in a bill about oranges. The Court has no difficulty telling apples from oranges. However, Iowa case law provides inadequate guidance concerning whether such a bill should be treated as an improper bill about the two subjects of apples and oranges or a proper bill about the single subject of fruit.

*Trucke v. Erlemeier*, 657 F. Supp. 1382, 1393 (N.D. Iowa 1987). *Trucke* was decided in 1987, and *Miller* provided a definitive answer two years later—a bill with provisions about both apples and oranges is a proper bill about fruit, or even more broadly about produce, food, or agriculture. *See Miller*, 444 N.W.2d at 490, *see also* Op. No. 79–2–9, 1979 WL 21163, at *2 (noting a "bill requiring licenses for the sale of beef and the sale of milk" is properly characterized "at a more general level" to be about food). The subject can be broad, and that breadth is a necessary application of the longstanding rule that the Court should "give such an instruction to an act, if possible, [to] uphold the law" rather than invalidate it. *State ex rel. Weir v. Cty. Judge*, 2 Iowa 280, 283 (1855). "The legal environment established by Article III, § 29 is not demanding." Op. No. 85–5-1, 1985 WL 68969, at *1.

*Miller* further confirms that Plaintiffs' single-subject analysis is flawed. *Miller*, 444 N.W.2d at 489–90. There, the court rejected the plaintiff's "comparisons between two or more of the several items in the legislation in a manner suggesting dissimilarities based on a common understanding." *Id.* Plaintiffs here engage in the same comparison; indeed, Plaintiffs prepared an entire PowerPoint slide doing so. (1/29/21 Hrg. Tr. at 15–16.) But "the subject of a statute lies in its ultimate objective and not in the detail or steps leading to that objective." *Id.* at 489.

Along the same lines, in *Miller*, the challenged bill was "a multifaceted effort to promote economic development," not an improper amalgamation of provisions affecting the lottery, farm machinery, and property taxes. *See id.* at 488–90; *see also Cook v. Marshall Cty.*, 93 N.W. 372, 378 (Iowa 1903) (upholding a law that fit the broad subject of "crimes and their punishment"). In other words, a high level of generality is permissible when evaluating whether legislation addresses a single subject. Op. No. 85–5–1, 1985 WL 68969, at *2 ("[T]he subject of a bill may be broadly characterized in order to arrive at an interpretation that removes any potential 'one subject' defeat. We today reaffirm the expansive approach to subject definition."). And here, HF 2643 addresses continuity and operations of the entire state government—assuredly broad, but not wholly limitless, and not simply a subject of "laws," as Plaintiffs wryly assert. (1/29/21 Hrg. Tr. at 27.) State government is broad and complex, and a bill can properly contain multiple provisions addressing, as the district court in *Miller* described it, "one broad and complex subject comprised of numerous matters." *Miller*, 444 N.W.2d at 488.

The entirety of state government, including the Iowa Utilities Board, was appropriated in HF 2643. 2020 Iowa Acts ch. 1121, § 1. HF 2643 accomplished this by appropriating amounts for fiscal year 2021 from the same funds, in the same amounts, as in fiscal year 2020. *See id.* The Iowa Utilities Board's appropriation was one of those carried forward. In fiscal year 2020, the legislature appropriated $8.7 million to the Board and authorized 70 full time employees from the commerce revolving fund. *See* 2019 Iowa Acts ch. 136, § 7(2)(*d*). And under *State ex rel. Turner v. Iowa State Highway Commission*, 186 N.W.2d 141, 153 (Iowa 1971), it is permissible for an appropriation to an agency to contain substantive law related to that agency as well.[1] It isn't the

[1] *Turner* was later overruled, but only on other grounds related to its holding about an item veto. *See Rants v. Vilsack*, 684 N.W.2d 193, 210–12 (Iowa 2004).

narrowest subject, but maximum narrowness is not what article III, section 29 requires. *See* Op. No. 85–5–1, 1985 WL 68969, at *3 (opining the legislative process might "have more closely approached the constitutional ideal" if a particular bill "were divided into two or more separate bills," but nonetheless concluding perfection was not required and the bill satisfied article III, section 29). HF 2643 addresses a single subject within the meaning of article III, section 29, and Count I of Plaintiffs' petition therefore fails to state a claim.[2]

**B. Any Irreparable Harm Justifying an Injunction Must Be Forward-Looking.**

Plaintiffs' purported procedural injury—the discrete allegation of constitutional noncompliance in passing House File (HF) 2643—does not confer standing as a matter of law. "[S]eeing that the legislature acts in conformity with the constitution" is "an admirable interest, but not . . . sufficient to establish the personal injury required for standing." *Godfrey v. State*, 752 N.W.2d 413, 424 (Iowa 2008).

Even if the Court concludes otherwise, however, procedural harm still does not constitute *irreparable* harm supporting an injunction. The bill passed, the legislature adjourned, the governor signed it, and the law went into effect. A new legislature—a *different* legislature—is now in session. Purported failure to comply with article III, section 29 of the Iowa Constitution can never occur again with respect to the 2020 legislature's consideration of HF 2643. Accordingly, because the purported procedural injury is only past harm (if it is otherwise cognizable), an injunction is not warranted. *See Dobrovolny v. Reinhardt*, 173 N.W.837, 841 (Iowa 1970) ("Rights already lost and wrongs already committed are not subject to injunctive relief . . . ."); *see also Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 20 (Iowa 2020) (Appel, J., specially

[2] In turn, because Count I fails to state a claim, Plaintiffs are not likely to succeed on that claim, and are therefore not entitled to any injunction.

concurring) (agreeing an emergency stay that functioned like an injunction should be vacated, in part because "on a going forward basis, it [wa]s unlikely that the temporary injunction . . . would have any practical impact"). An injunction is a forward-looking remedy; if any injunction is entered, the harm it is intended to prevent must be too. *See Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 96 (Iowa 1985) (noting a district court considering a request for injunction must "balance the harm that a temporary injunction may *prevent* against the harm that may result from its issuance" (emphasis added)). The allegation of a past completed single-subject violation is simply not irreparable harm supporting an injunction.

## CONCLUSION

The Court should dismiss Plaintiffs' petition and deny Plaintiffs' motion for temporary injunction as moot. Alternatively, if the Court does not dismiss the petition, the Court should nonetheless deny Plaintiffs' motion for temporary injunction on the merits.

Respectfully submitted,

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All parties served via EDMS on this 5th day of February, 2021.