BEFORE THE IOWA SUPREME COURT

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No. 21-0696

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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.

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

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# PLAINTIFFS-APPELLANTS' PROOF BRIEF

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## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... 4

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW ..... 11

ROUTING STATEMENT ..... 21

STATEMENT OF THE CASE ..... 21

STATEMENT OF THE FACTS ..... 23

I. APPELLANTS, ELECTRIC TRANSMISSION AND COMPETITION ON THE GRID. ..... 23

II. LSP LOST ITS OPPORTUNITY TO COMPETE RIGHT AS THE RUBBER MET THE ROAD. ..... 30

III. THE DARK-OF-NIGHT AMENDMENT ADDING THE ROFR TO AN OMNIBUS APPROPRIATIONS BILL. ..... 34

IV. THE DISTRICT COURT ERRONEOUSLY GRANTS DISMISSAL. ..... 38

ARGUMENT ..... 42

I. THE DISTRICT COURT ERRED GRANTING THE MOTION TO DISMISS BECAUSE LSP POSSESSES STANDING. ..... 42

A. Liberal Motion to Dismiss Standards Counsel LSP Has Standing. ..... 42

B. The District Court's Conclusion LSP Lacked Standing Was Erroneous. ..... 45

1. The ROFR Deprives LSP of the Opportunity to Compete. ..... 47

2. The ROFR Injures LSP's Economic Competitive Interests. ..... 52

3. LSP Need Not Wait Until It Is Too Late. ..... 57

II. THE DISTRICT COURT ERRED IN FAILING TO FIND CONSTITUTIONAL VIOLATIONS ARE ISSUES OF GREAT PUBLIC IMPORTANCE. ..... 61

A. LSP's Claims Are Important and Require Judicial Intervention. ..... 63
B. LSP Is the Appropriate Party. ..... 71
III. AN INJUNCTION SHOULD ISSUE. ..... 74
A. Injunction Standards ..... 75
B. The ROFR Violates the Iowa Constitution. ..... 76
1. H.F. 2643 Has No Single Subject. ..... 77
2. H.F. 2643's Title Provides No Fair Notice of its Anti-Competitive ROFR. ..... 82
3. Iowa Code Section 478.16 Violates the Privileges and Immunities and Equal Protection Clauses. ..... 84
C. Irreparable Harm Results if Injunction is Not Granted. ..... 89
CONCLUSION ..... 90
REQUEST FOR ORAL ARGUMENT ..... 91
CERTIFICATE OF COMPLIANCE ..... 92
CERTIFICATE OF SERVICE ..... 93

## TABLE OF AUTHORITIES


CASES — Page

*Adams v. Watson*, 10 F.3d 915 (1st Cir. 1993) ..... 55, 58, 59

*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) ..... 50, 51, 52

*Alons et al. v. Iowa District Court for Woodbury County*, 698 N.W.2d 858 (Iowa 2005) ..... 63

*American Civil Liberties Union of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003) ..... 90

*American Petroleum Institution v. South Carolina Department of Revenue*, 677 S.E.2d 16 (S.C. 2009) ..... 68

*Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 562 (1977) ..... 57

*Atchison, Topeka & Sante Fe Railway Co. v. Summerfield*, 229 F.2d 777, 779 (D.C. Cir. 1955) ..... 56

*Berent v. City of Iowa City*, 738 N.W.2d 193 (Iowa 2007) ..... 75

*Bormann v. County Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998) ..... 47, 67

*Bras v. California Public Utilities Communication*, 59 F.3d 869 (9th Cir. 1995) ..... 52

*Bronner v. Exchange State Bank*, 455 N.W.2d 289 (Iowa Ct. App. 1990) ..... 45

*C.C. Taft v. Alber*, 171 N.W.2d 719 (Iowa 1919) ..... 66

*Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319 (Fed. Cir. 2008) ..... 54, 57

*Carmack v. Director, Missouri Department of Agriculture*, 945 S.W.2d 956 (Mo. 1997) ..... 84

*Carney v. Adams*, 141 S. Ct. 493 (2020) ..... 50

*Chicago Anamosa and Northern Railway Co. v. Whitney*, 121 N.W. 1043 (Iowa 1909) ..... 75

*Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470 (Iowa 2004) ..... 45, 57

*City of Philadelphia v. Commonwealth*, 838 A.2d 566 (Pa. 2003) ..... 81

*Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) ..... 46

*Clinton v. City of New York*, 524 U.S. 417 (1998) ..... 54

*Colton v. Branstad*, 372 N.W.2d 184 (Iowa 1985) ..... 65, 79

*Commonwealth v. Neiman*, 84 A.3d 603 (Pa. 2013) ..... 69, 81

*Community State Bank, National Association v. Community State Bank*, 758 N.W.2d 520 (Iowa 2008) ..... 76

*Coral Construction, Inc. v. City and County of San Francisco*, 10 Cal. Rptr. 3d 65 (Cal. App. 1st Dist. 2004) ..... 52

*Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514 (5th Cir. 2014) ..... 60

*Emera Maine v. Federal Energy Regulatory Commission*, 854 F.3d 552 (D.C. Cir. 2017) ..... 64

*Exira Community School District v. State*, 512 N.W.2d 787 (Iowa 1994) ..... 63

*Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) ..... 90

*Free the Nipple-Ft. Collins v. City of Ft. Collins*, 916 F.3d 792 (10th Cir. 2019) ..... 89

*Giles v. State*, 511 N.W.2d 622 (Iowa 1994) ..... 66, 77, 80

*Godfrey v. State*, 752 N.W.2d 413 (Iowa 2008) ..... 62, 66, 68

*Gregory v. Shurtleff*, 299 P.3d 1098 (Utah 2013) ..... 63, 67, 71, 74

*Harbor v. Deukmejian*, 742 P.2d 1290 (Cal. 1987) ..... 67, 81

*Hawkeye Bancorp v. Iowa College Aid Commission*, 360 N.W.2d 798 (Iowa 1985) ..... 46

*Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600 (Iowa 2012) . 42, 45, 47, 52, 53

*Homan v. Branstad*, 864 N.W.2d 321 (Iowa 2015) ..... 75

*Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013) ..... 45, 47, 48, 50, 86

*Hunsucker v. Fallin*, 408 P.3d 599 (Okla. 2017) ..... 67

*Iowa Bankers Association v. Iowa Credit Union Department,* 335 N.W.2d 439 (Iowa 1983) ..... 46, 52, 53

*Iowa Citizens for Community Improvement v. State*, 962 N.W.2d 780 (Iowa 2021) ..... 44, 45, 46, 57, 60

*Iowa Department of Transportation v. Iowa District Court*, 586 N.W.2d 374 (Iowa 1998) ..... 59

*Johnson v. Walters*, 918 P.2d 694 (Okla. 1991) ..... 81

*Junkins v. Branstad*, 421 N.W.2d 130 (Iowa 1988) ..... 65

*Kleman v. Charles City Police Department*, 373 N.W.2d 90 (Iowa 1985) ..... 76

*League of Women Voters of United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016) ..... 90

*Lebeau v. Commissioners of Franklin County*, 422 S.W.3d 284 (Mo. 2014) ..... 67

*Linndale v. State*, 19 N.E.3d 935 (Ohio Ct. App. 2014) ..... 69

*Louisiana Energy and Power Authority v. F.E.R.C., 141 F.3d* 364 (D.C. Cir. 1998) ..... 57

*LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846 (Iowa 2015) ..... 86

*LSP Transmission Holdings, LLC v. Federal Energy Regulatory Commission*, 700 F. App'x 1 (D.C. Cir. 2017) ..... 59

*LSP Transmission Holdings, LLC v. Lange*, No. 17-cv-04490 DWF/HB (D. Minn. Apr. 13, 2018) ..... 64

*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ..... 42, 47, 57

*Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990) ..... 43

*Madden v. City of Eldridge*, 661 N.W.2d 134 (Iowa 2003)..... 61

*Maguire v. Fulton*, 179 N.W.2d 508 (Iowa 1970)..... 65

*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002) ..... 61

*Midwest ISO Transmission Owners v. F.E.R.C.*, 373 F.3d 1361 (D.C. Cir. 2004) ..... 24

*Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012)..... 90

*MISO Transmission Owners v. F.E.R.C.*, 819 F.3d 329 (7th Cir. 2016)..... 26, 27, 28, 55

*Monson v. Drug Enforcement Administration*, 589 F.3d 952 (8th Cir. 2009)..... 47

*New York v. FERC*, 535 U.S. 1 (2002)..... 24

*Northeastern Florida Chapter of Associated General Contractors of America v. Jacksonville*, 508 U.S. 665 (1995) ..... 48, 49, 50

*Oklahoma Gas and Electric Co. v. Federal Energy Regulatory Commission*, 827 F.3d 75 (D.C. Cir. 2016)..... 33, 56

*Patrice v. Murphy*, 966 P.2d 1271 (Wash. 1998)..... 69

*People v. Olender*, 854 N.E.2d 593 (Ill. 2005) ..... 81

*People v. Reedy*, 708 N.E.2d 1114 (Ill. 1999) ..... 81

*Plain Local School District Board of Education*, 2020 WL 5521310 (S.D. Ohio Sept. 11, 2020)

*Planned Parenthood of the Heartland v. Branstad*, No. 17-0708, Order (May 9, 2017) ..... 62, 70, 73

*Porten Sullivan Corp. v. State*, 568 A.2d 1111 (Md. 1990)..... 71

*Racing Association of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004)..... 67, 85, 86, 89

*Rants v. Vilsack*, 684 N.W.2d 193 (Iowa 2004)..... 78

*Rees v. City of Shenandoah*, 682 N.W.2d 77 (Iowa 2004)..... 43

*Residential and Agricultural Advisory Commission, LLC v. Dyersville City Council*, 888 N.W.2d 24 (Iowa 2016) ..... 86

*Rush v. Ray*, 332 N.W.2d 325 (Iowa 1983) ..... 65

*Rush v. Reynolds*, 2020 WL 825953 (Iowa Ct. App. Feb. 19, 2020) ..... 62, 73

*Sherley v. Sebelius*, 610 F.3d 69 (D.C. Cir. 2010) ..... 54

*Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999) ..... 71

*Sloan v. Wilkins*, 608 S.E.2d 579 (S.C. 2005) ..... 67

*South Carolina Public Service Authority v. F.E.R.C.*, 762 F.3d 41 (D.C. Cir. 2014) ..... 25, 27

*St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. 1998) ..... 84

*State v. Acevedo*, 899 P.2d 31 (Wash. Ct. App. 1995) ..... 71

*State v. Hernandez-Lopez*, 639 N.W.2d 226 (Iowa 2002) ..... 63, 72

*State v. Iowa District Court*, 410 N.W.2d 684 (Iowa 1987) ..... 82

*State v. Kolbet*, 638 N.W.2d 653 (Iowa 2001) ..... 60, 72

*State v. Mabry*, 460 N.W.2d 472 (Iowa 1990) ..... 77, 78, 79, 81

*State ex rel. Miller v. Grodzinsky*, 571 N.W.2d 1 (Iowa 1997) ..... 44

*State v. Nickelson*, 169 N.W. 832 (Iowa 1969) ..... 85

*State v. Osborne*, 154 N.W. 294 (Iowa 1915) ..... 88

*State v. Santee*, 82 N.W. 445 (Iowa 1900) ..... 89

*State v. Taylor*, 557 N.W.2d 523 (Iowa 1996) ..... 59, 82

*State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 715 N.E.2d 1062 (Ohio 1999) ..... 81, 84

*Stoner McCray Systems v. City of Des Moines*, 78 N.W.2d 843 (Iowa 1956) ..... 90

*Texas Cable & Telecommunications Association v. Hudson*, 265 F. App'x 210 (5th Cir. 2008) ..... 54, 56, 60

*Tigges v. City of Ames*, 356 N.W.2d 503 (Iowa 1984) ..... 45

*Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th Cir. 2012) ..... 60, 61

*U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009)..... 43

*Utilicorp United Inc. v. Iowa Utilities Board*, 570 N.W.2d 451 (Iowa 1997)..... 72

*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)..... 66, 87

*Welton v. Iowa State Highway Commission*, 227 N.W. 332 (Iowa 1929) ..... 75

*Western International v. Kirkpatrick*, 396 N.W.2d 359 (Iowa 1996) ..... 66, 73, 80, 83, 84

*In re Trust of Willcockson*, 368 N.W.2d 198 (Iowa 1985) ..... 45

STATUTES AND OTHER AUTHORITIES

18 C.F.R. § 35.34 ..... 26

18 C.F.R. § 39.2 ..... 88

16 U.S.C. § 824(a) ..... 25, 65

Edward M. Mansfield & Conner L. Wasson, Exploring the Original Meaning of Article I, Section 6, 66 Drake L. Rev. 147, 155 (2018) ..... 86

H-8340, 87th G.A., Reg. Sess. (Iowa 2018) ..... 36

H. Journal, 88th G.A., Reg. Sess. 769 (June 14, 2020) ..... 39

H.S.B. 540, 88th G.A., Reg. Sess. (as introduced in subcommittee Jan. 22, 2020) ..... 37

Iowa Administrative Code rule 199-11.9 ..... 88

Iowa Administrative Code rule 199-25 ..... 88

Iowa Code § 3.4 ..... 79

Iowa Code Chapter 478..... 87

Iowa Code § 478.16(1)(c) ..... 32

Iowa Code § 478.16(2) ..... 38

Iowa Code § 478.19 ..... 88
Iowa Constitution Article I, Section 6..... 39, 65
Iowa Constitution Article III, Section 29.....*passim*
Iowa Constitution Article X, Section 1..... 74
Iowa Rule of Civil Procedure 1.1502 ..... 76
Iowa Rule of Civil Procedure 1.1503(2)..... 91
Iowa Rule of Appellate Procedure 6.1001 ..... 75
John Dimanno, Beyond Taxpayers' Suits: Public Interest Standing and the States, 41 Conn. L. Rev. 639, 664 (2008) ..... 74
Regional Transmission Organizations, Order No. 2000, 65 FR 809 (January 6, 2000)..... 25
S. Journal, 88th G.A., Reg. Sess. 840 (June 14, 2020) ..... 35
S. Journal, 88th G.A., Reg. Sess. 842 (June 14, 2020) ..... 38
S-5163, 88th G.A., Reg. Sess., at 1 (Iowa 2020)..... 35, 38, 72
S.F. 2311, 87th G.A., Reg. Sess. (as passed by Senate, Mar. 6, 2018)..... 36
Statement of Interest on Behalf of the United States of America at 1-3 ..... 64
The Honorable Joseph Coleman, Office of the Attorney Gen. Op. No. 75-6-7 (Iowa June 18, 1975)..... 80
The Honorable Robert D. Ray, Office of the Attorney Gen. Op. No. 75-7-11 (July 8, 1975)..... 80
Thomas A. Mayes & Anuradha Vaitheswaran, Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice, 55 Drake L. Rev. 39 (2006) ..... 62
Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, Order No. 1000, 136 F.E.R.C. ¶ 61,051, 76 Fed. Reg. 49,842 (2011) ..... 27, 30, 55, 87

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

### I. THE DISTRICT COURT ERRED GRANTING THE MOTION TO DISMISS BECAUSE LSP POSSESSES STANDING.

Cases

*Hawkeye Foodservice Distributing, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600 (Iowa 2012)

#### A. Liberal Motion to Dismiss Standards Counsel LSP Has Standing.

Cases

*Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600 (Iowa 2012)

*U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009))

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*Iowa Citizens for Community Improvement v. State*, 962 N.W.2d 780 (Iowa 2021)

*State ex rel. Miller v. Grodzinsky*, 571 N.W.2d 1 (Iowa 1997)

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*Bronner v. Exchange State Bank*, 455 N.W.2d 289 (Iowa Ct. App. 1990)

*Tigges v. City of Ames*, 356 N.W.2d 503 (Iowa 1984)

### B. The District Court's Conclusion LSP Lacked Standing Was Erroneous.

Cases

*Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013)

*Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600 (Iowa 2012)

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*Iowa Bankers Association v. Iowa Credit Union Department*, 335 N.W.2d 439 (Iowa 1983)

*Hawkeye Bancorp v. Iowa College Aid Commission*, 360 N.W.2d 798 (Iowa 1985)

*Monson v. Drug Enforcement Administration*, 589 F.3d 952 (8th Cir. 2009)

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#### 1. The ROFR Deprives LSP of the Opportunity to Compete.

Cases

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*Northeastern Florida Chapter of Associated General Contractors of America v. Jacksonville*, 508 U.S. 665 (1995)

*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)

*Carney v. Adams*, 141 S. Ct. 493 (2020)

*Coral Construction, Inc. v. City and County of San Francisco*, 10 Cal. Rptr. 3d 65 (Cal. App. 1st Dist. 2004)

*Bras v. California Public Utilities Communication*, 59 F.3d 869 (9th Cir. 1995)

### 2. The ROFR Injures LSP's Economic Competitive Interests.

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### 3. LSP Need Not Wait Until It Is Too Late.

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*Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514 (5th Cir. 2014)

*Iowa Bankers Association v. Iowa Credit Union Department*, 335 N.W.2d 439 (Iowa 1983)

## II. THE DISTRICT COURT ERRED IN FAILING TO FIND ARTICLE III, SECTION 29 VIOLATIONS ARE ISSUES OF GREAT PUBLIC IMPORTANCE.

Cases

*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)

*Madden v. City of Eldridge*, 661 N.W.2d 134 (Iowa 2003)

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*State v. Hernandez-Lopez*, 639 N.W.2d 226 (Iowa 2002)

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Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39 (2006)

### A. LSP's Claims Are Important and Require Judicial Intervention.

Cases

*Emera Maine v. Federal Energy Regulatory Commission*, 854 F.3d 552 (D.C. Cir. 2017)

*Maguire v. Fulton*, 179 N.W.2d 508 (Iowa 1970)

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*Sloan v. Wilkins*, 608 S.E.2d 579 (S.C. 2005)

*American Petroleum Institution v. South Carolina Department of Revenue*, 677 S.E.2d 16 (S.C. 2009)

*Harbor v. Deukmejian*, 742 P.2d 1290 (Cal. 1987)

*Patrice v. Murphy*, 966 P.2d 1271 (Wash. 1998)

*Linndale v. State*, 19 N.E.3d 935 (Ohio Ct. App. 2014)

*Commonwealth v. Neiman*, 84 A.3d 603 (Pa. 2013)

*Plain Local School District Board of Education*, 2020 WL 5521310 (S.D. Ohio Sept. 11, 2020)

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*Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, Order No. 1000, 136 F.E.R.C. ¶ 61,051, 76 Fed. Reg. 49,842 (2011)

Iowa Constitution, art. III, § 29

Iowa Constitution, art. I, § 6

### B. LSP is the Appropriate Party.

Cases

*Gregory v. Shurtleff*, 299 P.3d 1098 (Utah 2013)

*State v. Kolbet,* 638 N.W.2d 653, 661 (Iowa 2001)

*State v. Hernandez-Lopez*, 639 N.W.2d 226 (Iowa 2002)

*Utilicorp United Inc. v. Iowa Utilities Board*, 570 N.W.2d 451 (Iowa 1997)

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*Western International v. Kirkpatrick*, 396 N.W.2d 359 (Iowa 1996)

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## III. AN INJUNCTION SHOULD ISSUE.

Cases

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*Planned Parenthood of the Heartland v. Branstad*, No. 17-0708, *Order* (May 9, 2017)

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Statutes and Other Authorities

Iowa Rule of Appellate Procedure 6.1001

### A. Injunction Standards.

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*Community State Bank, National Association v. Community State Bank*, 758 N.W.2d 520 (Iowa 2008)

Statutes and Other Authorities

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### B. The ROFR Violates the Iowa Constitution.

Cases

*State v. Mabry*, 460 N.W.2d 472 (Iowa 1990)

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### 1. H.F. 2643 Has No Single Subject.

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*Giles v. State*, 511 N.W.2d 622 (Iowa 1994)

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*Rants v. Vilsack*, 684 N.W.2d 193 (Iowa 2004)

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*State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999)

*Johnson v. Walters*, 918 P.2d 694 (Okla. 1991)

*Harbor v. Deukmejian*, 742 P.2d 1290 (Cal. 1987)

*State v. Taylor*, 557 N.W.2d 523 (Iowa 1996)

Statutes and Other Authorities

Iowa Code § 3.4

The Honorable Joseph Coleman, Office of the Attorney Gen. Op. No. 75-6-7 (Iowa June 18, 1975)

The Honorable Robert D. Ray, Office of the Attorney Gen. Op. No. 75-7-11 (July 8, 1975)

### 2. H.F. 2643's Title Provides No Fair Notice of its Anti-Competitive ROFR.

Cases

*State v. Iowa District Court*, 410 N.W.2d 684 (Iowa 1987)

*Western International v. Kirkpatrick*, 396 N.W.2d 359 (Iowa 1996)

*Carmack v. Director, Missouri Department of Agriculture*, 945 S.W.2d 956 (Mo. 1997)

*State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999)

*St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. 1998)

*State v. Nickelson*, 169 N.W. 832 (Iowa 1969)

### 3. Iowa Code Section 478.16 Violates the Privileges and Immunities and Equal Protection Clauses.

Cases

*Racing Association of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004)

*Residential and Agricultural Advisory Commission, LLC v. Dyersville City Council,* 888 N.W.2d 24 (Iowa 2016)

*LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846 (Iowa 2015)

*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)

*State v. Osborne,* 154 N.W. 294 (Iowa 1915)

*State v. Santee*, 82 N.W. 445 (Iowa 1900)

Statutes and Other Authorities

Edward M. Mansfield & Conner L. Wasson, *Exploring the Original Meaning of Article I, Section 6*, 66 Drake L. Rev. 147, 155 (2018)

Iowa Code ch. 478

*Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, Order No. 1000, 136 F.E.R.C. ¶ 61,051, 76 Fed. Reg. 49,842 (2011)

18 C.F.R. § 39.2

Iowa Code § 478.19

Iowa Administrative Code rule 199-11.9

Iowa Administrative Code rule 199-25

### C. Irreparable Harm Results if Injunction is Not Granted.

Cases

*Free the Nipple-Ft. Collins v. City of Ft. Collins*, 916 F.3d 792 (10th Cir. 2019)

*Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012)

*Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011)

*American Civil Liberties Union of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003)

*Stoner McCray Systems v. City of Des Moines*, 78 N.W.2d 843 (Iowa 1956)

*League of Women Voters of United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016)

Statutes and Other Authorities

Iowa Rule of Civil Procedure 1.1502(2)

## ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court pursuant to Iowa Rule of Appellate Procedure 6.1101(2) because it presents substantial constitutional questions regarding the validity of a statute and fundamental issues of broad public importance requiring determination by the Supreme Court.

## STATEMENT OF THE CASE

In the dead of night on June 14, 2020, Iowa's legislature passed anticompetitive legislation overhauling Iowa's electric transmission framework. Whereas previously, Iowans could benefit from innovation and cost-savings associated with competitive processes for electric transmission projects, under Iowa Code section 478.16, only an "incumbent electric transmission owner" has the right to construct, own and maintain an electric transmission line approved by a federally registered planning authority and connected to the incumbent's facility. An incumbent transmission owner is an entity "who, as of July 1, 2020, own[ed] and maintain[ed] an electric transmission line" in Iowa. *Id.* § (1)(b).

Appellants LS Power Midcontinent, LLC, and Southwest Transmission, LLC (collectively "LSP"), are non-incumbent entities

who invested time and resources to be eligible to compete for projects approved by federally registered planning authorities. (Pet., ¶¶ 33). LSP intended to compete for upcoming projects in Iowa until its sudden exclusion by section 478.16's right of first refusal ("ROFR"). (Pet., ¶¶ 27, 33-34); *see also* (Resistance to Mot. to Dismiss [hereinafter "MTD"], Ex. 6, ¶¶ 2-5). LSP brought suit challenging the ROFR, seeking declaration its late-night enactment violated the Iowa Constitution's single-subject and title clauses (Article III, Section 29) and arguing it was facially invalid under the privileges and immunities clause (Article I, Section 6). It also sought injunction to prohibit the ROFR's enforcement. (Pet., ¶¶ 54-58).

The district court dismissed LSP's claims. Despite finding LSP had a "particular interest" in the legislation by being "non-incumbent energy companies that will be injured due to the ROFR requirements," the district court concluded because LSP did not allege a "specific project is planned, when such a project may arise, or that the Plaintiffs have been denied such a project," LSP's injuries were "speculative," and it did not have standing. (Order on

MTD, at 3-4). The district court's order required injury to be complete, rather than likely. It also failed to consider relevant evidence, controlling Iowa caselaw and the exception to standing. The district court also erred in denying injunctive relief. This appeal followed.

## STATEMENT OF THE FACTS

### I. APPELLANTS, ELECTRIC TRANSMISSION AND COMPETITION ON THE GRID.

To understand the staggering effect Iowa's ROFR has on LSP, one must understand who Appellants are and the field in which they operate. The electricity market is composed of three main steps: generation (making power), transmission (carrying power) and distribution (dispersing power either wholesale or to retail consumers). In the "bad old days" (as characterized by one court), "utilities were vertically integrated monopolies," and all three services "were generally provided by, and under the control of, a single regulated utility" for a particular geographic area at a single, bundled price. *Midwest ISO Transmission Owners v. F.E.R.C.*, 373 F.3d 1361, 1364-64 (D.C. Cir. 2004). Competition was "not prevalent." *N.Y. v. FERC*, 535 U.S. 1, 5 (2002).

Today, however, this is not the case. While some entities continue to provide all three services, the business of building and owning transmission lines (large, high-voltage lines responsible for carrying power) is now separate from the business of generating electricity or distributing electricity to customers. Companies can, and do, provide one without the others.

Additionally, competition in electric transmission markets not only exists, but is encouraged. In 1935, Congress enacted the Federal Power Act, which gave the Federal Energy Regulatory Commission (FERC) power to regulate electrical transmission in interstate commerce. 16 U.S.C. § 824(a). FERC was directed to "divide the country into regional districts for voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy" and assigned the "duty" to "promote and encourage such interconnection and coordination." *S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 49 (D.C. Cir. 2014) (quoting 16 U.S.C § 824(a)).

As part of that effort, in 1999, FERC issued Order No. 2000, which encouraged formation of regional transmission organizations

("RTOs") with the "goal [] to promote efficiency in wholesale electricity markets and to ensure that electricity consumers pay the lowest possible price for reliable service." Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000); *see also* 18 C.F.R. § 35.34. RTOs are independent, non-governmental, entities tasked with, among other functions, coordinating and planning transmission grid expansion within their regional footprints. (Resistance to MTD, Ex. 1, ¶ 3, 5-7); *Transmission Owners v. F.E.R.C.*, 819 F.3d 329, 331-32 (7th Cir. 2016). Transmission owners joining an RTO cede operational control and planning to the RTO. (Resistance to MTD, Ex. 1, ¶¶ 3-4).

Today, two RTOs, the Midcontinent Independent System Operator ("MISO") and Southwest Power Pool ("SPP") oversee electric transmission development in the Midwest. (Resistance to MTD, Ex. 1, ¶ 4). While states retain authority over siting, routing and permitting transmission within this region, it is MISO or SPP, not the state, that decides whether to order regionally-beneficial transmission projects. (Pet., ¶ 21).

Prior to 2011, MISO and SPP tariffs contained a ROFR for newly approved electric transmission projects. This meant, "if MISO decided that another transmission facility was needed ... the MISO member that served the local area in which the facility would be built had the first crack at building it." *Midwest ISO Transmission Owners*, 819 F.3d at 332. This was true even if a third-party innovator, such as a non-incumbent competing provider, identified and proposed the solution. *S.C. Pub. Serv. Auth.*, 762 F.3d at 72.

In 2011, however, FERC issued Order No. 1000. Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49,842, 49,885 (2011) [hereinafter "Order No. 1000"]. Order No. 1000, among other reforms, instructed ROFRs be removed from tariffs for certain[1] RTO-approved projects subject to cost-sharing on a

[1] Two types of projects qualify for MISO competitive bidding: (1) Multi Value Projects, which are large projects with a regional focus; and (2) Market Efficiency Projects, which reduce market congestion. (Resistance to MTD, Ex. 3, at 55-63); *Midwest ISO Transmission Owners*, 819 F.3d at 335. Each are subject to regional cost allocation, meaning operating costs can be distributed across the entire footprint. (Resistance to MTD, Ex. 6, ¶ 5).

regional basis. *Id.* Failure to do so, FERC found, "would leave in place practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs" and deprive customers of benefits and savings competition produces.

> FERC was convinced that competition among firms for the right to build transmission facilities would result in lower rates to consumers of electricity. There would be a low bidder, and the lower his bid and therefore (in all likelihood) the cost of the facility he built, the lower would be the rates charged consumers of the electricity transmitted by the facility. In contrast, when the local firm has a right of first refusal, an outsider will have little incentive to explore the need for a new transmission facility because the local firm would be likely to say to the outsider (*sotto voce*) "thank you very much for identifying, at no cost to me, a lucrative opportunity for me to exploit," and thus the outsider would be unable to recoup the cost of his research into the need for the new facility.

*Midwest ISO Transmission Owners*, 819 F.3d at 332-33.

Since 2011, MISO and SPP each revised their tariffs to remove federal ROFRs, developing rigorous competitive processes to allow entities to propose, compete and be selected to construct approved transmission projects. (Resistance to MTD, Ex. 1, ¶ 9).

To be eligible for competitive processes, each RTO requires an entity be "qualified." (Resistance to MTD, Ex. 1, ¶ 10).

As MISO and SPP tariffs detail, the qualification process is anything but pro forma. (Resistance to MTD, Ex. 2 at 154; Ex. 3 at 113-37; Ex. 4 at 2-7; Ex. 5 at 14-20, 21-29). Entities must compile and submit considerable documentation, including satisfying certain financial criteria; detailed descriptions of capability; experience in transmission project development, safety, operations and maintenance; and demonstrated ability to comply with industry and North American Electric Reliability Corporation (NERC) reliability standards. (Resistance to MTD, Ex. 3, at 121-36; Ex. 4, at 7). They also must pay an initial application and renewal fee, which in MISO is up to $20,000. (Resistance to MTD, Ex. 5, at 15). Following approval, each qualified entity must meet certain periodic reporting requirements, including certifying it continues to meet application criteria. (Resistance to MTD, Ex. 3 at 117; Ex. 4, at 9).

In short, only qualified, competent and financially sound entities are certified through MISO and SPP to participate in

selection for eligible transmission projects. Selection processes are also quite extensive. Qualified entities must demonstrate necessary financing, engineering design and technical requirements, construction timeline, operations information, safety information and necessary financial strength to complete a project. (Resistance to MTD, Ex. 3, at 150-66; Ex. 4, at 14-21).

Appellant LS Power Midcontinent invested the time and resources to become a Qualified Transmission Developer in MISO; Appellant Southwestern Transmission invested to become a Qualified RFP Participant in SPP. (Pet., ¶¶ 33-34; Resistance to MTD, Ex. 6, ¶¶ 2-3). Together, Appellants make up part of LS Power Group, an entity actively developing, constructing and managing wholesale electric transmission projects, with more than 42,000 megawatts of competitive power and 660 miles of electric transmission infrastructure combined. (Pet., ¶ 27).

Since Order No. 1000, LSP affiliates have competed for (and been awarded) electric transmission projects planned by RTOs. (Pet., ¶ 27; Resistance to MTD, Ex. 6, ¶ 3). Specifically, Southwest Transmission has competed for projects in SPP, and LSP affiliates

have been selected as successful bidder and designated alternative selected developers on projects in MISO and three other RTOs. (Resistance to MTD, Ex. 6, ¶ 3). LSP's competitive success is largely due to innovative, cost-saving mechanisms, such as binding cost caps and limiting rates of return. (Resistance to MTD, Ex. 6, ¶ 3).

## II. LSP LOST ITS OPPORTUNITY TO COMPETE RIGHT AS THE RUBBER MET THE ROAD.

LSP's right to continue to compete on these electric transmission projects in Iowa effectively vanished on June 14, 2020, when Iowa's legislature passed Iowa Code section 478.16, a state-level ROFR providing "[a]n incumbent electric transmission owner" has the "right to construct, own, and maintain an electric transmission line" approved for construction in a federally-registered planning authority and connected to its facility. *Id.* § (2). An "incumbent electric transmission owner" is defined as "any of the following":

> (1) A public utility or a municipally owned utility that owns, operates, and maintains an electric transmission line in this state.
>
> (2) An electric cooperative corporation or association or municipally owned utility that owns an electric transmission facility in this state and has turned over the functional control of such facility to a federally approved authority.

> (3) An "electric transmission owner," or an "an individual or entity who, as of July 1, 2020, owns and maintains an electric transmission line that is required for rate-regulated electric utilities, municipal electric utilities, and rural electric cooperatives in this state to provide electric service to the public for compensation."

*Id.* § (1)(c). Within 90 days of the approval for construction of the line, the incumbent electric transmission owner must give written notice whether it intends to construct the line, and only if the incumbent declines is another entity eligible for the project. *Id.* § (3). If the incumbent elects to construct the line, it provides a cost estimate to the Iowa Utilities Board ("IUB")—not subject to any reasonableness, timeline or efficiency standards. *Id.* § (4). There is no bidding.

When a ROFR exists under state law, MISO and SPP defer to state procedures and must automatically assign any eligible project to the incumbent electing to exercise its state-granted right. (Resistance to MTD, Ex. 1, ¶ 21); (Mot. for Temporary Inj. [hereinafter "MTI"], Ex. 15 at 30; Ex. 12, at 163; Ex. 13, at 101).

LSP is not an "incumbent transmission owner" under section 478.16. (Pet., ¶ 13). As of July 1, 2020, LSP did not own, operate or maintain electric transmission in Iowa. Because new

transmission projects often connect transmission facilities already in place, and "in practice, the incumbent utilities [are] likely to exercise" their ROFR, LSP is all but foreclosed from eligible projects in Iowa. (Resistance to MTD, Ex. 1, ¶ 24); *Okla. Gas & Elec. Co. v. Fed. Energy Regul. Comm'n*, 827 F.3d 75, 76 (D.C. Cir. 2016). Thus, after LSP invested substantial time and resources to be qualified to compete in MISO and SPP, now there is no selection criteria, no bidding process and no competition in Iowa.

Iowa projects are imminent. MISO's Long Range Transmission Planning (LRTP) Outlook in October 2020 made clear "significant transmission investment needs will exist in Iowa." (MTI, Ex. 20). Specifically, it discussed a potential $252 million project between south of Sioux City and Council Bluffs, designed to address transmission constraints. (MTI, Ex. 20). Additionally, MISO's LRTP map indicates near-term testing of routing solutions, identifies anticipated build-out (in Iowa) and suggests initial project recommendations are impending. (MTI, Ex. 26). Indeed, this Court may take judicial notice that MISO recently estimated it will submit the first batch of recommended projects in Future 1

(including anticipated projects in Iowa) in March 2022.[2] *See* Iowa R. Civ. P. 5.201(b)(2). Studies are also underway to identify more transmission needs at the "seam" between MISO and SPP, which runs straight through the state. (MTI, Ex. 22; Ex. 24; Mot. for Recons., Enlargement or Modification [hereinafter "MTR"], at Ex. A). Iowa's Governor announced a need for electric transmission in 2021, and studies from RTOs and industry leaders predict Iowa in the center of expected transmission builds, regardless of the scenario. (MTI, Ex. 22; Ex. 25). Transmission is coming, but by operation of the ROFR, LSP immediately became a permanent spectator in Iowa's electricity boom.

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[2] *See* Reliability Imperative: Long Range Transmission Planning, MISO (Sept. 15, 2021), https://cdn.misoenergy.org/20210915%20System%20Planning%20Committee%20of%20the%20BOD%20Item%2005%20Reliability%20Imperative%20LRTP588026.pdf (listing alignment of March 2022 with recommendations); Future 1 Reliability Analysis Updates, MISO (Sept. 24, 2021), https://cdn.misoenergy.org/20210924%20LRTP%20Item%2003%20Reliability%20Results%20Analysis591890.pdf.

## III. THE DARK-OF-NIGHT AMENDMENT ADDING THE ROFR TO AN OMNIBUS APPROPRIATIONS BILL.

Perhaps worse than the ROFR's timing is the way it passed. In the dark of night on June 14, 2020, the legislative session's final day, S-5163, an omnibus amendment to H.F. 2643, the fiscal appropriations bill, was introduced at 1:35 a.m. (Pet., ¶ 17); S. Journal, 88th G.A., Reg. Sess. 840 (June 14, 2020); *see also* (MTI, Ex. 2, at 2). It proposed, in no less than fifty pages, to "strike everything after the enacting clause" of H.F. 2643 and replace it with all new language. S-5163, 88th G.A., Reg. Sess., at 1 (Iowa 2020). While many of S-5163's provisions related to appropriations, it also contained a medley of substantive policy initiatives with no appropriation attached, including the ROFR (Division XXXIII).

Senators expressed surprise and confusion regarding S-5163's introduction. One senator lamented, "It would have been nice to have had this amendment during the – during the daytime and had more opportunity to actually understand what we are voting on, but we are not going to get that opportunity...." (MTI, Ex. 2, at 6-7). Another echoed, "Wow, this is not what I would call transparency,

2:30 in the morning, .... Well, I'm not [used to doing all-nighters], and I don't think most of Iowans are." (MTI, Ex. 2, at 10).

On the ROFR specifically, senators were more pointed. Senator Bisignano stated, "I've never heard of anything like this in any moving legislation that was drafted and in committee, and do you have a bill history on the bill this would have addressed?" (MTI, Ex. 2, at 23-24). Another similarly commented, "I don't think many of at least my colleagues on this side of the aisle saw [the ROFR] coming," and asked,

> Was there a – And maybe I missed this. Was there a bill with a subcommittee process? Because it feels like we're – we're –we're kind of technical in our discussion here, and I – I want to make sure that members of the public and – and – and interested players in this system were able to get a question and answer like this and have a discussion so that we all understood the risks and advantages of doing something like this as a public policy change.

(MTI, Ex. 2, at 21).

Senators had good reason for surprise. Two years prior, in a different legislative session, S.F. 2311, titled "An Act modifying various provisions relating to public utilities," contained a section similar to the ROFR. S.F. 2311, 87th G.A., Reg. Sess. (as passed by

Senate, Mar. 6, 2018). Although able to pass through the Senate, when S.F. 2311 was sent to the House, the ROFR was removed. See H-8340, 87th G.A., Reg. Sess. (Iowa 2018). At that point, legislators considered the ROFR "basically dead." (MTI, Ex. 2, at 27).

In January 2020, another attempt was made. H.S.B. 540, a study bill containing an ROFR, was assigned to subcommittee. H.S.B. 540, 88th G.A., Reg. Sess. (as introduced in subcommittee Jan. 22, 2020). The title of H.S.B. 540 accurately read, "An Act relating to the construction, ownership, and maintenance of electric transmission lines." *Id.* at 2. This, too, was unsuccessful. The bill never advanced out of subcommittee; a meeting on the measure was never held. In short, the ROFR *twice* failed on its own merit and never made it to the floor during the legislative session.

Unfortunately, legislators' confusion was not rectified during floor debate. Responding to questions regarding the ROFR's history and effect, Senator Breitbach, the amendment's sponsor, claimed (inaccurately) the ROFR "went through the full committee process, passed out of the House, came over to the Senate and then we did not move it." (MTI, Ex. 2, at 28); *see also* (MTI, Ex. 2, at 29-

30) ("I'm not sure if it was voted on the floor, but it went through the committee process, ... I believe it made it all the way through the floor."). He also misrepresented the measure's effect, stating:

> Okay. You know, there are several different ways you can – you can do extension of utilities. One of the ways that has been used is if you own the line running to Area X and now you're going to go to Y, you're the company that gets to do it, period. Nobody else gets to bid on it. You have – You have priority. Another way to do it is to just put it out for open bids, take the low bid, and that's it.
> ...
> With this situation, it's a first right of refusal. So if I own the line going to Point X, and they're bidding out to Y, it's open for bids. If I happen to be the low bid, I get it. If somebody else happens to be the low bid and I have a first right of refusal, then I can say I will do it for that price, and I'll extend it out.

(MTI, Ex. 2, at 18-19). This is not what the ROFR does. The ROFR does not allow a price-matching mechanism as claimed, nor does it entail any initial bidding process; rather, under the ROFR, the incumbent is the company, "that gets to do it, period." *Id.*; *see* Iowa Code § 478.16(2). Nor could Senator Breitbach say what interest drafted the bill's language (MTI, Ex. 2, at 28) or how often the ROFR would apply, except to generally state it happens "quite often." (MTI, Ex. 2, at 20).

Nonetheless, with these statements uncorrected on the record, the amendment was moved. (MTI, Ex. 2, at 32-34). Amendment S-5163 containing the ROFR passed on a voice vote at 5:44 a.m. S. Journal, 88th G.A., Reg. Sess. 842 (June 14, 2020). H.F. 2643, as amended, passed four minutes later. *Id.* at 842-43. At 1:08 p.m., H.F. 2643 came before the House and passed. H. Journal, 88th G.A., Reg. Sess. 769 (June 14, 2020). In short, the ROFR, after being twice rejected, was reintroduced, discussed and passed between 1:30 a.m. and 1:08 p.m.—less than 12 hours. Only by shoving the anticompetitive ROFR into a late-night, everything-but-the-kitchen-sink amendment to a needed appropriations bill with no opportunity for public input and misstatements on the floor about its history and effect, did the measure pass. (Pet., ¶ 20). The Governor signed the bill and the ROFR was codified.

## IV. THE DISTRICT COURT ERRONEOUSLY GRANTS DISMISSAL.

On October 14, 2020, LSP sued, seeking declaration of the ROFR's illegality. LSP alleged three constitutional violations: (1) H.F. 2643, containing the ROFR, violated the single-subject clause (Iowa Const. art. III, § 29) by encompassing dissimilar and

discordant subjects with no relation to one another; (2) H.F. 2643 violated the title clause (Iowa Const. art. III, § 29) by failing to give fair notice of the ROFR; and (3) the ROFR violated the privileges and immunities clause (Iowa Const. art. I, § 6) by classifying incumbents and non-incumbents differently, without a plausible policy reason for doing so.

LSP, in its Petition, detailed the harm it suffers from the ROFR, including the danger upcoming projects would be assigned. Specifically, LSP alleged:

> 31. It is estimated that the MISO and SPP footprint may require more than $30 billion in grid expansion over the next 10 years, some of which will be in the State of Iowa and some of which would have been eligible for competitive processes in Iowa but for Division XXXIII.
>
> 32. MISO and SPP studies, encouraged by the Midwestern Governors Association in September 2020 to act with a sense of urgency, are also underway to plan for more transmission between the boundaries of SPP and MISO, including in Iowa.
>
> ...
>
> 34. LS Power Midcontinent LLC and Southwest Transmission, LLC, are now prevented from being assigned a competitive project in Iowa and prevented from participating in an Iowa transmission competitive process in MISO and SPP as a result of Division XXXIII.

> 35. LS Power Midcontinent, LLC, and Southwest Transmission, LLC, face actual, imminent injury as a result of Division XXXIII in H.F. 2643.

(Pet., ¶¶ 31-32, 34-35). On November 13, 2020, LSP sought an injunction to prohibit the ROFR's enforcement, operation and rulemaking during the litigation's pendency. (MTI Brief).

On November 16, 2020, Defendants State of Iowa, Iowa Utilities Board, Geri Huser, Glen Dickinson and Leslie Hickey (hereinafter collectively "State Defendants") moved to dismiss LSP's claims. Intervenors MidAmerican Energy Company and ITC Midwest LLC, while also answering, joined the State's Motion. State Defendants and Intervenors asserted LSP lacked standing because it could not establish "actual injury." Despite numerous sources confirming likely transmission in Iowa in the near-term and despite LSP's exclusion from the opportunity to compete for any such projects, State Defendants and Intervenors argued that, because no specific Iowa project was scheduled, injury was "hypothetical" and not imminent—as if competitors lobbied for the ROFR for no reason.

LSP resisted State Defendants' Motion, stressing project approval in Iowa was not a matter of "if," but "when." (Resistance to MTD, at 4). LSP highlighted *it* was the ROFR's exact target and denial of opportunity to compete and harm to competitive interests is actual, non-speculative injury, even absent a particular project. (*Id.* at 10).

On March 25, 2021, the court disagreed, dismissed LSP's claims based on standing and denied its temporary injunction request. (Order on MTD, at 3-4). LSP moved to enlarge and reconsider the district court's order, noting the court did not rule on the public importance exception and failed to consider specific evidence in the record of upcoming projects. (Br. in Supp. of MTR, at 6-12). The district court summarily denied the motion. (Order on MTR, at 1).

On May 20, 2021, LSP timely appealed the district court's orders.

## ARGUMENT

### I. THE DISTRICT COURT ERRED GRANTING THE MOTION TO DISMISS BECAUSE LSP POSSESSES STANDING.

**Rule 6.903(2)(g) Statement.** LSP preserved error when it resisted the motion to dismiss. In resisting, LSP advanced grounds for standing addressed herein and urged the court to consider evidence outside the pleadings. (Resistance to MTD, at 7-8). The court declined to consider the evidence and dismissed. (Order on MTD, at 4). LSP unsuccessfully urged the court to reconsider. (Br. on MTR, at 13-14). This Court reviews motions to dismiss on standing for errors at law. *Hawkeye v. Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 608 (Iowa 2012).

#### A. Liberal Motion to Dismiss Standards Counsel LSP Has Standing.

"In considering a motion to dismiss, the court considers all well-pleaded facts to be true." *Id.* (quoting *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009)). Facts are viewed in the light most favorable to the plaintiff, and dismissal should be affirmed only if there is no right to recovery under any state of facts. *Id.* Iowa is a notice pleading state. A petition need not allege ultimate

facts to support each element of a cause of action, but simply must give fair notice of the claim. *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004). "At the pleading stage, general factual allegations of injury ... may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support them." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

The district court held LSP failed to allege a "specific project is planned, when such a project may arise, or that the Plaintiffs have been denied such a project." (Order on MTD, at 3-4). Ignoring no specific project is necessary under Iowa law (*infra*, at § I.B.), the court's order failed to take well-pleaded facts as true and consider evidence submitted in resisting the motion.

LSP pled an estimated "$30 billion in grid expansion" will occur over the next ten years, including in Iowa (Pet., ¶ 31), that projects are encouraged "with a sense of urgency," and referenced studies currently "underway to plan for more transmission" at Iowa's MISO and SPP seam. (*Id.*, ¶ 32); *see also* (MTI, Ex. 20; Ex.

25).[3] LSP pled that "as a result of Division XXXIII [the ROFR]," it is prevented from being assigned these projects and participating in MISO and SPP competitive processes. (Pet., ¶¶ 34-35). LSP adequately pled harm.

Moreover, documents outside the pleadings show imminence of Iowa projects. "A motion to dismiss based on jurisdictional grounds … may be supported by affidavits or other forms of evidence outside the petition." *State ex rel. Miller v. Grodzinsky*, 571 N.W.2d 1, 2 n.2 (Iowa 1997); *see also Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 473 (Iowa 2004). The Iowa Supreme Court recently clarified, "[s]tanding is jurisdictional." *Iowa Citizens for Cmty. Improvement*, 962 N.W.2d at 794; *see also In re Tr. of Willcockson*, 368 N.W.2d 198, 202 (Iowa 1985); *Bronner v. Exchange State Bank*, 455 N.W.2d 289, 290 (Iowa Ct. App. 1990). Thus, facts outside the pleadings are properly considered, and the court erred in disregarding them. *See Tigges v.*

[3] Because these items expressly are referenced, they are properly considered. *See Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 792 n.4 (Iowa 2021).

*City of Ames*, 356 N.W.2d 503, 512 (Iowa 1984). As detailed below, projects in Iowa *are* in planning, they *are* expected imminently, and from LSP, are denied.

### B. The District Court's Conclusion LSP Lacked Standing Was Erroneous.

Iowa follows a two-pronged standing approach: (1) a plaintiff must have a "specific personal or legal interest" in the litigation; and (2) a plaintiff must be injuriously affected. *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 452 (Iowa 2013) (quoting *Citizens for Responsible Choices*, 686 N.W.2d at 475). "To satisfy the first element, '[courts] require the litigant to allege some type of injury different from the population in general." *Hawkeye Foodservice Distrib., Inc.*, 812 N.W.2d at 606 (quoting *Godfrey v. State*, 752 N.W.2d 413, 423 (Iowa 2008)). Under the second element, a plaintiff must show injury in fact fairly traceable to the defendant's conduct likely to be remedied by a favorable decision. *Iowa Citizens for Cmty. Improvement*, 962 N.W.2d at 790. Injury in fact "cannot be 'conjectural' or 'hypothetical,' but must be 'concrete' and 'actual or imminent.'" *Id.* (quoting *Godfrey*, 52 N.W.2d at 423).

Nonetheless, "[o]nly a likelihood or possibility of injury need be shown. A party need not demonstrate injury will accrue with certainty, or has already accrued."[4] *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 444 (Iowa 1983); *see also Hawkeye Bancorp v. Iowa Coll. Aid Comm'n*, 360 N.W.2d 798, 801-02 (Iowa 1985) (finding Iowa's injury standard more liberal than federal law, stating "likelihood of injury is sufficient"). When a party is the legislative action's target, "there is little question that the action … has caused [it] injury, and that a judgment preventing or requiring the action will redress it." *Monson v. Drug Enf't Admin.*, 589 F.3d 952, 959 (8th Cir. 2009) (quoting *Lujan*, 504 U.S. at 561-62).

Although the district court correctly determined LSP suffered injury different from the population in general, the court incorrectly determined LSP suffered no injury in fact because no specific project was alleged. (Order on MTD, at 3). The district court's order

[4] Iowa has not subscribed to federal imminence standards, where injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Even then, however, a plaintiff need not demonstrate "it is literally certain that the harms they identify will come about." *Id.* at 414 n.5.

contradicts Iowa precedent. The ROFR immediately and permanently relegates LSP and other non-incumbent entities to second-class status in competing for electric transmission projects. Because lost opportunity to compete on an equal playing field and deprivation of competitive economic interests constitute concrete injuries, even without a specific project, the district court erred in dismissing LSP's claims. *Horsfield Materials*, 834 N.W.2d at 457; *Hawkeye Foodservice Distrib.*, 812 N.W.2d at 606.[5]

### 1. The ROFR Deprives LSP of the Opportunity to Compete.

Denying opportunity to compete on an equal playing field *is* injury. When "a government practice has put [the plaintiff] in a separate category from certain other suppliers," the "injury" is not the "lo[st] profits associated with a particular project," but instead erection of a barrier "that makes it more difficult for members of

[5] The context in which this case arises is noteworthy. LSP sought declaratory judgment under Iowa Rule of Civil Procedure 1.1102. "The purpose of a declaratory judgment is to determine rights in advance." *Bormann v. Cnty. Bd. of Supervisors*, 584 N.W.2d 309, 213 (Iowa 1998). "The essential difference between such an action and the usual action is that no actual wrong need have been committed or loss incurred to sustain declaratory judgment relief." *Id.*

one group to obtain a benefit than it is for members of another group." *Horsfield Materials*, 834 N.W.2d at 457 (quoting *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 667 (1995)). LSP suffered such an injury when the ROFR was awarded to incumbent providers.

In *Horsfield Materials*, the city of Dyersville included in specifications for publicly bid projects certain pre-approved material suppliers who could be used. 834 N.W.2d at 448. Entities not on the pre-approved list were forced to "obtain approval from the City and Engineer prior to bidding," or they could be substituted, but only *after* the bid was awarded. *Id.* Horsfield Materials, not on the pre-approved list, sued, alleging due process and equal protection violations by their exclusion. *Id.* at 457.

The Iowa Supreme Court reversed the district court's order holding Horsfield lacked standing. *Id.* The Court explained,

> True, Horsfield has not established that its exclusion from the City's list has caused it to lose the profits associated with a particular project. However, it has proved a negative, i.e., that its ongoing exclusion from the preapproved supplier list and the practical obstacles associated with postaward approval make it unlikely it will be able to get work on city projects—far less likely than the privileged three.

*Id.* Horsfield's evidence that it "regularly supplies numerous contractors" in surrounding cities, that it was qualified and ready to do so in Dyersville and that contracts used preapproved lists in the past showed imminent future harm. *See id.* Horsfield therefore possessed standing. *Id.*

Similarly, in *Northeastern Florida Chapter of Associated General Contractors*, 508 U.S. at 668, and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995), the United States Supreme Court found standing when a system incentivizing hiring minority-owned businesses damaged other companies' equal opportunity to compete for projects. In each, the Court held petitioners alleged concrete injury, despite lacking a specific future project, due to "inability to compete on equal footing in the bidding process." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am.*, 508 U.S. at 666; *Adarand Constructors*, 515 U.S. at 211. Harm was sufficiently immediate to warrant judicial intervention because the excluded bidders (1) regularly bid on contracts in surrounding areas, (2) were able and ready to compete for contracts in question and (3) presented evidence "sometime in the relatively near future"

another project likely would arise. *See Adarand Constructors*, 515 U.S. at 211-12; *see also Carney v. Adams*, 141 S. Ct. 493, 502-03 (2020) (competing in past, opportunities in reasonably foreseeable future and "able and ready to apply" make injury non-hypothetical).

LSP meets this standard. The ROFR places LSP and other non-incumbent entities in a separate category from other electric transmission providers; they remain on the "outside looking in" when seeking to construct, own and maintain electric transmission projects. *Horsfield Materials, Inc.*, 834 N.W.2d at 457. LSP affiliates have competed for (and been awarded) transmission projects in MISO and SPP, when not intentionally excluded by a state ROFR. (Pet., ¶ 27); (Resistance to MTD, Ex. 6, ¶ 3). Nor is LSP's readiness to participate in Iowa's electric transmission market conjectural. Petitioners are licensed in Iowa (Pet., ¶ 1) and have taken concrete steps to become qualified to compete for eligible, approved projects. (Pet., ¶¶ 28, 33); (Resistance to MTD, Ex. 6, ¶ 3). LSP undertook these processes expecting, and intending, to bid on eligible electric transmission line projects

within each RTO's territory, including Iowa. (Resistance to MTD, Ex. 6, ¶ 3).

Finally, LSP alleged (and provided evidence) that, in the relatively near future, transmission in Iowa will occur. In addition to petition allegations regarding MISO and SPP efforts for more transmission (Pet., ¶¶ 31-32), MISO's 2020 presentation to the Planning Advisory Committee stated, "significant transmission planning needs will exist in Iowa" and discussed a potential $252 million project between south of Sioux City and Council Bluffs, designed to address transmission constraints. (MTI, Ex. 20). That these large, multifaceted planning efforts take months to complete does not mean harm will not occur. As one court described,

> If this were an accurate statement of the law, then those who bid on contracts that are let frequently would have standing to challenge a bidding ordinance but those who bid on contracts that are let only sporadically or infrequently would not—even if they can prove (a) an actual injury from past bidding and (b) the intention and ability to continue bidding. But standing does not turn on the happenstance of contract frequency.

*Coral Constr., Inc. v. City & Cnty. of San Francisco*, 10 Cal. Rptr. 3d 65, 80 (Cal. App. 1st Dist. 2004); *see also Adarand Constructors*, 515 U.S. at 211-12 (concluding injury imminent when likely within

next year and a half); *Bras v. Cal. Pub. Utilities Commc'n*, 59 F.3d 869, 874 (9th Cir. 1995) (concluding ability to compete every "several years" was imminent). In short, approved transmission projects in Iowa are a matter of *when*, not *if*, and all signs point to the near future. (Resistance to MTD, Ex. 4, ¶¶ 13-20). LSP has alleged concrete, imminent injury.

**2. The ROFR Injures LSP's Economic Competitive Interests.**

Apart from being deprived of opportunity to compete on an equal playing field, Iowa recognizes "injury can be harm done to the competitive interest of a company by government action that gives an advantage to a competitor." *Hawkeye Foodservice Distrib.*, 812 N.W.2d at 606; *Iowa Bankers Ass'n*, 335 N.W.2d at 444. By giving incumbents—with whom LSP competes—a right of first refusal, the ROFR harms LSP's competitive interests and deprives it of economic advantage.

In *Hawkeye Foodservice Distribution*, a plaintiff alleged harm when government entities selected its competitor as a prime vendor, despite arguably superior bids from other qualified parties. 812 N.W.2d at 603. The Iowa Supreme Court determined plaintiff

had standing to challenge the entities' authority, stating, "by acting … to award Hawkeye's competitor a prime vendor contract, the [government entities] are allegedly taking business away from Hawkeye." *Id.* Additionally, because plaintiff "lost and continues to lose business" due to illegal actions, its interest was "sufficiently concrete to support a claim of imminent harm." *Id.* The law at issue here goes a step further by foreclosing LSP's opportunity to even make a more compelling proposal, guaranteeing the incumbent will win.

Similarly, in *Iowa Bankers Association*, plaintiff challenged an administrative agency's rules removing certain impediments from credit unions to offer share-draft services. 335 N.W.2d at 444. The court held the banks' "competitor status distinguishes its interest from that of the community as a whole," and the allegation that "some banks have lost business as a result" of allowing the share-drafts "demonstrate[d] a special, injurious effect to its competitive interest." *Id.*

These decisions align Iowa with the general consensus that a party suffers reviewable harm when illegal government action

alters competitive conditions, including by benefiting an existing competitor. *Clinton v. City of N.Y.*, 524 U.S. 417, 433 (1998); *see also Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (finding standing when "the Government takes a step that benefits his rival and therefore injures him economically."); *Canadian Lumber Trade All. v. U.S.*, 517 F.3d 1319, 1333 (Fed. Cir. 2008); *Tex. Cable & Telecomms. Ass'n v. Hudson*, 265 F. App'x 210, 217 (5th Cir. 2008). So long as harm is likely (which past competition or loss of business show), future injury in fact is "viewed as 'obvious' since government action that removes or eases only the competitive burdens on the plaintiff's *rivals* plainly disadvantages the plaintiff's competitive position in the relevant marketplace." *Adams v. Watson*, 10 F.3d 915, 922 (1st Cir. 1993).

Here, LSP directly competes with incumbent entities in MISO and SPP for RTO projects. (Resistance to MTD, Ex. 1, ¶ 25); *MISO Transmission Owners*, 819 F.3d at 333-34 (confirming incumbent and non-incumbent entities compete). LSP affiliates have a strong record of participation in RTO competitive processes, having been selected as designated or alternate provider on numerous occasions.

(Resistance to MTD, Ex. 6, ¶ 3). This competitive edge is due to innovative cost-saving mechanisms such as binding caps on all-in construction costs and limited rates of return. (Resistance to MTD, Ex. 6, ¶ 4). LSP's ability to reap the benefits of any competitive advantage, however, is now gone with respect to Iowa projects; its competitors received an ROFR.

This causes LSP concrete, economic harm. Specifically, competitive projects awarded through MISO and SPP allow designated providers to use MISO and SPP cost-allocation frameworks to recoup costs of construction from the entire benefitted region. Order No. 1000, 76 Fed. Reg. 49,842, ¶ 335; (Resistance to MTD, Ex. 6, ¶ 5). This gives projects a guaranteed rate of return for the useful life of the project—up to hundreds of millions of dollars. (Resistance to MTD, Ex. 6, ¶ 5). Because economic logic dictates LSP's competitors also wish to benefit from this rate of return, the ROFR is likely to be exercised. *Okla. Gas & Elec. Co.*, 827 F.3d at 76 (recognizing unlikelihood of rejecting projects). Indeed, in other states with ROFRs, they have been—to LSP's exclusion. *See* (Resistance to MTD, Ex. 6, ¶ 8). LSP's

substantial investment to become "qualified" under MISO and SPP tariffs will be rendered meaningless with respect to Iowa projects. *See Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 562 (1977); *Atchison, Topeka & Sante Fe Ry. Co. v. Summerfield*, 229 F.2d 777, 779 (D.C. Cir. 1955). The ROFR's advantage to LSP's competitors does not just stack the deck in their favor—it wholly excludes LSP from any economically beneficial project.

Like the opportunity to compete, the fact no Iowa ROFR has yet deprived LSP of a particular project does not prevent standing. Even when competition is latent or inchoate, competitive injury is actionable. *See Hudson*, 265 F. App'x at 217 n.2 (noting court allowed action when canal would compete with railroad, "despite the fact that the canal's construction, much less its competition with the railroad was anything but imminent"). A party is not required "to wait until increased competition actually occurs" before suing. *La. Energy & Power Auth. v. F.E.R.C.*, 141 F.3d 364, 367 (D.C. Cir. 1998). LSP has competitive standing.

### 3. LSP Need Not Wait Until It Is Too Late.

Injury in fact's purpose, as the Iowa Supreme Court affirmed, is ensuring a party has a "sufficient stake in an otherwise justiciable controversy" to obtain judicial resolution. *Citizens for Responsible Choices*, 686 N.W.2d at 475. It ensures the court can fix your problem, that judicial action will redress it, and it is not an advisory opinion. *Iowa Citizens for Cmty.*, 962 N.W.2d at 791.

But "[i]njury-in-fact is not Mount Everest." *Canadian Lumber Trade All.*, 517 F.3d at 1333 (quoting *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005)). Imminence is an "elastic" concept, meant to ensure that the alleged injury is not speculative. *Lujan*, 504 U.S. at 565 n.2. "The meaning of the term 'imminent' depends on the particular circumstances, and in the highly competitive market of [wholesale electric transmission], governmental actions often have intractable, long-term consequences. … '[I]t could hardly be thought that [State] action likely to cause harm cannot be challenged until it is too late.'" *Adams*, 10 F.3d at 924 (quoting *Rental Housing Ass'n of Greater Lynn, Inc. v. Hills*, 548 F.2d 388, 390 (1st Cir. 1977)).

Yet, that is what the district court's order causes. Iowa projects are being planned at MISO and SPP *right now*. (Pet., ¶ 32); *see also* (MTI, Ex. 26; Ex. 20). Once impending projects are approved, MISO or SPP *automatically* will assign them to the incumbent provider. (Resistance to MTD, Ex. 3, at 101; Ex. 5, at 162); *see also Adams*, 10 F.3d at 924 (although injury may take "years to materialize," "[o]nce realized, ... [the] newfound competitive edge would likely continue for an extended period"). By asking LSP to wait until a particular project is approved and has gone to LSP's competitor (Order on MTD, at 3), the court required that harm be *complete*, rather than imminent.

Further, if action is postponed until LSP actually loses a project, LSP's ability to enforce Article III, Section 29 vanishes. Under Iowa caselaw, any defect in the title or subject of a bill is "cured" (abolished) once an act is codified. *Iowa Dep't of Transp. v. Iowa Dist. Ct.*, 586 N.W.2d 374, 376 (Iowa 1998). Only challenges preceding codification are timely. *Id.*; *State v. Taylor*, 557 N.W.2d 523, 526 (Iowa 1996). LSP filed suit in the only time frame it could to address the constitutional violations: **prior to the ROFR's**

**codification**. Had LSP delayed, or if dismissal is upheld, any subsequent challenge will be moot. *See id.* The legislature's violation of Article III, Section 29 (and by extension, LSP's constitutional rights) will go unremedied.

These circumstances distinguish this case from federal authority the district court cited. In *LSP Transmission Holdings, LLC v. Federal Energy Regulatory Commission*, 700 F. App'x 1 (D.C. Cir. 2017), the Circuit Court of Appeals for the District of Columbia, applying federal law, reviewed FERC's approval of an RTO tariff and held LSP lacked standing to challenge an RTO to prospectively adhering to state-law first refusal rights when no particular project had yet been denied. There, however, no particular state law was at issue. *Id.* Nor were state constitutional violations alleged. *Id.* Nor was evidence before the Court, as here, that projects were forthcoming. *Id.* Nonetheless, the Court noted, "LSP could be injured without bidding for a project if SPP deprived it of the opportunity to bid by enforcing a state right." *See id.* That is exactly the harm imminent to LSP now. Moreover, whereas the D.C. Circuit pointed out that, once a specific project was approved,

a challenge could be brought, here that is untrue as to constitutional challenges due to the law's codification. *Id.* at *2-*3; *see State v. Kolbet,* 638 N.W.2d 653, 661 (Iowa 2001).

Applying the common-sense standard in *Iowa Citizens for Community*, LSP has standing. 962 N.W.2d at 791. LSP has a sufficient stake in this controversy—it is the target the ROFR excludes. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012) (finding "no further showing of suffering based on that unequal positioning is required" (quoting *Hudson*, 265 F. App'x at 218); *see also Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 518 (5th Cir. 2014) (when targeted as group for exclusion, group is object of legislative action). Its injuries are not "conjectural"; no party is arguing projects will <u>never</u> arise. Once they do, there's no doubt LSP will be excluded. The court can fix LSP's problem by remedying the government exclusion and declaring the law unconstitutional. It can do so *now*; the Court's opinion is not advisory. *See Hudson*, 667 F.3d at 636. LSP has standing.

## II. THE DISTRICT COURT ERRED IN FAILING TO FIND CONSTITUTIONAL VIOLATIONS ARE ISSUES OF GREAT PUBLIC IMPORTANCE.

**Rule 6.903(2)(g) Statement**: If this Court concludes LSP lacks traditional standing, LSP's claims should still go forward based on the public importance exception. LSP preserved error on the public importance exception in resisting Defendants' Motion to Dismiss and its Motion for Reconsideration under Iowa Rule of Civil Procedure 1.904. (Resistance to MTD, at 14); (Br. in Supp. of MTR, at 5); *see Meier v. Senecaut*, 641 N.W.2d 532, 537-38 (Iowa 2002). Although the Court declined to rule on the exception (Order on MTR, at 1), LSP's actions preserved error. *See Madden v. City of Eldridge*, 661 N.W.2d 134, 138 (Iowa 2003); *see also* Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 70 (2006). Whether the public importance exception to standing applies is reviewed for correction of errors at law. *Rush v. Reynolds*, 2020 WL 825953, at *7 (Iowa Ct. App. Feb. 19, 2020); *see also Godfrey*, 752 N.W.2d at 418.

The Iowa Constitution, unlike the United States Constitution, does not contain a specific "case or controversy" requirement rooting standing in constitutional soil. Instead, Iowa's standing doctrine is a "self-imposed rule of restraint." *Alons et al. v. Iowa Dist. Ct. for Woodbury Cnty.*, 698 N.W.2d 858, 864 (Iowa 2005). The Iowa Supreme Court in *Godfrey* recognized Iowa's "doctrine of standing is not so rigid that an exception to the injury requirement could not be recognized" for those entities "who seek to resolve certain questions of great public importance and interest in our system of government." *Godfrey*, 752 N.W.2d at 425.

Although *Godfrey* did not articulate the exception's precise contours, it clarified that policies underlying standing must be "kept at the forefront" in determining its application. *Id.* at 425-26. Those policies include separation of powers, ensuring litigants are true adversaries, ensuring individuals most concerned are before the court and ensuring a concrete case exists to enable the Court to properly weigh the decision's consequences. *Id.*

In light of these principles, whether a particular claim qualifies for standing waiver should center on "the issue presented"

by the litigation, as well as the parties presenting it. *See id.* Where a claim is of "utmost importance and the constitutional protections are the most needed," separation of powers must give way to judicial review. *Id.* at 427. Additionally, when no other party can raise the constitutional challenge and the plaintiff has the interest and expertise necessary to assist the court in reviewing legal and factual questions, the exception is appropriate. *Exira Cmty. Sch. Dist. v. State*, 512 N.W.2d 787, 790 (Iowa 1994). Analyzing these two factors is consistent with other states' application of their public interest exception (*see Gregory v. Shurtleff*, 299 P.3d 1098, 1109 (Utah 2013)) and with Iowa's historical application of a public importance exception to mootness, another aspect of justiciability. *See State v. Hernandez-Lopez*, 639 N.W.2d 226, 235-36 (Iowa 2002). Because LSP satisfies both factors, the district court erred in failing to waive standing and LSP should be permitted to proceed with its constitutional claims.

### A. LSP's Claims Are Important and Require Judicial Intervention.

Regarding the first factor, the ROFR is critically important to Iowa's energy future. FERC found removal of ROFRs at the federal

level to be "essential to meeting demands of changing circumstances facing the electric industry," as such measures "severely harm the public interest." *ISO New England Inc.*, 143 FERC ¶ 61150, 2013 WL 2189868 (May 17, 2013); *Emera Maine v. Fed. Energy Regul. Comm'n*, 854 F.3d 552, 667 (D.C. Cir. 2017). It is "not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs." Order 1000, 76 Fed. Reg. 49,842 ¶ 286; 16 U.S.C. § 824(a) ("It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest…."); Statement of Interest on Behalf of the United States of America at 1–3, *LSP Transmission Holdings, LLC v. Lange*, No. 17-cv-04490 DWF/HB (D. Minn. Apr. 13, 2018), *available at* https://www.justice.gov/atr/case-document/file/1053256/download. ROFRs remove incentives to innovate and increase rates to consumers by depriving them of benefits of competition, including design efficiencies and cost-overruns. *Id.*; *see also* (MTI, Ex. 16, at

3-4). There is simply no plausible policy reason to deprive Iowa ratepayers of the direct, economic benefits of competition.

Moreover, LSP seeks to remedy *constitutional* violations concerning the validity of a statute. *See Maguire v. Fulton*, 179 N.W.2d 508, 510 (Iowa 1970) ("Among the issues of which the courts frequently retain jurisdiction because the public interest is involved … are questions of constitutional interpretation, issues as to the validity [o]r construction of statutes.").[6] LSP brings claims under the Iowa Constitution's single-subject, title, and privileges and immunities clauses. *See* Iowa Const., art. III, § 29; art. I, § 6. Article III, Section 29, states:

> Every act shall embrace but one subject, and matters properly connected therewith; which 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.

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[6] When injuries concern procedural processes affecting a law's enactment, Iowa has not hesitated to find the public importance at stake. *See, e.g.*, *Rush v. Ray*, 332 N.W.2d 325, 326-27 (Iowa 1983) (finding exercise of line-item veto matter of public importance regarding mootness); *Junkins v. Branstad*, 421 N.W.2d 130, 134 (Iowa 1988) (same); *Colton v. Branstad*, 372 N.W.2d 184, 187 (Iowa 1985) (same).

This section is mandatory, not advisory. *C.C. Taft v. Alber*, 171 N.W.2d 719, 720 (Iowa 1919); *W. Int'l v. Kirkpatrick*, 396 N.W.2d 359, 364 (Iowa 1996) (referring to "the mandate" of Article III, Section 29).

The single-subject requirement forces "each legislative proposal to stand on its own merits by preventing the 'logrolling' practice of procuring diverse and unrelated matter to be passed as one 'omnibus'" legislation and prevents "the attachment of undesirable 'riders' on bills certain to be passed." *Godfrey*, 752 N.W.2d at 236. Meanwhile, "[t]he purpose of the title requirement is to provide reasonable notice to lawmakers and the public regarding proposed legislation, thereby preventing surprise and fraud." *Giles v. State*, 511 N.W.2d 622, 625 (Iowa 1994). The privileges and immunities clause "is essentially a direction that all persons similarly situated should be treated alike." *Varnum v. Brien*, 763 N.W.2d 862, 878-79 (Iowa 2009) (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) [hereinafter *RACI*]).

Single-subject and title challenges are of the utmost importance. As other states highlight in applying their public-interest exceptions, single-subject and title challenges are a "fundamental stricture of legislative power articulated in our constitution." *Gregory*, 299 P.3d at 1108-09. Giving parties a mechanism to enforce them is "of particular importance because these provisions are designed to assist the citizens [of the State] by providing legislative accountability and transparency." *Lebeau v. Comm'rs of Franklin Cnty.*, 422 S.W.3d 284, 289 (Mo. 2014); *see also Hunsucker v. Fallin*, 408 P.3d 599, 602-03 (Okla. 2017) ("We find petitioners possess a public interest standing in this matter."); *Sloan v. Wilkins*, 608 S.E.2d 579, 584 (S.C. 2005) ("In light of the great public importance of this matter, we find Sloan has standing to maintain this action."), *abrogated on other grounds by Am. Petroleum Inst. v. S.C. Dep't of Rev.*, 677 S.E.2d 16 (S.C. 2009); *Harbor v. Deukmejian*, 742 P.2d 1290, 1300 (Cal. 1987) ("The issue raised by the respondents is of great public importance...").

*Godfrey* considered the standing exception's application in a single-subject challenge. 752 N.W.2d at 427. The plaintiff

challenged an act amending Iowa's workers' compensation framework, alleging her claim had public importance because "the individual provisions of [the Act] do not relate to the same subject." She did not allege a title violation, or allege facts implicating fraud, surprise, personal or private gain. *Id.* at 427. Nor was there any allegation "that the provisions were purposely placed into one bill to engage in logrolling," and in fact, legislative history revealed legislators were well-informed of the measure before its passage. *Id.* Under such circumstances, the Iowa Supreme Court held the public interest was not implicated.

This case is not *Godfrey*. LSP *does* allege a title challenge. (Pet., ¶¶ 42-45). Unlike the title of the bill in *Godfrey*, described as "comprehensive," the title of H.F. 2643 (containing the ROFR), gave no fair notice of its contents. *See infra* § III.B.2. Also, LSP expressly alleged the ROFR was purposely placed into one bill to engage in logrolling constituting fraud, deceit and surprise upon the public and the legislature's other members. (Pet., ¶¶ 39, 44).

Most importantly, in contrast to *Godfrey*, legislative history reveals the ROFR passed using the chief evils Article III, Section

29 prevents. Notice of legislation is Article III, Section 29's critical purpose.

> [I]t provides a vital assurance to residents ... that they will be able to make their views and wishes regarding a particular piece of legislation known to their duly elected representatives **before** its final passage, and it concomitantly ensures that those representatives will be adequately apprised of the full scope and impact of a legislative measure before being required to cast a vote on it.

*Commonwealth v. Neiman*, 84 A.3d 603, 612 (Pa. 2013). The ROFR's dark-of-night submission afforded legislators no time to consider the legislation's scope or effect, and certainly no time for public input. (MTI, Ex. 1, ¶ 16; Ex. 21, ¶ 13).

Had there been such opportunity, the measure is unlikely to have passed—particularly given its two previous failures when Art. III, Section 29 was followed. (Petition, ¶¶ 14, 16); *see Patrice v. Murphy*, 966 P.2d 1271, 1273 (Wash. 1998) (finding rider impermissible when "[t]he day before the bill was voted on" language identical to a bill that died in subcommittee was inserted); *Linndale v. State*, 19 N.E.3d 935, 940-41 (Ohio Ct. App. 2014) (invalidating legislation "taken from another bill that was stuck in committee and added at the last minute").

Legislative debate suggests no legislator understood the ROFR when it passed. (MTI, Ex. 2, at 21-24); *Plain Local Sch. Dist. Bd. of Educ.*, 2020 WL 5521310, at *21 (S.D. Ohio Sept. 11, 2020) (noting rule is "meant to limit the presentation to one subject in each bill so that, 'the issues presented can be better grasped and more intelligently discussed'" (quotation omitted)). The bill's sponsor mispresented its legislative history by telling colleagues it passed on the House floor (it did not), and it allowed incumbents to match a winning bid (it does not—the incumbent is entitled to the project outright). (MTI, Ex. 2, at 18-19, 28-30). Because these misstatements were never corrected before voting, fraud inhered upon legislators (and any public listening between 1:30 and 5:30 a.m.) relying on such comments. (MTI, Ex. 21, ¶ 9).

Most importantly, due to the inherent temptation to tack riders onto a "must-pass" end-of-session budget bill, the need for enforcement of Article III, Section 29 is particularly acute. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). As the Washington Court of Appeals explained,

> If substantive provisions could be attached to a budget bill (an appropriations bill), legislators could be caught

> on the horns of a dilemma because the 'budget bill' must be passed to operate state government. As a result, legislators could be coerced to pass substantive laws by having them attached to appropriations bills.

*State v. Acevedo*, 899 P.2d 31, 33 (Wash. Ct. App. 1995); *see also Porten Sullivan Corp. v. State*, 568 A.2d 1111, 1116 (Md. 1990) (noting one-subject clause is to "avoid the necessity for a legislator to acquiesce in a bill he or she opposes in order to secure useful and necessary legislation"). This concern is not hypothetical; S-5163's sponsor threatened to make everyone delay the bill by an additional *three months* unless the ROFR was attached. (MTI, Ex. 2, at 30).

### B. LSP Is the Appropriate Party.

LSP has "the interest necessary to effectively assist the court in developing and reviewing relevant legal and factual questions." *Gregory*, 299 P.3d at 1109. LSP is intimately familiar with the ROFR's legislative history and the electric transmission policy it sought to thwart. It is amply competent to articulate this constitutional challenge.

Moreover, if LSP, the focus of the legislation's anticompetitive intent, does not have standing, no party does. When a project is approved, no party will be able to assert the Article III, Section 29

challenges alleged herein because codification renders them untimely. *Kolbet*, 638 N.W.2d at 661. LSP, therefore, is the only non-incumbent entity that may pursue this right, although all nonincumbents, and all electricity ratepayers, are disadvantaged. *See Hernandez-Lopez*, 639 N.W.2d at 235-26 (finding exception applies when "nonparties to the litigation stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves" (cleaned up) (quoting *State v. Price*, 237 N.W.2d 813, 816 (Iowa 1976))).

With a too-restrictive approach to standing, Article III, Section 29 becomes unenforceable. Iowa appellate courts have not addressed an Article III, Section 29 claim on the merits in nearly twenty-five years. *See Utilicorp United Inc. v. Iowa Utilities Bd.*, 570 N.W.2d 451, 454 (Iowa 1997). Meanwhile, the legislature continues violating the Constitution. In 2019, the legislature passed an everything-but-the-kitchen-sink appropriations bill using the exact same nebulous, non-descript title as H.F. 2643. *Rush*, No. 19-1109, 2020 WL 825953. When challenged, the Iowa Court of Appeals avoided the merits based on standing, but noted,

"SF 638 does not appear to be a single-subject bill, and the second and third clauses of the title are vague categorical descriptions that do not disclose specific subject matters." *Id.* at *12. That the legislature attempted similar action just a year later in 2020 confirms history will continue to repeat itself unless Article III, Section 29's constitutional protections are enforced. *Id.*

LSP does not argue the title and single-subject requirements *always* merit public importance. But here, where requirements were flagrantly disregarded and impact every electricity consumer in the state, the Court "must not hesitate to proclaim the supremacy of the Constitution." *W. Int'l*, 396 N.W.2d at 366 (quoting *Chi., Rock Island & Pac. Ry. v. Streepy*, 224 N.W. 41, 43 (Iowa 1929)). Indeed, if a party does not have standing until harm is already complete, the legislature can simply declare the bill only effective after codification, and Article III, Section 29 will forever escape review. John Dimanno, *Beyond Taxpayers' Suits: Public Interest Standing and the States*, 41 Conn. L. Rev. 639, 664 (2008) (noting a "constrained approach to public actions … renders some

constitutional provisions judicially unreviewable and thus futile limitations on government power").

"Where the legislature has passed a bill and the governor has signed it, [the Court] cannot assume that either of those branches are appropriate parties to whom to entrust the prosecution of a claim that the bill violates the strictures" of the Constitution. *Gregory*, 299 P.3d at 1109. Review of such action is for courts, and courts must vindicate LSP's constitutional rights. Should Iowans decide Article III, Section 29's enforcement is no longer useful and riders should be allowed to be hidden in bills, there is a procedure to address the question—amend the constitution. Iowa Const., art. X, § 1. Absent such amendment, Article III, Section 29 cannot be ignored.

## III. AN INJUNCTION SHOULD ISSUE.

**Rule 6.903(2)(g) Statement:** LSP requested temporary injunctive relief in its Petition, and filed its Motion for Temporary Injunction and Brief in Support before the district court. (Pet., ¶¶ 54-58; MTI). The district court denied LSP's Motion. (Order on MTD, at 4). Denial of a temporary injunction is reviewed for abuse

of discretion. *Homan v. Branstad*, 864 N.W.2d 321,327-28 (Iowa 2015).

Under Rule 6.1001, the Supreme Court may issue "all writs and process necessary for the exercise and enforcement of its appellate jurisdiction." Iowa R. App. P. 6.1001. This includes the power to enjoin enforcement, including before the district court upon remand. *See Planned Parenthood of the Heartland v. Branstad*, No. 17-0708, *Order* (May 9, 2017). "[W]hen no other means of protection is afforded by the law, there is no hesitancy in granting the order." *Welton v. Iowa State Hwy. Comm'n*, 227 N.W. 332, 332-33 (Iowa 1929); *see also Chi. Anamosa & N. Ry. Co. v. Whitney*, 121 N.W. 1043, 1045 (Iowa 1909). Judicial economy would be served by the Court's grant of an injunction rather than remanding for a temporary order. *See Berent v. City of Iowa City*, 738 N.W.2d 193, 206 (Iowa 2007).

**A. Injunction Standards.**

Under Iowa Rule of Civil Procedure 1.1502, courts may issue a temporary injunction "[w]hen the Petition supported by affidavit, shows that plaintiff is entitled to relief which includes restraining

the commission or continuance of some act which would greatly or irreparably injure the plaintiff." "A temporary injunction is a preventative remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation." *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985).

In deciding whether to issue an injunction, the Court must consider whether LSP demonstrated (1) "an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for injunction is granted; and (3) there is no adequate legal remedy available." *Cmty. State Bank, Nat'l Ass'n v. Cmty. State Bank*, 758 N.W.2d 520, 528 (Iowa 2008). Because LSP satisfied these standards, enjoining rulemaking[7] and enforcement is appropriate.

### B. The ROFR Violates the Iowa Constitution.

Article III, Section 29 has "four requirements." *State v. Mabry*, 460 N.W.2d 472, 474 (Iowa 1990). "First, the act may have

[7] Enjoining rulemaking is necessary because MISO and SPP tariffs provide they will "comply with Applicable Laws **and Regulations** granting a right of first refusal to a Transmission Owner." (MTI, Ex. 13, at 101 (emphasis added); Ex. 15, at 162).

only one subject together with matters germane to it." *Id.* "Second, the title of the act must contain the subject matter of the act." *Id.* "Third, any subject not mentioned in the title is invalid." *Id.* "Last, an invalid subject in the act does not invalidate the remaining portions that are expressed in the title." *Id.* "[L]egislation will not be held unconstitutional unless clearly, plainly and palpably so." *Long v. Bd. of Supervisors of Benton Cnty.*, 142 N.W.2d 378, 381-82 (Iowa 1966) (quoting *Burlington & Summit Apts. v. Manolato*, 7 N.W.2d 26, 28 (1942)).

**1. H.F. 2643 Has No Single Subject.**

"To survive constitutional scrutiny, 'all matters treated [in an act] should fall under one general idea and be so connected with or related to each other, either logically or in popular understanding, as to be part of ... one general subject.'" *Giles*, 511 N.W.2d at 625 (quoting *Long*, 142 N.W.2d at 381)). When an act contains two or more "dissimilar or discordant subjects that have no reasonable connection or relation to each other," it cannot survive. *Mabry*, 460 N.W.2d at 474. The proper analysis is to "search for (or eliminate the presence of) a single purpose toward which the several

dissimilar parts of the bill relate." *Id.* (quoting *Miller v. Bair*, 444 N.W.2d 487, 490 (Iowa 1989)).

H.F. 2643 is not a single-subject bill. There is no single purpose fairly encompassing all its measures. H.F. 2643 has 34 separate divisions. Its evident purpose, as the title and majority of its sections indicate, is to set the state budget for the fiscal year. Yet, H.F. 2643 contains numerous *other* subjects that are not appropriations nor related thereto. *See Rants v. Vilsack*, 684 N.W.2d 193, 204-05 (Iowa 2004) (defining appropriation); Iowa Code § 3.4.

For example, Division XXXIII, the ROFR, grants a substantive right: "An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line...." It makes no appropriation. Nor is it a condition or limitation on an appropriation or made contingent on an appropriation, nor does it set forth how an appropriation should be spent. It epitomizes an unrelated, standalone rider. *Colton v. Branstad*, 372 N.W.2d 184, 191 (Iowa 1985) ("Conditions and limitations properly included in an appropriations bill must exhibit

such a connexity with money items of appropriations that they logically belong in a schedule of expenditures." (Quoting *Henry v. Edwards,* 346 So.2d 153, 157-58 (La. 1977)).

Beyond the ROFR, H.F. 2643's remaining topics are discordant. Division V, in part, relates to civil trial locations, specifying that "if all parties in a case agree, a civil trial including a jury trial may take place in a county contiguous to the county with proper jurisdiction...." Division XV contains corrective provisions. Division XXVIII relates to returning search warrants. Division XXXI amends procedures for requesting and verifying information required for absentee ballots. Division XXXII relates to the Board of Regents hiring attorneys. Such a smattering of subjects has no fair relation to appropriations, and certainly "no reasonable connection or relation to each other." *Mabry*, 460 NW.2d at 474.

Indeed, the Iowa Supreme Court has held, when substantive measures are placed into a corrections bill, the bill violates the single-subject clause. *Giles*, 511 N.W.2d at 625; *see W. Int'l*, 396 N.W.2d at 365. Similarly, policy language does not belong in an appropriations bill. The Honorable Joseph Coleman, Office of the

Attorney Gen. Op. No. 75-6-7 (Iowa June 18, 1975) (opining appropriations bill making substantive changes to campaign finance laws violated single-subject rule); *see also* The Honorable Robert D. Ray, Office of the Attorney Gen. Op. No. 75-7-11 (July 8, 1975) ("SF 566, an act making appropriations to various state officers and departments, and at the same time making substantive amendments... is unconstitutional and void in its entirety…."). H.F. 2643 contains *all three*: appropriations; corrections; and policy.

H.F. 2643 cannot pass Article III, Section 29 muster. Before the district court, the State and Intervenors could only hypothesize its myriad provisions might all fit under "continuity of operations of the entire state government" or "legal and regulatory responsibilities." Each may as well have proposed the subject: "laws." Although courts must search for a purpose to which all matters are connected, "[n]o two subjects are so wide apart that they may not be brought into a common focus, if the point of view be carried back far enough." *Neiman*, 84 A.3d at 612. A subject too broad renders Article III, Section 29 "impotent to guard against the

evils that it was designed to curtail" by bringing all topics, no matter how diverse, within one Act. *City of Phila. v. Commonwealth*, 838 A.2d 566, 588 (Pa. 2003). Only by making the subject so diffuse as to be devoid of meaning can the potpourri of H.F. 2643 be brought under one intendment.[8]

Even if such sweeping, vague concepts could suffice, it is insufficient to hypothesize a subject if all the Act's provisions are not logically or naturally connected to it. *Mabry*, 460 N.W.2d at 474 (stating matters "should fall under one general idea and be so connected with or related to each other, either logically or in popular understanding"). There is no natural connection between an ROFR for electric transmission projects approved by a *federally* sanctioned planning authority and "operations of state

[8] Indeed, other states have rejected the use of such sweeping and vague categories to unite unrelated measures together. *See People v. Reedy*, 708 N.E.2d 1114, 1119 (Ill. 1999) (rejecting "governmental matters" as single subject"); *see also People v. Olender*, 854 N.E.2d 593, 603 (Ill. 2005) (finding "governmental regulation" subject too vague, as "any legislative action could fit within the broad category"); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1097-98 (Ohio 1999) (rejecting "tort and other civil actions" subject); *Johnson v. Walters*, 918 P.2d 694, 698 (Okla. 1991) (rejecting "state government" subject); *Harbor*, 742 P.2d at 1100-01 (finding "fiscal affairs" to be of "excessive generality").

government." Nor does the ROFR involve "legal" or "regulatory" responsibility—it is a substantive right that automatically applies.[9] No logical reading of the ROFR connects it with H.F. 2643, the appropriations bill into which it was inserted. H.F. 2643 violates Iowa's single-subject clause.

### 2. H.F. 2643's Title Provides No Fair Notice of its Anti-Competitive ROFR.

H.F. 2643 also violates Article III, Section 29's title requirement. To be constitutional, an act's title must afford the reader "fair notice of a provision in the body of the act." *State v. Iowa Dist. Ct.*, 410 N.W.2d 684, 688 (Iowa 1987). "If reasonable guidance with respect to the act's material provisions is not provided by the title, the basic purpose of the title requirement (prevention of surprise and fraud) may be frustrated." *Id.* "In determining the sufficiency of a title, courts examine whether anyone reading the title of an act could reasonably assume that the

[9] Tangential agency action (such as rulemaking) does not render the purpose of legislation a "regulatory" responsibility. *See Taylor*, 557 N.W.2d at 525 (noting merely because "weapons" could affect "juveniles" does not mean substantive weapon law in any reasonable sense was auxiliary to juvenile justice).

reader would be apprised of all its material provisions." *Id.* (quoting *W. Int'l*, 396 N.W.2d at 365).

The answer as to H.F. 2643 is resoundingly "no." H.F. 2643's title states,

> An Act relating to State and Local Finances By Making Appropriations, Providing for Legal and Regulatory Responsibilities, Providing for Other Properly Related Matters, and Including Effective Date, Applicability, and Retroactive Applicability Provisions.

Nothing in this title informs a reader that electric transmission lines, rights-of-first refusal or substantive rights of non-incumbent electric transmission owners are addressed. Indeed, the title remained exactly the same both before and after the ROFR was added, begging the question of how it could possibly signal the ROFR's presence.

Nor can the title be saved by vague references to "legal and regulatory responsibilities." Such an interpretation stretches "fair notice" too far. *See W. Int'l*, 396 N.W.2d at 365 (holding title stating act was bill "altering current practices" failed to give fair notice of practices being changed). When a title is so "broad and amorphous" that it could include "nearly every activity the state undertakes,"

notice is not achieved. *Carmack v. Dir., Mo. Dep't of Agric.*, 945 S.W.2d 956, 960 (Mo. 1997); *see also Acad. of Trial Lawyers*, 715 N.E.2d at 1097 ("If we accept this notion, the General Assembly could conceivably revamp all Ohio law in two strokes of the legislative pen—writing once on civil law and again on criminal law. The thought of it is staggering."); *St. Louis Health Care Network v. State*, 968 S.W.2d 145, 148 (Mo. 1998) (invalidating title so broad as "could define most, if not all, legislation passed by the general assembly").

No one reading H.F. 2643's title would know of the ROFR. Although titles are viewed broadly, here "[n]ot even the presumptions in favor of constitutionality in which [courts] indulge are enough to show where the subject of [the ROFR] is 'expressed in the title.'" *State v. Nickelson*, 169 N.W. 832, 837 (Iowa 1969).

### 3. Iowa Code Section 478.16 Violates the Privileges and Immunities and Equal Protection Clauses.

Finally, section 478.16 violates Article I, Section 6 of the Iowa Constitution, which provides,

> All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any

> citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

Article I, Section 6 addresses "forms of special status that are bestowed by the government to which a person would not otherwise be entitled," particularly in the area of economic privileges that may result in monopoly or oligopoly status. Edward M. Mansfield & Conner L. Wasson, *Exploring the Original Meaning of Article I, Section 6*, 66 Drake L. Rev. 147, 155 (2018). Even when no fundamental right or suspect class is involved, governmental action is reviewed using a rational basis standard, which "is not a toothless one in Iowa." *RACI*, 675 N.W.2d at 9 (quoting *Mathews v. De Castro*, 429 U.S. 181 (1976).

Under Iowa's rational basis standard, the court must undertake a three-part analysis. First, there must be a valid, "realistically conceivable" policy reason for the classification. *Id.* "To be realistically conceivable, the [statute] cannot be 'so overinclusive and underinclusive as to be irrational.'" *Residential & Agric. Advisory Comm'n, LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016) (quoting *Horsfield Materials, Inc.*, 834

N.W.2d at 459). Next, the Court must evaluate whether the asserted interest is factually based. *RACI*, 675 N.W.2d at 8. "Although 'actual proof of an asserted justification [i]s not necessary ... the court w[ill] not simply accept it at face value and w[ill] examine it to determine whether it [i]s credible as opposed to specious." *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 860 (Iowa 2015) (alteration in original) (quoting *Qwest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 560 (Iowa 2013)). Finally, the relationship between the classification and its goal cannot be "so attenuated as to render the distinction arbitrary or irrational." *RACI*, 675 N.W.2d at 7.

Section 478.16, on its face, draws a classification between two groups: (1) "incumbent transmission owners," or those who as of "July 1, 2020," owned, operated and maintained electric transmission lines "in this state" and (2) non-incumbent transmission entities, who did not. These groups are similarly situated with respect to the "the purposes of the law." *Varnum*, 763 N.W.2d at 883. They are subject to the same state-level permitting and routing processes with the IUB when seeking to construct the

line. *See* Iowa Code ch. 478. They are also subject to the exact same federal and state reliability, safety, and maintenance standards. *See* Order No. 1000, 76 Fed. Reg. 49,842; 18 C.F.R. § 39.2; Iowa Code § 478.19; Iowa Admin. Code r. 199-11.9, 199-25.

No plausible policy reason exists to distinguish between incumbent and non-incumbent providers with respect to projects approved by a federally registered planning authority when both have been deemed qualified by that very planning authority. Arbitrarily ossifying entities permitted to construct transmission in Iowa appears merely intended to insulate special interests—incumbents in Iowa as of July 1—from competition.[10] Such economic favoritism strikes at the very heart of conduct Article I, Section 6 is designed to prevent.

For example, in *State v. Osborne*, the Iowa Supreme Court addressed a statute stating a merchant who newly entered the

[10] During debate, the bill's sponsor justified the distinction in the ROFR as relating to making sure the bid-winning entity would "be there to maintain the line." (MTI, Ex. 2, at 19-20). This purpose has no basis in fact, as SPP and MISO require ongoing maintenance as part of their agreements with selected developers on awarded projects. (Resistance to MTD, Ex. 1, ¶¶ 29, 31-32); *see also* (MTI, Ex. 13, at 128-32; Ex. 14, at 34-35).

county must "procure a license and give bond for the benefit of his customers," but a competitor who had "previously conducted … business" in the county did not. 154 N.W. 294, 300 (Iowa 1915). The court invalidated the law, concluding a purpose merely to stifle competition was improper:

> [W]e think it proper to add that it is perfectly manifest from a reading of the entire statute that the ultimate purpose sought to be accomplished by its provisions was … to relieve the so-called permanent merchant of the more or less annoying competition of the transient merchant…. Assuming that both lines of business are honestly conducted, one is as legitimate as the other and entitled to like protection, and the law should not be converted into a weapon by which either competitor may annihilate the business of the other.

*Id.* More recently, in *RACI*, the court reiterated a differential cannot be justified simply as a way to promote one group of companies over another. *RACI*, 675 N.W.2d at 9; *see also State v. Santee*, 82 N.W. 445, 446-47 (Iowa 1900) ("Special privileges and monopolies are always obnoxious, and discriminations against persons or classes still more so"). Where a law, like the ROFR, does not advance a legitimate purpose but stifles competition, it cannot be upheld.

### C. Irreparable Harm Results if Injunction is Not Granted.

If the ROFR is not enjoined, LSP will be substantially damaged. As detailed in section I.B. *supra*, the ROFR deprives LSP of its opportunity to compete, instead awarding incumbent entities "first dibs" on certain projects. Infringement of constitutional rights constitutes irreparable harm sufficient for injunction. *Free the Nipple-Ft. Collins v. City of Ft. Collins*, 916 F.3d 792, 806 (10th Cir. 2019) ("[I]n the context of constitutional claims, the principle … equat[es] likelihood of success on the merits with a demonstration of irreparable injury."); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Ezell v. City of Chi.*, 651 F.3d 684, 699 (7th Cir. 2011); *Am. Civil Liberties Union of Ky. v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003); *Stoner McCray Sys. v. City of Des Moines*, 78 N.W.2d 843, 850-51 (Iowa 1956). Because LSP showed violation of the single-subject, title and privileges and immunities clauses, injunction is appropriate.

As confirmed by RTO planning presentations, Iowa's governor and other industry leaders, a project subject to the ROFR is anticipated during this suit's pendency. (Resistance to MTD, Ex. 1,

¶¶ 12-20); (MTI, Ex. 25; Ex. 20; Ex. 24). Indeed, MISO identified at least four high-priority transmission constraints in Iowa, for which solutions are expected. (Br. in Supp. of MTR, Ex. A). This meets the imminence required for injunctive relief. *See* Iowa R. Civ. P. 1.1502(2) (emphasis added) ("[w]here, *during the litigation*, it appears a party … threatens or is about to do, an act violating the other party's right," injunction is appropriate).

"Damocles's sword does not have to actually fall on [LSP] before the court will issue an injunction." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8-9 (D.C. Cir. 2016). Because the legislation in question is unconstitutional, has injured LSP and will injure LSP during this action, enjoining enforcement and rulemaking until final decision on the merits is warranted.

## CONCLUSION

The district court improperly concluded LSP lacked standing to sue. Section 478.16's operation deprives LSP the opportunity to compete for projects and takes its competitive advantage. In the alternative, the district court erred in declining to allow LSP to proceed under the public interest exception. Accordingly, LSP

requests this Court reverse the district court's order and remand for further proceedings. To preserve the status quo during the pendency of the litigation, enjoining enforcement and rulemaking related to Iowa Code section 478.16 is appropriate.

## REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument.


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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and length limitation of Iowa Rules of Appellate Procedure 6.902(1)(*e*)(1) and 6.903(1)(*g*)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook 14 pt. and contains 13,387 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

*/s/ Shannon Olson*

## CERTIFICATE OF SERVICE

I hereby certify on the 23rd day of September, 2021, I electronically filed the foregoing Appellants' Proof Brief 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 party. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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