BEFORE THE IOWA SUPREME COURT

No. 21-0696

LS POWER MIDCONTINENT, LLC and SOUTHWEST TRANSMISSION, LLC,

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees,

and

MIDAMERICAN ENERGY COMPANY and ITC MIDWEST, LLC,

Intervenors-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
OF POLK COUNTY
HON. CELENE GOGERTY

APPELLANTS' RESPONSE TO PETITIONS FOR REHEARING

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ARGUMENT

On March 24, 2023, this Court correctly held Appellants LS Power Midcontinent, LLC and Southwest Transmission, LLC (collectively "LSP") had standing to challenge the constitutionality of Iowa Code section 478.16; and, as requested, granted a temporary injunction enjoining section 478.16's enforcement pending final resolution of LSP's constitutional claims. On April 7, 2023, the State Appellees ("the State") and Intervenors MidAmerican Energy Company and ITC Midwest, LLC (the "Intervenors") sought rehearing asking the Court to vacate its ruling. Because the law supports the Court's well-reasoned ruling, the petitions for rehearing should be denied.

I. THE COURT PROPERLY EXERCISED AUTHORITY GRANTING A TEMPORARY INJUNCTION.

The Court correctly held LSP has standing to challenge the constitutionality of section 478.16. The State and Intervenors do not request the Court reconsider that ruling. After reviewing the record to determine LSP was likely to succeed on the merits of its claim, the Court exercised its discretion to temporarily enjoin enforcing section 478.16 pending final resolution to prevent

harming the public and LSP. The Court had authority to enter a temporary injunction and properly did so. Iowa R. Civ. Pro. 1.1506(2).[1] The State and Intervenors baselessly claim injunction issues were not fully briefed. Below and on appeal, the parties exchanged 21 briefs consisting of approximately 340 pages litigating injunction issues. The State and Intervenors had ample opportunity to present their arguments.

An injunction was proper. Likelihood of success on the merits is "the most important" temporary injunction factor. *Craig v. Simon*, 980 F.3d 614, 617 (8th Cir. 2020) (internal quotation omitted); *Jones v. Jegley*, 947 F.3d 1100, 1105 (8th Cir. 2020); *Reg Seneca, LLC v. Harden*, 938 F. Supp. 2d 852, 857 (S.D. Iowa 2013). As the Court correctly held, LSP is likely to succeed on its article III, section 29 challenges. This law has created, and will continue to create while in effect, real, material harm from diminished competition. Thus, given clear constitutional violations and the prospect of multi-millions of losses without an injunction, LSP

[1] Contrary to the Intervenors' argument, a decision on the merits is not first required to grant a temporary injunction and would defeat its purpose. *See* Iowa R. Civ. Pro. 1.1501; Iowa R. Civ. Pro. 1.1502.

should not have to endure further delay or incur additional fees litigating well-trodden ground.

The Intervenors claim the record was out-of-date as to the current state of projects for the Court to grant an injunction. Despite the State and Intervenors insisting otherwise, the Court understood projects were imminent from the record. *LS Power Midcontinent, LLC v. State*, ___ N.W.2d ___, 2023 WL 2618192, at *10 (Iowa 2023). That is the very harm at issue and what LSP argued throughout. LSP *did* present evidence of which the Court could take judicial notice regarding transmission projects, which the State and Intervenors resisted (despite not disputing its accuracy). *Id.* at *8. The record was sufficient for injunctive relief and stopping this illegal act spares the public enormous harm.

Because section 478.16 is unconstitutional, it is void *ab initio* and conferred no rights or authority to anyone. *Security Sav. Bank of Valley Junction v. Connell*, 198 Iowa 564, 200 N.W. 8, 10 (Iowa 1924); *Rodgers v. Mabelvale Extension Road Imp. Dist. No. 5 of Saline Cty.*, 103 F.2d 844, 846–47 (8th Cir. 1939). Projects or permits awarded under an unconstitutional statute are void and

ultra vires. *Mid-America Pipeline Co. v. Iowa State Commerce Comm'n*, 253 Iowa 1143, 1147, 1150–51, 114 N.W.2d 622, 624, 626 (1962). Because a temporary injunction is to preserve the status quo, it may enjoin the Iowa Utilities Board ("IUB") and Intervenors from taking further action on projects unlawfully assigned. *Id.* at 626.[2]

Troublingly, Intervenors appear to seek profit from a constitutional violation. Since oral argument—and, at least once, *after* this Court issued its injunction and in apparent violation of it—Intervenors asked IUB for public meetings to advance unlawfully assigned projects. *See, e.g.,* Letter, IUB (Apr. 11, 2023), https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=2117180&noSaveAs=1; Letter, IUB (Apr. 11, 2023), https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=2117181

[2] Although this appears to be the Court's intent, LSP does not object to clarifying projects should not proceed to the detriment of competition and the public, in derogation of our constitution under an Act that necessarily is void *ab initio*—as Intervenors apparently intend.

&noSaveAs=1; Letter, IUB (Apr. 11, 2023), https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=2117182&noSaveAs=1. Ignoring the injunction, Intervenors apparently seek to gather, wash, slice and devour as many fruits of the poisonous tree as they can before the Act finally is deemed unconstitutional; the very harm this Court sought to prevent. *LS Power Midcontinent, LLC*, 2023 WL 2618192, at *16–17. Respecting the law and this Court's authority demands more. Vacating the injunction and sending it to the district court for further briefing, hearing, ruling and likely appeal could delay enjoining violations for months or even years, all while consumers and LSP are injured as Intervenors try to push projects so far down the line it becomes untenable to stop the harm when section 478.16 is deemed void.

Importantly, the Court's temporary injunction only enjoins enforcing section 478.16. It does <u>*not*</u> restrain awarding projects through lawful competitive bidding under the state of the law <u>*before*</u> the unconstitutional act. Thus, the purported "<u>*harm*</u>" Intervenors

seek to avoid is robust competition benefiting the public. LSP argued, and the Court seemingly held, this is an injunction's *virtue*, not a harm. Intervenors may compete for projects when MISO bids them and only lose *if* the public benefits from a more competitive bid winning. *See* Josiah Neeley, *How ROFR Laws Increase Electric Transmission Costs in Midwestern States*, R STREET (Mar. 7, 2023), https://www.rstreet.org/commentary/how-rofr-laws-increase-electric-transmission-costs-in-midwestern-states/ (finding ROFRS in the MISO region, including Iowa's, have together cost midwestern consumers over $1.25 billion); Michael Hagerty, et al., *Report by Brattle Economists Discusses the Benefits of Competitive Transmission*, BRATTLE (Apr. 1, 2019), https://www.brattle.com/insights-events/publications/report-by-brattle-economists-discusses-the-benefits-of-competitive-transmission/ (estimating 20–30 percent cost savings from competitive bidding for transmission projects). What Intervenors see as an injunction's harm, in fact, dramatically benefits the public.

II. HABITUALLY VIOLATING CONSTITUTIONAL MANDATES IS A REASON TO ENJOIN, NOT EXCUSE, FURTHER VIOLATIONS.

Arguing the merits, the State contends the Court's determination that LSP likely succeeds on its single-subject clause challenge untenably limits the legislature's common practice of including numerous, unrelated subjects in bills. The State seemingly argues that, because it routinely flouts the constitution, the Court should excuse its conduct here. But article III, section 29, like all provisions of the Iowa Constitution, is mandatory and binds the legislature. *C.C. Taft Co. v. Alber*, 185 Iowa 1069, 171 N.W. 719, 720 (Iowa 1919) ("The people are sovereign, and speak through their Constitution, and, when they thus speak, its mandates are binding upon all people, and on the Legislature, which is but one of the agencies of government…. [T]he provisions of our Constitution are mandatory, and their mandates bind as closely and as firmly the legislative branch of the government as they do the citizen of the commonwealth."); *State v. Lynch*, 169 Iowa 148, 151 N.W. 81, 87 (1915) ("the several sections of the Constitution are mandatory, and when an act has been

promulgated as therein prescribed, and only then, does it become a law of the state.").

Habitually violating the law does not somehow make misbehavior acceptable. Rather, as this Court long recognized, it is *more* reason to demand fidelity to the constitution:

> **If … a constitutional provision is to be enforced at all, it must be treated as mandatory, and if the legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the courts should enforce it**, and it also seems to us that there are few evils which can be inflicted by a strict adherence to the law, so great as that which is done by the habitual disregard by any department of the government of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed.

Koehler v. Hill, 60 Iowa 543, 14 N.W. 739, 744 (1883) (internal quotes omitted) (emphasis added); *Wattles v. City of Lapeer*, 40 Mich. 624, 628 (Mich. 1879) (holding government's "habitual disregard" for the law "is of course no excuse whatever"). The Court, importantly, is a meaningful check on the legislature and "it is an imperative duty, from which no court will shrink, to declare void any statute the unconstitutionality which is made apparent…." *McGuire v. Chi., B. & Q.R. Co.*, 131 Iowa 340, 108

N.W. 902, 905 (1906); *Koehler*, 14 N.W. at 751 ("it is not only the province but the duty of the judiciary to fearlessly declare a statute or amendment to the constitution to be unconstitutional when such is clearly the case. We would be derelict to duty if we did not do so.").

The State essentially argues it should always be permitted to attach myriad disparate substantive and corrective riders to broad appropriations bills under the tenuous theme of "government." This Court correctly reaffirmed that article III, section 29 is justiciable and enforceable. Yet, the State's overly broad single-subject clause interpretation would render it meaningless. The Court lacks authority to nullify or amend a constitutional provision by judicial fiat—nor is the Legislature free to ignore it. *Meier v. Sulhoff*, 360 N.W.2d 722, 726 (Iowa 1985) (holding court cannot alter law "by judicial fiat"); *Koehler*, 14 N.W. at 751 (holding court cannot ignore constitutional provisions and process for amendment must be strictly followed). Rather than leaving the legislature "under a cloud of uncertainty," enforcing article III, section 29 reminds the Legislature what it always had to do: obey the law.

C.C. Taft Co., 171 N.W. at 720 ("The legislative branch must obey the Constitution or fundamental law, and must follow and obey its requirements and directions."). The Court correctly held the Act likely violated the single-subject clause and should not vacate its ruling.

III. THE COURT'S DECISION IS CONSISTENT WITH *PLANNED PARENTHOOD OF THE HEARTLAND, INC.*

The State further contends that, by discussing clear logrolling here, the Court contradicted its recent *Planned Parenthood of the Heartland, Inc. v. Reynolds* decision. LSP trusts the Court knows what it meant in *Planned Parenthood* and did not suffer the confusion the State suggests. Indeed, the Court's decision <u>is</u> consistent with *Planned Parenthood*. Although the State claims the Court cannot ever look to facts surrounding enactment, this Court in *Planned Parenthood* <u>did</u> look to "circumstances of [the act's] passage" when reviewing the single-subject claim. 975 N.W.2d 710, 727 (Iowa 2022). The Court, as here, stated the "single-subject requirement is primarily aimed at … avoiding logrolling." *Id.* (internal quotation omitted). Reviewing factually how the act was passed was not done for interpretive purposes but helped the Court

determine whether "the purposes of the single-subject rule were thwarted." *Id.* at 728. The same is true here.

The Court's factual review in *Planned Parenthood*, in turn, confirms constitutional violations here. The Court found no logrolling in *Planned Parenthood* because the "24-hour waiting period was separately approved by a house majority," there was debate exclusively on the 24-hour waiting period's merits, there was no evidence the 24-hour waiting period could not stand on its own, nor was there evidence any legislators did not understand what was voted on "or were misled as to what they were voting on." *Id.* at 727. As this Court noted, the legislative record here confirms the opposite. Further, unlike *Planned Parenthood*, the act here included "substantive changes … woven into the same legislation" as technical corrections, which meant "there ceased to be only one subject." *Id.* at 726. The lengthy bill here contained numerous unrelated matters, which the Court in *Planned Parenthood* reiterated violates the single-subject clause. *Id.* The record reveals all these facts unequivocally. Thus, rather than creating confusion,

the two cases in conjunction provide the legislature a clear roadmap to navigate article III, section 29's requirements.

Beyond misstating the Court's recent precedent, the State further claims that, if the Court looks at how an act is passed when addressing a single-subject clause claim, it will chill legislative debate. The Court reviewing the circumstances surrounding a challenged act's enactment to determine whether there was logrolling ultimately will *not* stifle debate. Quite the opposite, the more likely outcome is *greater* transparency and *greater* accuracy by legislators—both benefits. If a bill's opponents believe it is being logrolled, they *will* say so demanding response. Rather than silencing a bill's proponents, the Court's ruling encourages openly and accurately describing the bill's history and effect to ensure an accurate record should there be a later challenge—the opposite of what occurred here. It is hard to see how a ruling vindicating purposes underlying article III, section 29 must be vacated because, otherwise, it forces legislators to be accurate, transparent and forthcoming.

IV. THE COURT SHOULD RULE ON THE MERITS.

Finally, the State and Intervenors express concern regarding the injunction's implications and uncertainty they feel it causes. There is an obvious solution that grants certainty: the Court could rule on the constitutional claims' merits. All uncertainty as to whether the offending parties can proceed with an unconstitutional action disappears and everyone is protected. The State's and Intervenors' concerns regarding a *temporary* injunction become moot.

The Court may "deny the rehearing but simultaneously amend the opinion." Iowa R. App. Pro. 6.1205(4). The district court did not reach the merits because it dismissed based on "its erroneous conclusion that LSP lacked standing." *LS Power Midcontinent, LLC*, 2023 WL 2618192, at *11. Where the district court did not reach certain issues deeming them "unnecessary to the decision under the rationale it elected to invoke," this Court "may in the interest of sound judicial administration decide the issues where they have been fully briefed and argued." *IBP, Inc. v.*

Burress, 779 N.W.2d 210, 218 (Iowa 2010) (quotations omitted); *Berent v. City of Iowa City*, 738 N.W.2d 193, 206 n.1 (Iowa 2007).

Here, "[a]ll parties briefed the merits of the constitutional claims in the district court." *LS Power Midcontinent, LLC*, 2023 WL 2618192, at *12. "And LSP and Intervenor incumbent MidAmerican briefed the merits of the constitutional claims on appeal…." *Id.* The State and ITC Midwest "emphasized the urgency of resolving the legal issues in this case." *Id.*; *see also L.S. Power Midcontinent, LLC, et al. v. State, et. al.*, Iowa Courts, at 27:25–27:52, (Feb. 1, 2023) https://www.youtube.com/watch?v=ZaGXcrejSTA (Waterman, J. speaking) (hereinafter "Oral Argument") (noting the Court could decide the merits because they were fully briefed below, MidAmerican briefed them on appeal, and the "State maybe took a chance by leaving that alone" on appeal).

"The constitutional claims turn on questions of law…." *LS Power Midcontinent, LLC*, 2023 WL 2618192, at *12. The factual record is complete to determine these legal issues. *See Boekelman v. City of Algona*, 311 N.W.2d 90, 93 (Iowa 1981) (holding Court can

"take judicial notice of the background of a statute"); *Socony Vacuum Oil Co. v. State*, 170 N.W.2d 378, 382 (Iowa 1969) (holding court "may take judicial notice of legislative proceedings as record therein to the same extent that they take judicial notice of statutes of the legislative body" (internal quotations omitted)). As Justice McDonald noted, the title clause challenge here "seems very clear and a very clear legal question." Oral Argument at 30:55–31:01 (McDonald, J. speaking). No further facts must be developed to determine whether H.F. 2643's title was unconstitutional and the act therefore void *ab initio*. A decision now finding a violation decides the case, even without addressing the single-subject clause violation. *LS Power Midcontinent, LLC*, 2023 WL 2618192, at *12.

At oral argument, LSP stated the Court can and should decide the case's merits. Doing so promotes judicial efficiency. Because the parties fully briefed the issues, remand only "add[s] to the delay" and the district court's decision "inevitably would be appealed by either side." Oral Argument at 27:25–27:52 (Waterman, J. speaking). Thus, if the State and Intervenors fear uncertainty of proceeding under an unconstitutional act, there is a

better solution than arguing they should be able to harm LSP and the public until final resolution: decide the constitutional challenges' merits. The record is sufficient to do so.

CONCLUSION

To alleviate the State's and Intervenor's concerns regarding the temporary injunction, the Court may amend its ruling to decide the merits of clear legal issues. Certainty prevails. If the Court does not reach the merits, however, the Court should not vacate its well-reasoned ruling. The Court's decision was consistent with precedent. The Court had authority to issue the temporary injunction, and correctly did so given LSP's likelihood of success and injury further delay causes LSP and consumers. Therefore, LSP respectfully requests the Court deny the petitions for rehearing. The only clarification possibly in order is reiterating to Intervenors that they are *not* to continue trying to profit from an unconstitutional act, including finalizing their ill-gotten gains, while the case remains pending.

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CERTIFICATE OF COMPLIANCE

This Application for Further Review complies with the typeface requirements and length limitation of Iowa Rule of Appellate Procedure 6.1103(4) because this Application has been prepared in a proportionally spaced typeface using Century Schoolbook 14 pt. and contains 2,798 words, excluding the parts of the Application exempted by Iowa Rule of Appellate Procedure 6.1103(4).

/s/Michael R. Reck

CERTIFICATE OF SERVICE

I hereby certify on the 19th day of April, 2023, I electronically filed the foregoing Appellants' Response to Petitions for Further Review with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following parties. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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