IN THE SUPREME COURT OF IOWA

PLANNED PARENTHOOD OF THE HEARTLAND, INC., and
JILL MEADOWS, M.D.,
Appellees,

v.

KIM REYNOLDS ex rel. STATE OF IOWA, and
IOWA BOARD OF MEDICINE,
Appellants.

No. 21-0856

BRIEF OF AMICI CURIAE KIRKWOOD INSTITUTE, INC. and MEMBERS OF THE 89TH GENERAL ASSEMBLY OF IOWA

Appeal from the Iowa District Court for Johnson County
Hon. Mitchell Turner, District Judge
Case No. EQCV081855

Alan R. Ostergren
President and Chief Counsel
THE KIRKWOOD INSTITUTE, INC.
500 Locust Street, Suite 199
Des Moines, Iowa 50309
alan.ostergren@kirkwoodinstitute.org
(515) 207-0134

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Cases

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE

The Kirkwood Institute, Inc. is a nonprofit corporation formed under the laws of the State of Iowa. Its mission is, in part, to advance constitutional governance in the State of Iowa by advocating for the enforcement of rights guaranteed to all Iowans by the Constitution of the State of Iowa and the Constitution of the United States. A particular area of concern for the Kirkwood Institute is the separation of powers, an issue directly affected by the proper understanding of the single-subject clause of the Iowa Constitution.

This brief is also submitted on behalf of 12 members of the 89th General Assembly of Iowa. As legislators, they have an interest in the validity of statutes they enact and have a particular concern about the Court's jurisprudence concerning the single-subject clause of the Iowa Constitution. Joining this brief are: Speaker of the House Pat Grassley, Rep. Michael Bergan, Rep. Jane Bloomingdale, Rep. Jacob Bossman, Rep. Holly Brink, Rep. Dave Deyoe, Rep. Shannon Lundgren, Rep. Ann Meyer, Rep. Thomas Moore, Rep. Ross Paustian, Rep. David Sieck, Rep. Brent Siegrist.

ARGUMENT

I. The Court's cases construing Art. III, § 29 of the Iowa Constitution have drifted away from the text, history, meaning, and purpose of the clause. A fresh look at these sources shows the clause does not provide a justiciable standard to find the combination of subjects in a statute to be unconstitutional.

It is the Court's duty to independently determine the meaning of the Iowa Constitution "guided by 'the standards elaborated by controlling precedents and by our own understanding and interpretation of [its] text, history, meaning, and purpose.'" *State* v. *Wright*, 2021 WL 2483567, at *3 (2021) (citing *State* v. *Crooks*, 911 N.W.2d 153, 167 (Iowa 2018)). The inquiry is textual, informed by an understanding of historical practices and the context in which the text was written. *Star Equipment, Ltd.* v. *State*, 843 N.W.2d 446, 457 (Iowa 2014) ("First and foremost, we give the words used by the framers their natural and commonly-understood meaning. However, we may also examine the constitutional history and consider the object to be attained or the evil to be remedied as disclosed by the circumstances at the time of adoption.")

This appeal asks the Court to consider the meaning of Art. III, § 29 of the Iowa Constitution, the so-called "single-subject" clause.

This clause, which contains a "complete title" requirement as well, has been brought before this Court many times but with few successes by challengers. A review of the text and history of the clause shows that it was enacted to *prevent*, not facilitate, challenges to legislation. It was written for a specific purpose: to guard against the Court invalidating statutes. Furthermore, the history of codification of statutes (involving as it did the legislature enacting entire titles of the Code anew) cuts strongly against an exuberant interpretation of the clause. Precedent, too, supports this view. The Court has considered around 100 single-subject challenges. In only three of those did it find that the statute included impermissibly connected subjects.

This appeal presents a good opportunity for this Court to bring needed clarity to this area of the law. A proper understanding of the text and history of the clause shows that a successful challenge based on the subjects of a statute will rarely, if ever, be possible. Whatever evils might be prevented with a justiciable single-subject clause will be overshadowed by the evils such a rule would create.

A. The understanding of the clause must start with its text and the history of its adoption.

The Court should start "where constitutional interpretation ought to begin: with the relevant constitutional provisions." *Planned*

Parenthood of the Heartland v. *Reynolds*, 915 N.W.2d 206, 247 (Iowa 2018) (Mansfield, J., dissenting). This is not a piecemeal inquiry. *Doe* v. *State*, 943 N.W.2d 608, 610 (Iowa 2020) ("We begin our inquiry in this case with the language of the statute as a whole. Interpreting a statute requires us to assess it in its entirety to ensure our interpretation is harmonious with the statute as a whole rather than assessing isolated words or phrases.") The clause reads:

> Every Act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed in the title.

Iowa Const., Art. III, § 29.

As with so many constitutional standards, this clause cannot be understood without resort to the history of its adoption and to the judicial gloss placed on it during ratification. See *Wright*, 2021 WL 2483567, at *4 (discussing term "unreasonable" in Iowa Const. Art I, §8, in context of founding era common-law rules of search and seizure). In pursuit of this history, we start in 1846.

B. The clause's origins in the "single-object" clause of the 1846 constitution.

Iowa's first constitution also regulated the scope of legislation. "Every law shall embrace but one object, which shall be expressed in

the title." Iowa Const. of 1846, Art. III, § 26. This single-object clause quickly became the basis of a court case involving an issue near to the hearts of pioneer Iowans: the construction of roads. The Court's interpretation of the single-object clause, and the fear that the interpretation would be overruled, led directly to our present constitution's language.

In 1853 the legislature passed an act related to road construction. "The act in question contains sixty-six sections, in which it establishes some forty-six roads, and vacates some, and provides for the relocation of others." *State ex rel. Weir* v. *County Judge of Davis County*, 2 Iowa 280, 281 (1855). A dispute arose in Davis County about the construction of a road from Bloomfield to Winterset and the demand of a county judge (the precursor to a county supervisor) that certain parties pay costs as a precondition to the opening of the road. The party who didn't want to pay the road assessment claimed the road act was unconstitutional. *Id.*

The Court interpreted the single-object clause broadly. "It cannot be held with reason, that each thought or step toward the accomplishment of an end or object, should be embodied in a separate act." *Id.* And the Court noted that "[w]e are still in the days when the

legislature may be called contemporaneous with the constitution, and when its acts may be considered as a contemporaneous construction of that instrument." *Id.* at 283. The legislature's construction of the single object clause was hardly limited:

> When we find in the revenue law provisions concerning the county treasurer's powers to levy upon and sell personal property as a constable, or concerning his fees, or relating to pedler's [sic] license; and when we see in the school law, provisions about the superintendent of public instruction, and the school fund commissioner, and about school district officers, and their bonds, and about state, and county and school district funds; we are not surprised, and no one suspects a breach upon the constitution. These things are congruous with the end proposed.

Id. at 282.

"We will look at the acts of the session of 1846 and 1847, the first after the adoption of the constitution." *Id.* at 283. "The revenue, school, and justices' acts, and others, are broad and cover many particulars." *Id.* But this did not create a single-object concern. "In all such cases, the whole of the matter is homogeneous, and falls under some general idea expressed in the title. The unity of object is to be looked for in the ultimate end, and not in the detail or steps leading to the end." *Id.*

But the Court was not unanimous. Chief Justice Wright dissented on the analysis of the single object clause but did not explain his view beyond stating, "I am not prepared to hold such legislation

constitutional, but incline to hold that the objection is well taken." His dissent, and the possibility that his view was shared by other Justices, would figure into the debates leading to the ratification of our 1857 constitution.

C. The framers of the 1857 constitution intended to prevent court challenges to legislation by adopting the present single-subject clause.

During the 1857 constitutional convention, the language that ultimately became Art. III, § 29 was read during floor debate. The delegate from Davis County (where *State ex rel. Weir* originated) rose to discuss the use of the word "subject" rather than "object":

> Mr. PALMER: I move to strike out the word "subject" wherever it occurs in this section, and insert the word "object." I believe it was the intention of the framers of this constitution that the word should be "object." A virtual violation of the section by the legislature led to a great deal of difficulty. For instance, there would be acts passed in relation to certain state roads, therein named. There was one omnibus act of this kind, embracing provisions for the establishment of many state roads, and also to vacate others already established. It related to but one subject, it is true, that of state roads, but it related to more than one object. There was some question before the supreme court as to the meaning of the word "subject," and it was the opinion of many that the act was in compliance with the original provision of the constitution. It appears to me that if we can embrace so many different provisions under the word "subject," it ought to be stricken out, and some other word substituted for it, which would confine the action of the legislature within some more limited range.

1 W. Blair Lord, Debates of the Constitutional Convention of the State of Iowa, 530 (1857).

In response, another delegate made it clear that this language had been carefully chosen to ensure that the legislature could craft legislation as it saw fit without fear that a court would unduly interfere, and that the word "subject" was selected as a reaction to the Court's decision in *State ex rel. Weir*:

> Mr. CLARKE, of Johnson. This subject has been before the supreme court, in the case referred to by the gentleman from Davis, [Mr. Palmer.] The session before last of the General Assembly passed what is known as the "omnibus road bill," providing for the laying out, establishing and vacating some thirty, forty or fifty roads. Under that act roads were established, and damages were allowed to a certain individual, which the county judge refused to pay. And a proceeding, by writ of mandamus, was commenced in the name of a third person to test that matter. In that proceeding, this whole matter was discussed in the supreme court. The proceedings were dismissed in the district court, and in the supreme court a decision was rendered by two judges, sustaining the law as constitutional; that though it embraced a variety of objects, it embraced but one subject. From that decision the chief justice dissented. That decision now stands, though there are two judges in favor of it, and two against it. I think the construction put upon the act by the majority of the court was a correct one.

Id. at 531.

The delegate continued by pointing out the connection of the word "subject" with the next draft clause, one that would get the legislature out of the business of passing laws of a narrow focus:

> But as they leave the subject open to discussion here, it might be well for this Convention to consider this section, in connection with the section that succeeds it. That section reads—
>
> > "The General Assembly shall not pass local or special laws in the following cases:
> >
> > For the assessment of collection of taxes for State, county, or road purposes;
> >
> > For laying out, opening, and working on roads or highways;
> >
> > For changing the names of persons;
> >
> > For the incorporation of cities or towns;
> >
> > For vacating roads, town plats, streets, alleys, or public squares;
> >
> > In all other cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."
>
> If the supreme bench should eventually reverse that decision, and decide that each act providing for laying out and vacating State roads, must provide for only one road, we gain very little by the section I have just read.
>
> I do not say that the amendment of the gentleman from Davis [Mr. Palmer] will affect this matter beneficially. But the word "subject' is a broader word, and more extensive in its application, that the word "object." it is found in the constitution of New York, and in some other constitutions, I think. The supreme court drew a distinction between the two words, and the question is now a debateable [sic] question in the courts, and among the bar. I think we should do something to remove these doubts and difficulties, if we can. I am not very particular about the matter myself, but I throw out these suggestions for the consideration of the Convention.

Id. There was no other debate on the clause. The motion to replace the word "subject" with the word "object" failed.

The language prohibiting local or special laws also made it into the ratified constitution. By enacting these two clauses, the framers

sought to largely eliminate the possibility of a constitutional challenge to a law because of its scope. This language was added out of concern that a 2-1 decision from this Court upholding a statute might flip to a 3-2 rejection of another in the future. They did not intend to create a mechanism by which a Court would blot laws out of existence by its own sense of how laws should be made.

The Court's cases, particularly during the founding era, confirm this understanding of the clause. Before discussing this precedent, however, we should first understand a significant development in how statutes were published and shared with the public. The history of codification of laws bears great significance on the proper understanding of the single-subject clause.

D. The Iowa legislature would periodically codify the session laws then in existence. The well-established practice of codification proves the futility of a single-subject challenge.

Let's start with a proposition that sounds seditious. *The Iowa Code is not the law*. To be certain, a copy (printed or otherwise) is at the fingertips of every judge and lawyer in the state. It is regularly cited in legal arguments and court opinions. And every day prisoners are received by the Iowa Department of Corrections with a mittimus that

recites they were convicted of one provision or another of the Iowa Code. It sure *seems* like the law, doesn't it?

Think about title to real estate. The proof that someone owns a particular piece of property is made up from the various documents on file with the county recorder. By looking at them we can establish the chain of transactions that lead to the present owner's interest. But it is awfully inconvenient to go to the recorder's file room every time we want to know who owns what. Instead, we use an abstract of title: a written summary of the various documents that make up the chain of title.

A statutory code works in much the same way. The laws that the legislature passes are in the Secretary of State's file room. But no one wants to, or even practically can, read every document in the file room every time she wants to know what the law is. Instead, we look to the Code of Iowa as an *abstract* of the law. No one wants it to be any different.[1] The framers understood this as well, particularly because of the technology of the era.

[1] For more on this topic in relation to the U.S. Code, see *Some Reflections on Not Reading the Statutes*, 10 Green Bag 2d 283 (2007). Available at https://perma.cc/9WG8-M73V. <last visited July 18, 2021>.

We live in an era where we take for granted that information can be transmitted instantly at nearly no cost. Iowans have access to the proceedings of the legislature with a smartphone. This was not the world of 1857. Typewriters were still a generation away. To share writing meant setting type in a printshop. Since territorial days, session laws would be printed in pamphlet form and distributed to county courthouses. 1839 Statute Laws of the Territory of Iowa 342. After statehood, acts of the legislature would include a publication clause, direction as to in which specific newspapers they were to be printed. See, e.g., 1858 Iowa Acts, Ch. 1, § 3 ("[t]his act shall take effect and be in force from and after its publication in the Iowa Citizen, Burlington State Gazette, Gate City of Keokuk, and Burlington Hawkeye.")

The challenge of knowing the state of law under this system was obvious. The territorial laws and early statehood laws directed the Secretary of State to at times publish a statute book. But as Iowa grew, and the legislature's work increased correspondingly, understanding the current state of the statutory law was a challenge. The 1858 General Assembly set out to address this problem by passing "[a]n Act providing for a Revision of the Laws of Iowa, and the preparation of a Code of Civil and Criminal Procedure." 1858 Iowa Acts, Ch. 40. The

next major code was the Code of 1873. It was adopted effective September 1, 1873, with "[a]ll public and general statutes passed prior to the present session of the general assembly, and all public and special acts, the subjects whereof are revised in this code, or which are repugnant to the provisions thereof, are hereby repealed, subject to the limitations and with the exceptions herein expressed." See, Code of Iowa (1927) v-vi (prefatory material describing history of codification). "The *Code of 1873* continued to be the official code of the state for twenty-four years…" *Id.* Additional codes[2] were published under legislative direction or by private initiative in 1880, 1888, and 1897 with periodic supplements to these publications. *Id.* A comprehensive code was published in 1919 with the legislature reenacting the code as a whole as 253 separate code commissioners' bills. See, 1919 Report of the Code Commission 4-7.

The 38th General Assembly directed a new codification project that spilled into the 39th General Assembly. Again, the code commissioners prepared codification bills to reenact existing session laws. See, 1922 Report of the Code Commission vii-x (itemizing 262 codification bills). The 40th General Assembly took the important step

[2] Archived codes may be found at: https://www.legis.iowa.gov/archives/code <Last visited July 18, 2021.>

of establishing a permanent code editor. Code of Iowa (1927) ix. "Under the law enacted, there will be a new code issued every four years; and it is, in our judgment, entirely feasible and economical to do this and thus with timely revisions of portions of the law prevent in the future the great complication and confusion into which our laws fell between the adoption of the *Code of 1897* and the present time." *Id.*

This, of course, is the progenitor to our modern system. Today, the Legislative Services Agency and the Iowa Code Editor publish the proceedings of the legislature in near real time and compile a new Iowa Code at the end of each General Assembly. See Iowa Code §§ 2B.6-.13. But how does codification fit with the single subject and title clause of the Iowa Constitution? The legislature has accomplished codification by passing laws in bulk to adopt a new code (or, as we saw for the 1873 Code, repealing everything that wasn't in the book). Do we dare give voice to the thought that the Iowa Code, *the entire thing*, might be unconstitutional on single-subject grounds? To the good fortune of all concerned the Court has already spoken to this question.

In *Cook, et al.,* v. *Marshall Cnty.*, 119 Iowa 384, 93 N.W. 372 (1903) a shopkeeper sought to avoid paying a penalty tax on a variety of tobacco products. Cook argued that the "statute under which the

disputed tax was levied is void, because it does not conform to section 29 of article 3 of the constitution of this state." *Id.* at 376. The penalty tax was enacted in a codification of the various criminal statutes. The codification statute, Cook said, unconstitutionally contained many subjects.

The Court recited the history of the single-object clause of the 1846 constitution and the *State ex rel. Weir* precedent. Noting the possibility of the legislature's intent in passing a law could be easily frustrated, it stated the clause was enacted "seemingly to avoid the embarrassments which might arise from a narrow construction of the rule as thus expressed…" *Id.* at 377.

The clause's language "and matters properly connected therewith" was significant. The words "are highly important, and indicate the intention that the rule shall be liberally interpreted." *Id.* The national trend toward codification confirmed this. "It is the general policy of every state in the Union to collect and restate from time to time the whole body of its statute law in a complete and systematic form or code, and we think it has never been held by any court that this assembling under one head of various enactments tending to the same general object is not valid under the constitution."

Id. "Any other conclusion would render valueless all efforts at codification." *Id.*

The analysis was highly deferential to the legislative process. "All that is required is that the act should not include legislation so incongruous that it could not by any fair intendment be considered germane to the general subject." *Id.* "The subject may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject, and not several." *Id.* It is not "necessary that the connection or relationship should be logical." *Id.*

Of course, when the legislature enacts a code it restates laws passed individually, presumably with titles that reflected their content. But whether this created a constitutional difference "is not now before us, and we need not consider it." *Id.* The legislature reenacted "the entire body of the statutory law of this state, consisting of many hundred separate acts, was classified and combined under 26 titles." *Id.* "Each of these titles of necessity contains widely variant provisions, but all having more or less appropriate relation to the general topic to which such title is devoted." *Id.* The rule suggested by Cook to avoid

paying a penalty tax "would unsettle the validity of a multitude of Code provisions, and open the door to legal chaos." *Id.*

Without question, obedience to the commands of our constitution may require things that are inconvenient, undesirable, or otherwise costly. This "should not deter the court from accepting and announcing a rule which is clearly right…" *Id.* "[B]ut it is a good and sufficient reason why we should pause and refuse to take a position attended with such grave consequences until its propriety and correctness are demonstrated beyond reasonable doubt." *Id.* "Moreover, it is a well-established principle, which this court has often applied, that it is the duty of the courts to give such a construction to an act, if possible, as will avoid the necessity of holding it void for unconstitutionality." *Id.*

The Court's resolution of this question made perfect sense. After all, the very first legislature to meet after the ratification of our current constitution adopted the 1858 Code of Iowa. Surely, they didn't believe they were breaking the new charter by doing so. With this in mind, let us turn to how the Court has considered single-subject challenges.

E. Since 1857 the Court has only found a statute to violate the single-subject clause three times.

The Court's cases have followed a consistent pattern: a litigant's single-subject challenge would be rejected out of hand. For example, in *Whiting and Whiting* v. *City of Mt. Pleasant*, 11 Iowa 482 (1861) landowners wanted their property excised from the city limits of Mt. Pleasant and sought to use a recently passed law that permitted such a thing. The case presented the question of whether the law applied to cities already established when the law was enacted. This Court, citing cases that had rejected single-object challenges under the 1846 constitution, upheld the statute. "The provisions of the new constitution upon this subject are different from those of the old; the latter more restrictive than the former." *Id.*

A railroad sought to escape liability for the death of one of its employees by claiming that the statute which imposed the liability violated the single-subject clause. *McAunich* v. *Mississippi & M.R. Co.*, 20 Iowa 338 (1866). The law was titled "[a]n act in relation to the duties of railroad companies." *Id.* The railroad claimed that the provision imposing liability on it spoke to an unrelated subject. "The objection is not well taken. Every law prescribing *duties* must have the sanction of *liabilities* resulting from a failure to perform those duties, in order to

have any practical beneficial effect or operation." *Id.* (emphasis original). The Court rejected the challenge.

In a prosecution for selling alcohol within two miles of city limits the statute that permitted cities to forbid such activity was challenged on single-subject grounds. *State* v. *Shreoder*, 51 Iowa 197, 1 N.W. 431 (1879). The Court had little trouble rejecting the claim.

The Court first identified the subject of the act was to "prohibit and regulate the sale of malt and vinous liquors within certain specified territory." *Id.* at 433. In connection with this subject was "[t]he extent of the prohibition or regulation, the territory over which the law extends, the periods of time when the law shall be operative, the punishment for its violation, the proceedings and the court wherein they are to be tried, and the authority and territorial extent of the jurisdiction of the cities to regulate and prohibit the sale of malt and vinous liquors under the act…" *Id.*

The Court recognized that the constitution permitted the legislature to do many things under a single law hoping to accomplish a certain objective. "These matters relate to the means and manner of attaining the object of the act, or carrying into effect the policy of the law, and enforcing its provisions. They are not the subject of the act."

Id. The Court recognized that much of what the legislature does is written in such a way. "Many statutes could be cited similar in character…It has bever been claimed that [such acts are] in conflict with the provisions of the constitution under consideration." *Id.* at 433-34.

Although challenges continued to be brought, the first 100 years of the constitution produced little success for litigants. As recited by a 1958 law review note, "There have been about ninety cases before the Iowa Supreme Court in which the validity of a statutory provision has been assailed for noncompliance with this constitutional section or its predecessor, but there have been only nine opinions discovered in which the Court has held a statutory provision invalid because of such noncompliance." (citing William J. Yost, Note, *Before a Bill Becomes a Law—Constitutional Form*, 8 Drake L. Rev. 66 (1958)). But this tally obscures a key fact: the successful challenges to statutes were to the *title* of an act, not because of the *subjects* of an act.

Consider a case in which this Court found that an "act to amend the charter of the city of Keokuk" was improperly titled as to a section that purported to legalize the previous actions of the city to purchase railroad bonds and to purchase stock in a railroad company.

Williamson v. *City of Keokuk*, 44 Iowa 88, 92 (1876). And in *Rex Lumber Co.* v. *Reed*, 107 Iowa 111, 77 N.W. 572 (1898) this Court construed a statute entitled "an act to amend section 853 of the Code of 1873." *Id.* at 573. The amendment made, for the first time, unpaid taxes a lien against personal property of the taxpayer. *Id.* This was problematic, because it meant a good-faith purchaser might unknowingly acquire property with a lien against it. *Id.* Because the statute created great uncertainty to third parties, the Court held "we are forced to conclude that the title of the act does not express its subject, and that the act, for that is reason, is in conflict with the constitution, and void." *Id.* at 574.

All nine[3] of the cases identified in the Yost law review note were successful title challenges. There have only been *three* cases in which the Court found that a statute included impermissibly related subjects. These cases provide a slender basis to justify invalidating statutes.

In *Western International Ins. Co.* v. *Kirkpatrick*, 396 N.W.2d 359 (Iowa 1986), the Court considered a statute that permitted a direct appeal from an administrative decision in a workers' compensation

[3] The remaining cases are *State* v. *Bristow*, 131 Iowa 664, 109 N.W. 199 (1906), *Des Moines Nat. Bank* v. *Fairweather*, 191 Iowa 1240, 181 N.W. 459 (1921), *State* v. *Manhattan Oil Co.*, 199 Iowa 1213, 203 N.W. 301 (1925), *In re Breen*, 207 Iowa 65, 222 N.W. 426 (1928), *Chicago, R.I. & P. Ry.* v. *Streepy*, 207 Iowa 851, 221 N.W. 817 (1929), *Smith* v. *Thompson*, 219 Iowa 888, 258 N.W. 190 (1935), *Nat'l Benefit Accident Ass'n* v. *Murphy*, 222 Iowa 98, 269 N.W. 15 (1936).

case to this Court. The Court held that the act was unconstitutional for giving the Supreme Court original, rather than appellate, jurisdiction. *Id.* 362-63. Because the workers' compensation commissioner is not an inferior judicial tribunal, this Court cannot take an appeal from his decisions. *Id.*

The determination that the law was unconstitutional on judicial jurisdiction grounds should have been enough to decide the case. But the Court also analyzed the law on single-subject grounds in what can be only described as an effort to salt the legislative earth from which the direct-appeal idea had grown. The appeal provision had been inserted in a nonsubstantive code editor's bill. See Iowa Code § 2B.6(1). This was decisive. "[W]e can still effectuate the intent of the legislature in providing for a code corrections bill to keep the code in order. Only when that type of bill also incorporates substantive changes, as here, do we have to strike portions of a challenged bill…" *Id.* at 365. The Court also found the title, relating to a nonsubstantive code correction bill only, to be defective. *Id.*

A substantive provision in a code editor's bill also produced the next single-subject violation in *Giles* v. *State*, 511 N.W.2d 622 (Iowa 1994). The Court held in a previous case there was a right to direct

appeal of postconviction relief cases arising from prison disciplinary hearings. *Shortridge* v. *State*, 478 N.W.2d 613, 615 (Iowa 1991). In response, the legislature directed that the review would only be by writ of certiorari. The provisions were in the code editor's bill. *Giles*, 511 N.W.2d at 625. If this bill was "designed to incorporate nonsubstantive and lexicographical changes—such a lack of logical connection would not be fatal." *Id.* Citing the *Western Int'l* precedent, *supra*, the Court held "[w]hen such a bill incorporates substantive changes, however, the portions that violation article III, section 29 must be stricken."

The next single-subject challenge was *State* v. *Taylor*, 557 N.W.2d 523 (Iowa 1996). The defendant had been convicted of trafficking in stolen weapons, an offense created as part of an omnibus juvenile justice bill. "The bill contains seventy-four sections embracing a variety of initiatives, all but six of which expressly relate to juveniles." *Id.* There was nothing about the trafficking charge that contained a "reference to juvenile crime or juvenile justice so as to connect it to the general subject of the legislation." *Id.* This violated the single-subject clause. *Id.* And, because the title did not convey that the statute included an adult criminal offense, it was also deficient. *Id.*

Western Int'l, *Giles*, and *Taylor* do not consider the history of codification. It troubled the *Western Int'l* and *Giles* courts that substantive provisions had been placed in a nonsubstantive code editor's bill. Enforcement of the title rule should fix that problem. But imagine the juvenile justice provisions in *Taylor* were enacted as a codification of all criminal laws. Would the statute survive a single-subject challenge there because the statute had *more* subjects? If codification is good, then *Taylor*'s logic doesn't work. It makes little sense to say the clause permits statutes with small or large numbers of subjects and but considers unconstitutional those statutes in the middle.

Taylor, as limited as it is, is the high-water mark for single-subject challenges. The case the district court relied on below rejected a challenge. The logic of that case, however, leaves much to be desired and invites attention from the Court to remedy.

F. The district court misunderstood the holding of *State* v. *Mabry*, a case which itself gets the text and history of the single-subject clause not quite right. Under the Court's precedents, there is not a justiciable standard to determine that a law violates the single-subject clause.

The district court relied extensively on discussions of the purpose of the single-subject clause and the nature of the legislative process in *State* v. *Mabry*, 460 N.W.2d 472 (Iowa 1990). But the political process concerns *Mabry* discusses are merely dicta. The district court's sense of how the legislature should conduct itself may have been offended, but that is no basis to blot a statute out of existence. *Mabry* invites more mischief than a single erroneous district court order. The case's holding, that it was too late to raise a single-subject clause challenge, exposes the lack of justiciability of the single-subject clause and invites correction by the Court.

Mabry involved the appeal of a criminal conviction for trafficking in cocaine. *Id.* at 473. The defendant claimed that he had merely committed an accommodation offense, by providing a small quantity to another with no profit motive. *Id.* Unfortunately for him, the legislature had amended the accommodation offense statute to only apply to marijuana offenses. *Id.* The statutory amendment took place in 1980, eight years before the cocaine transaction. But the defendant claimed the amending statute suffered a single-subject clause defect. If he was right, the accommodation offense statute continued to apply to his actions.

Considering the constitutional claim, the Court did not heed the command to begin with the text. Instead, the Court began with a law review student note. *Id. (*citing Yost, *supra* at 67). Citing the note, the opinion related three purposes for the single-subject clause. "First it prevents logrolling. Logrolling occurs when unfavorable legislation rides in with more favorable legislation. Second, it facilitates the legislative process by preventing surprise when legislators are not informed. Finally, it keeps the citizens of the state fairly informed of the subjects the legislature is considering." *Id.* (internal citations omitted).

Regrettably, the opinion does not cite what follows in the note. "Such objectives are very laudable but, in individual cases, they are counterbalanced by a lack of desire by courts to declare laws unconstitutional, to make validity turn on a somewhat ritualistic and technical argument." Yost, *supra* at 67. To support this point, the note then cites to the passage in *State ex rel. Weir* warning "[t]o sustain the objection in the case at bar would render null a large portion of the legislation of this state, and render legislation so inconvenient as to make it nearly impracticable." *Id.* (citing *State ex rel. Weir*, 2 Iowa at 284).

It is only after this incomplete citation to the note that the opinion turns to the text of Art. III, § 29. It cites several cases, including *State ex rel. Weir*, to emphasize the deference to the legislature before abandoning the analysis to announce, "we need not decide the constitutional issue." *Id.* at 474-75. "As we mentioned earlier most states have constitutional provisions like article III, section 29 of the Iowa Constitution. In a number of these states, courts have held that codification of the challenged legislation cures a constitutional defect in title or subject matter." *Id.* at 475 (citing cases).

The opinion then announces the rule: "[a]lthough an act, as originally passed, was unconstitutional because it contained matter different from that expressed in its title, or referred to more than one subject, it becomes, if otherwise constitutional, valid law on its adoption by the legislature and incorporation into a general revision or code…" *Id.* (citing 82 C.J.S. *Statutes* § 274, at 459 (1953 & Supp. 1990)). "We think the rule is fair to all concerned, and we adopt it. The rule strikes a balance between the salutary purposes of the single-subject rule and the importance of upholding the constitutionality of new legislation." *Id.* Because the Iowa Code Editor had published the 1980 amendment long before the offense was committed in 1988 and

"[n]o one had lodged a successful [single-subject] challenge to the legislation before the 1981 Code was issued…any alleged constitutional defect Mabry raises was cured long before…" *Id.*

Two observations leap to the forefront. First, *Mabry*'s failure to engage with the text and history of the constitution does not follow the Court's modern practices of constitutional interpretation. No court can discharge its duty to say what the law is by quoting a law review note that summarizes a century of cases in a few sentences. Second, the case's adoption of the rule cutting off the period to raise a single-subject challenge does not consider the difference between codification by legislative action and codification by the ongoing efforts of the Iowa Code Editor.

The rule that a challenge can only be made before codification *by the Iowa Code Editor* makes no sense. The rule might be, as the Court put it, "fair" but that doesn't make it legally coherent. How does a void law become, well, unvoid? It does make sense that when the legislature reenacts the entire code as part of its own codification process it wipes out any possible single-subject claims to the individual session laws incorporated in the new code. But if that is true—and this is the key point—then the single-subject clause has no justiciable limiting

principle. If legislative action cures the defect, then the constitutionally valid subjects of a statute can be as broad as *the entire Code of Iowa*.

Mabry can't possibly be right when it says that the actions of the code editor make any difference. That means that everything that the legislature has passed since 1927 is fair game to challenge. *All of it*. Or the Court can recognize that the single-subject clause simply does not create a justiciable standard to determine what is or is not a validly connected subject in a bill.

To be certain, the Court does not have to jettison *Mabry* to uphold the 24-hour waiting period. Under the Court's precedents, the legislation here is plainly constitutional. It is titled "[a]n Act relating to medical procedures including abortion and limitations regarding the withdrawal of a life-sustaining procedure from a minor child." 2020 Iowa Acts, Ch. 1110. No one can argue that the topic of abortion is hidden by this title. So, too, is the subject of this law proper. The legislature saw fit to legislate on the decision-making process for irreversible acts that would cause the death of a child, born or not. Whether that is one subject or two properly connected subjects, it is absurd to call them incongruous.

While the Court can resolve this case without touching *Mabry*, it should not avoid the opportunity to fix this area of the law. This case teaches us what the single-subject clause can turn into if not sharply constrained. The district court sought to vindicate minority legislators and members of the public who were (or might have been) opposed to the bill. Of course, those legislators got to express their opposition by voting "no." And if the public doesn't like how the majority acted, they too can vote accordingly. But in our system, we don't grant the judiciary a veto over legislation. The district court's use of the clause here was nothing less.

This is not to say that the clause is without meaning. Legislators can point to it as a justification for voting against a bill. So, too, can the Governor use its authority to support her veto of an Act. The courts are not the sole guardians of the constitution. Each branch of government has a responsibility to obey and enforce it. And each branch has a corresponding duty to avoid calling into doubt the constitutionality of the other's acts unless the case to do so is clear. When the judiciary considers the legislature's judgment that subjects are properly connected, experience shows that the requisite clarity will not be present. The text, history, meaning, and purpose of the single-subject

clause simply do not provide a justiciable basis for a court to interfere with legislative judgments about the subjects of legislation.

Respectfully submitted,

/s/ Alan R. Ostergren
Alan R. Ostergren
President and Chief Counsel
THE KIRKWOOD INSTITUTE, INC.
500 Locust Street, Suite 199
Des Moines, Iowa 50309
alan.ostergren@kirkwoodinstitute.org
(515) 207-0134

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains **6,779** words, excluding parts of the brief exempted by that rule.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the typestyle requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Iowan Old Style, 14-point type.

No party, their counsel, or other individual has authored this brief in whole or in part. No party, their counsel, or other individual has contributed funds to the preparation of this brief.

/s/ Alan R. Ostergren
Alan R. Ostergren