IN THE SUPREME COURT OF IOWA

No. 21-0696

LS POWER MIDCONTINENT, LLC and
SOUTHWEST TRANSMISSION, LLC,

Appellants,

vs.

STATE OF IOWA; IOWA UTILITIES BOARD; GERI D. HUSER;
GLEN DICKINSON; and LESLIE HICKEY,

Appellees,

MIDAMERICAN ENERGY COMPANY and
ITC MIDWEST, LLC

Intervenors–Appellees.

Appeal from the Iowa District Court for Polk County
Celene Gogerty, District Judge

STATE APPELLEES' PETITION FOR REHEARING

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ARGUMENT

The State lost this appeal. This Court held that LS Power Midcontinent, LLC and Southwest Transmission, LLC (collectively "LS Power") have standing to challenge the right-of-first-refusal statute in Iowa Code section 478.16, reversing the dismissal of their suit. And the State does not seek to revisit that *appellate* ruling.

But this Court also issued an original temporary injunction. That injunction was based on incomplete briefing and an out-of-date factual record. The Court's opinion thus raises a host of serious questions about the scope of this new injunction on now-pending Iowa Utilities Board proceedings and the legal standard that applies to the merits of LS Power's constitutional challenges as the suit continues. Indeed, the Court's reasoning on the single-subject challenge conflicts with this Court's precedents—one as recent as last year. What's more, this new conflicting reasoning calls into question longstanding and common practices of the Iowa Legislature's enactment of annual appropriations bills.

These questions need to be resolved. Leaving them lingering will needlessly muddle the district court proceedings and chill legislative speech. It may invite further challenges to proper legislative enactments. And it could burden this Court with additional litigation over the scope and enforcement of *this Court's*

injunction—since the district court cannot address such matters on an injunction it did not issue.

So this Court should grant rehearing, vacate its opinion, and offer the parties the opportunity to fully brief and develop an up-to-date factual record on the request for a temporary injunction. Even if the Court issues an injunction pending appeal while rehearing progresses, it would be best to keep the substantive merits of the temporary injunction before the Supreme Court so that all the related questions can be resolved consistently by the same court.

Alternatively, this Court should modify its opinion to vacate the temporary injunction and leave it to the district court on remand to consider a temporary injunction in the first instance. This would permit the district court to consider a fully developed factual record and complete briefing in deciding whether an injunction is appropriate and the precise scope of any relief. And it would vest further enforcement or modification of the injunction with the district court, rather than this Court.

LS Power will get its day in court on the merits of its constitutional challenges to section 478.16. But in the meantime, the Court should be cautious not to prematurely reach underdeveloped issues with unforeseen and far-reaching consequences—especially in a case from which three justices are recused. This petition for rehearing should be granted.

I. The Court's consideration of the circumstances of enactment to decide a single-subject challenge contradicts last year's holding in *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State* and threatens to prolong proceedings on remand and chill legislative speech.

The Court should grant rehearing because its analysis of the likelihood of success on LS Power's single-subject challenge conflicts with precedent. After beginning with an analysis of the text of the challenged act, the Court continued by using more than twice as many words to discuss the circumstances of enactment. *Compare* Slip op. 31–32, *with id.* at 32–35; *see also id.* at 9–15. But analyzing the text of the act should have been the beginning and the end of the inquiry.

Just last year, this Court held—in an opinion joined by six justices[1]—that a court "should decide whether a violation of article III, section 29 occurred based on the text of [the act], not the process of its enactment." *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State,* 975 N.W.2d 710, 728 (Iowa 2022); *see also id.* at 727 (cautioning that the circumstances of passage are "not directly relevant to whether the legislation violated the single-

[1] Even the seventh justice agreed that the single-subject requirement is "relatively narrow" and "does not vest this court with general police powers to ensure that legislative leaders act courteously, provide advance notice of potentially controversial matters, and provide the public with a broad opportunity for input before legislation is enacted." *Planned Parenthood*, 975 N.W.2d at 764 (Appel, J., dissenting).

subject rule" before rejecting arguments based on those circumstances that the district court had heavily relied on).

Focusing only on the text of the act is consistent with the text of article III, section 29, which doesn't speak of legislative process but only a requirement for "Every Act." Iowa Const. Art III, §29. It also makes sense as a matter of comity. As the Court explained, "just as we would bristle at the legislature telling us how we should conduct our business internally, so should we be hesitant to pass judgment on how the legislature conducts theirs." *Planned Parenthood*, 975 N.W.2d at 728.

Despite this recent precedent, the Court still extensively considered the circumstances of enactment here. *See* Slip op. 32–35. While it acknowledged these circumstances are not "directly relevant," *id.* at 32, the comparative weight the Court gave this analysis belies that statement. And the many pages relying on the legislative process in *support* of its holding is a far cry from *Planned Parenthood*, which merely explained why a challenger's arguments and the district court's reasoning based on the legislative process lacked merit.

If the Court does not grant rehearing, parties and courts will be left to reconcile this case with the holdings and reasoning of *Planned Parenthood*. They're left to wonder—given the weight placed on the circumstances of enactment here—whether they

should expend resources to develop the factual record of the circumstances of enactment. And in light of the apparent acceptance of and reliance on legislative affidavits, *see* Slip op. 32–33, do the parties now need to engage in discovery of current and former legislators?[2] How will legislative privilege impact those who do not wish to voluntarily share information or be subject to depositions? *See generally Smith v. Iowa Dist. Ct.*, No. 22–0401. And despite this Court's repeated statements to the contrary,[3] do parties now need to sell the Court on the policy merits of challenged legislation? *Compare* Slip. op. 34 (using "[c]ommon sense" and data

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[2] Is this so even given the conflict with this Court's holdings that individual legislator testimony isn't admissible? *See Poller v. Okoboji Classic Cars, LLC*, 960 N.W.2d 496, 512 (Iowa 2021); *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 36 (Iowa 2019).

[3] *See, e.g., Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 85 (Iowa 2022) ("CAFOs are controversial, but it is not our role to second-guess the legislature's policy choices"); *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 26 (Iowa 2019) ("Our role is to decide whether constitutional lines were crossed, not to sit as a superlegislature rethinking policy choices of the elected branches."); *Bd. of Water Works Trustees v. Sac Cnty. Bd. of Supervisors*, 890 N.W.2d 50, 68 (Iowa 2017) ("The legislature having adopted a legislative presumption that drainage districts are beneficial, it is not our role to adopt a different presumption."); *see also Chi. Title Ins. Co. v. Huff*, 256 N.W.2d 17, 25, 29 (Iowa 1977) (rejecting a challenge to Iowa's ban on title insurance and explaining that "the judicial branch of the government has no power to determine whether legislative Acts are wise or unwise" and "our legislature might well have determined the competitive market is an ineffective force for effective regulation").

from an amicus to find the challenged provision "quintessentially crony capitalism"), *with id.* at 38 ("It is not our role to second guess policy choices of the elected branches or regulators.").

Perhaps more concerning, legislators would be left to second-guess whether debating on the floor will be used as a basis to invalidate their enactments. *See* Slip op. 33–34. Or whether their willingness to yield to questions from members of the opposing party will result in this Court saying they "falsely represented" matters, *id.* at 34, or engaged in "misrepresentations." *Id.* at 13. Such concerns will chill legislative speech. They will likely result in less transparency and opportunity for engagement and deliberation in the legislative process—some of the very interests underlying article III, section 29. Until now, the Court has avoided venturing into the legislative terrain beyond the text of the acts. The Court should grant rehearing so it can fully consider the serious ramifications of doing so.

II. The Court's other single-subject analysis also conflicts with precedent and puts untenable limitations on longstanding practices of the Iowa Legislature's enactment of appropriations bills.

Even beyond considering the irrelevant legislative process, the Court's remaining analysis also conflicts with precedent. True, the subject of funding all state and local government is broad. But "broad subject matters are acceptable." *Planned Parenthood*, 975 N.W.2d at 724. And this Court's precedents still compel the conclusion that the challenged act complies with article III, section 29's requirement. Indeed, it is the contrary conclusion that grinds Iowa's legislative process to a halt.

Deciding the breadth of an Act's subject is a legislative function. The framers of Iowa's Constitution made clear that article III, section 29 is a "flexible" requirement and "the legislature should be afforded considerable deference." *Planned Parenthood*, 975 N.W.2d at 723. Indeed, the Constitution was amended in the 1846 convention to permit not just one subject, but also "matters properly connected therewith." Iowa Const. art. III, § 29; *see Planned Parenthood*, 975 N.W.2d at 721–23.

While the Court's opinion here suggests it's improper to combine substantive law, appropriations, and code corrections, that's not the law (or at least it wasn't previously). This Court has upheld the inclusion of substantive provisions related to an appropriation under article III, § 29. *See State ex rel. Turner v. Iowa*

State Highway Comm'n, 186 N.W.2d 141, 153 (Iowa 1971), *abrogated on other grounds by Rants v. Vilsack*, 684 N.W.2d 193 (Iowa 2004). Indeed, the inclusion of policy "riders with appropriations bills that substantively legislate," is so well recognized that they are repeatedly noted as one of the three types of "items" subject to the Governor's item veto. *Homan v. Branstad*, 887 N.W.2d 153, 165 (Iowa 2016); *see also Colton v. Branstad*, 372 N.W.2d 184, 192 (Iowa 1985) (explaining that the item veto provides a limit on policy riders that couldn't be achieved by the single-subject requirement because "appropriation bills are by their nature unique").

Here, the provision enacting section 478.16 involved the Iowa Utilities Board's operations. It thus relates to the appropriation for the Board (along with the rest of state government) also in the bill. *See* 2020 Iowa Acts ch. 1121, § 1; *see also* 2019 Iowa Acts ch. 136, § 7(2)(d). So it is "properly connected" to the subject of funding state and local government. Iowa Const. art. III, § 29.

That the bill also amended Iowa Code section 260C.48, Slip op. 32, doesn't change things. The problem identified in *Giles v. State*, 511 N.W.2d 622, 625 (Iowa 1994), and *Western International v. Kilpatrick*, 396 N.W.2d 359, 364–65 (Iowa 1986), wasn't merely that those challenged acts included both a substantive statutory change and a corrective one. Indeed, many substantive bills have

some code amendments that could be deemed technical corrections. The issue was that those bills were *all* technical code corrections except for an entirely *unrelated* substantive provision. *See Giles*, 511 N.W.2d at 625; *Western Int'l*, 396 N.W.2d at 364; *Planned Parenthood*, 975 N.W.2d at 725–26. That's not the case here. The "correction" identified by the Court—amending section 260C.48 to adjust a duty of the state board of education—was properly related to another appropriation in the bill—the funding for the department of education. *See* 2020 Iowa Acts ch. 1121, § 1.

True, this bill contained appropriations for all state government. But if the Legislature cannot combine all appropriations together, where is the line drawn? Can it not combine appropriations for multiple departments together in one bill? If not, why—when a department is a somewhat arbitrary line when many departments, like the Department of Health and Human Services or the Department of Inspections and Appeals, cover broad and diverse subject matters. *See* Iowa Code chs. 10A, 217; *see also* Senate File 514 (realigning state government into fewer departments).

If the opinion remains, the Legislature may wonder whether its longstanding appropriations practices are now subject to challenge. Nearly every appropriations bill contains *some* related substantive provisions. *See, e.g.,* 2022 Iowa Acts ch. 1146, § 21

(increasing statutory indigent defense hourly rates); *id.* ch. 1145, § 6 (authorizing judicial officer salary increases); 2021 Iowa Acts ch. 168, § 7 (amending magistrate qualifications). And most appropriate for more than one department. *See, e.g.*, 2022 Iowa Acts chs. 1131, 1140, 1146, 1147, 1148, 1149, 1150.

The appropriations process for the upcoming fiscal year is ongoing. This Court should not leave that process under a cloud of uncertainty. Nor should it change the governing law to restrict the regular legislative practice of including related policy riders in appropriations legislation. And even if the Court is inclined to make such a drastic change, it should still do so only after granting rehearing so that the parties—and other interested amici—can provide briefing focused on these critical issues.

III. The Court's temporary injunction is based on an out-of-date factual record, raising questions whether any injunction is appropriate against these parties and whether the granted injunction impacts pending Utilities Board proceedings.

The Court granted "a temporary injunction to stay enforcement of section 478.16 pending resolution of this litigation." Slip op. 4; *see also id.* at 38–39. And it did so based on an understanding that "new projects are years away," so the injunction would cause no harm "while this case is pending." *Id.* at 36.

That was true when the parties developed a factual record in the district court over two years ago. No projects had yet been approved then, or when LS Power sought an injunction before the court of appeals in May and June 2022, or when it made its third attempt in this Court in July 2022. *See id.* at 16. But the situation changed in the eight months between LS Power's last application for an injunction and this Court's granting of one in March 2023.[4]

Just days before the Court granted the injunction, ITC Midwest and MidAmerican Energy each filed requests for public informational meetings with the Board regarding new

[4] The Court's rules offer no apparent way for the parties to have updated the Court on these changed circumstances. Nor was it clear that it would have been necessary to do so because both injunction applications in the appellate courts had already been denied, and any still-pending appellate review of the district court's denial of the temporary injunction could only be based on the record before that court. *See* Iowa R. App. P. 6.801.

Midcontinent Independent System Operator ("MISO")-approved projects. *See* ITC Request, IUB E-22544, https://perma.cc/NCP5-R3P9; MidAmerican Request, IUB E-22543, https://perma.cc/LK46-HFCF; *see also* Iowa Code § 478.2(1) (requiring informational meetings before filing a petition for franchise); Iowa Admin. Code r. 199–11.4(4). Shortly after, as required by Iowa Administrative Code rule 199-11.4(4), the Board approved the meetings.

The main effect of section 478.16 is on whether MISO selects a project developer through a competitive process. But MISO is not an enjoined party. (And how could it be; it's regulated by FERC.) So does the Court see its injunction as somehow undoing MISO's completed decision? After denying an injunction pending appeal *before* that occurred, does the Court now seek to stop the Iowa projects that MISO estimates will provide billions of dollars in benefits to the region?[5]

The Court's injunction, without any reference to these proceedings, creates a potentially chaotic environment in a highly regulated and important industry where delays have consequences. The Court should therefore clarify whether it intended the injunction to apply to these proceedings. And if it did so intend, then it should reconsider based on the harms and public interest.

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[5] See Jeff Postelwait, "MISO Approves 18 Transmission Projects in U.S. Midwest," *Utility Products*, https://perma.cc/T9GW-M9RQ.

Only this Court—not the district court—can give this clarity, whether in rehearing or further proceedings to modify, clarify, or enforce the injunction since this Court entered the injunction. *See Bear v. Iowa Dist. Ct.*, 540 N.W.2d 439, 441 (Iowa 1995) ("The court which rendered the injunction may modify or vacate [it] . . . ."). Or the Court can vacate the injunction and follow the normal practice: remanding for the district court to hear the new evidence and weigh the equitable considerations.

CONCLUSION

The Court's ruling granting a temporary injunction raises important and serious questions. The Court should grant rehearing to let the parties assist in resolving them now. Or it should vacate the injunction and send this case back to the district court to consider the current facts and apply the law in the first instance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(e)(1), 6.903(1)(g)(1), and 6.1205(5) because this petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 2,800 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Samuel P. Langholz*
Chief Deputy Attorney General

CERTIFICATE OF FILING AND SERVICE

I certify that on April 7, 2023, this petition was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ *Samuel P. Langholz*
Chief Deputy Attorney General