IN THE IOWA SUPREME COURT

Supreme Court No. 21-0696
District Court No. CVCV060840

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.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY
THE HONORABLE CELENE GOGERTY

PROOF BRIEF OF INTERVENOR ITC MIDWEST LLC

Amy Monopoli
ITC HOLDINGS CORP.
100 East Grand Ave., Suite 230
Des Moines, Iowa 50309
Tel: (774) 452-4227
Email: amonopoli@itctransco.com

Bret A. Dublinske
Lisa M. Agrimonti
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Tel: (515) 242-8900
Fax: (515) 242-8950
Email:bdublinske@fredlaw.com
lagrimonti@fredlaw.com

Attorneys for Intervenor ITC Midwest LLC

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ROUTING STATEMENT

While ITC Midwest believes this case can be decided on application of prior precedents and therefore could be appropriately routed to the Court of Appeals, ITC Midwest has no objection to Petitioners' request that the Supreme Court retain this case.

STATEMENT OF THE CASE

Petitioners' dramatic rhetoric cannot hide the simple truth that there is less to this appeal than Petitioners' suggest. The only question truly before the court is a narrow one: did Petitioners have standing, despite any alleged harm being remote and speculative? Petitioners try and boost that claim over a difficult hurdle by arguing for the "great public importance" exception to standing, an argument that the Court of Appeals noted in 2020 has *never* been successful in Iowa's appellate courts.[1]

This case is about a technical economic regulation that impacts a very limited and specific set of transactions. It is about a policy decision by the Iowa legislature -- passed by both chambers, signed by the Governor -- to allow owners and operators of existing high-voltage electric transmission

[1] *See Rush v. Reynolds*, 946 N.W.2d 543 (Table), 2020 WL 825953 (Ia. Ct. App., Feb. 19, 2020) at *13 ("The simple fact is no Iowa appellate case has ever waived traditional standing requirements because of an issue of great public importance.")

lines the first opportunity to build new lines that connect to those owners' own existing facilities.[2] As narrow as that issue is, it is even less of a change than the passage of new legislation may make it seem. What Petitioners fail to point out to the Court in their effort to inflate the impact of this change is that (a) the change in federal law that allowed competitive bidding by parties like the Petitioners also ***expressly contemplated that states may adopt rights of first refusal (ROFRs) for incumbent electric transmission owners***;[3] and (b) only a very small subset of transmission lines with regional impacts and which are eligible for regional cost sharing are allowed to be competitively bid; and (c) since the door was opened to bidding for such lines over a decade ago ***not a single line in Iowa has ever been competitively bid***, so the "status quo" is that no competitive bidding has ever occurred for a transmission project in Iowa. It is not surprising, then, that challenges to

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[2] HF 2643, Section XXXIII, codified at Iowa Code §478.16.

[3] *See Order 1000*, 136 FERC ¶ 61501 at ¶ 287, 2011 WL 2956837, at *92 ("Eliminating a federal right of first refusal in Commission-jurisdiction tariffs and agreements does not result in the regulation of matters reserved to the states.") Since issuing Order 1000, FERC has repeatedly reaffirmed its deference to state policy decisions regarding the construction and ownership of transmission facilities. *See*, *e.g.*, *S.C. Elec. & Gas Co.*, 147 FERC ¶ 61126, 61562-64; 2014 WL 1997987, at **34-37 (May 15, 2014). FERC has reiterated that "state-granted rights of first refusal. . . still exist under state or local law. . . and nothing in Order No. 1000 changes that law or regulation." *Id*. at ¶ 127, **36.

ROFRs like that adopted in Iowa have generally failed – including challenges brought in other courts by the Petitioners.[4]

Petitioners ask this Court to overturn the District Court's granting of a motion to dismiss based on lack of standing. In doing so, Petitioners ask this Court to entirely throw out the longstanding requirement that there be some specificity and some imminence to the harms alleged. As ITC Midwest describes below, the asserted harms here are far too remote and speculative to grant standing under existing Iowa precedents. Petitioners seek to bolster their standing argument by using the exception for matter of public importance. This case has few, if any, indicia of a case of great public importance, an exception that has never been successfully argued. This is not the case in which the exception should be used for the first time.

Petitioners make an even bigger ask of this Court, to grant an injunction that has not yet been ruled on by the district court. There is no basis for such a ruling. At the very least, if standing is found to exist, the case should be remanded for further consideration below. In any event, Petitioners cannot meet the tests for an injunction here. As with the public

[4] *LSP Transmission Holdings, LLC v. FERC*, 700 Fed. Appx. 1 (D.C. Cir. 2017), *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695 (D. Minn. 2018), *aff'd by LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020).

importance exception, Petitioners seek a novel ruling on the single-subject and title requirements that would be a profound intervention by the Court in how the legislature conducts business, one that has been repeatedly and wisely rejected by this Court.[5] The last claim by Petitioners is an equal protection claim that cannot come close to meeting the test for economic regulation, which requires only a rational basis[6], and which is refuted by the very cases Petitioners rely on.

In short, neither the facts nor the law favor the envelope-pushing arguments of Petitioners. To the extent the Court has any doubts about that, it should clarify the standards to be used and remand to the district court to apply those standards in the first instance. The outcome more faithful to Iowa precedent, however, is to affirm the correct ruling of the district court, dismissing Petitioners' claims.

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[5] *See*, *e.g.*, *Godfrey v. State*, 752 N.W.2d 413 (Iowa 2008); *Miller v. Bair*, 444 N.W.2d 487 (Iowa 1989); *see also Rush v. Reynolds*, 946 N.W.2d 543 (Table), 2020 WL 825953 (Ia. Ct. App., Feb. 19, 2020).

[6] *Qwest Corp. v. Iowa St. Bd. of Tax Review*, 829 N.W.2d 550, 558 (Iowa 2013); *NextEra Energy Resources LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 46 (Iowa 2012); *City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 530 (Iowa 2008).

STATEMENT OF THE FACTS

Intervenor-Appellee ITC Midwest, headquartered in Cedar Rapids, Iowa, is an independent, stand-alone transmission company engaged exclusively in the development, ownership and operation of facilities for the transmission of electric energy in interstate commerce. ITC Midwest provides transmission service in Iowa, Minnesota, Illinois and Missouri where it owns and operates approximately 6,700 circuit miles of transmission lines with the overwhelming majority of those lines in Iowa. ITC Midwest is a subsidiary of ITC Holdings Corp., which invests exclusively in the electric power transmission grid to improve electric reliability, facilitate access to renewable and other generation, improve access to power markets, and reduce the overall cost of delivered electric power.

While most people are familiar with the electric distribution network – the wires that bring the electricity they use to their homes, owned by their local electric company – people are less familiar with the electric transmission network, often called "the grid." That system of larger, higher-voltage lines is interconnected across state (and even national) lines and serves an indispensable role in carrying electricity over longer distances, whether between electric generating facilities and distribution networks,

from electric generating facilities to energy markets, or from one network to another.

Regulation of the transmission network is complex and multi-layered. There is a federal layer through the Federal Energy Regulatory Commission ("FERC"). There is a regional layer through regional non-governmental Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs") who generally oversee transmission system planning and energy markets in their region – these include the Midcontinent Independent System Operator, Inc. ("MISO") and the Southwest Power Pool ("SPP"). Finally, there remains an important state role; the Iowa Utilities Board ("IUB"), under Iowa Code chapter 478, regulates the siting and construction of electric transmission lines in Iowa.

The determination of which new electric transmission lines are built and where is largely a function of extensive planning processes undertaken by the regional ISOs and their stakeholders and ultimately involves the regulations and processes of all three layers. *See generally*, *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1023-1024 (8th Cir. 2020) (providing extensive background). Prior to 2011, FERC allowed transmission provider tariffs to include a federal right-of-first-refusal, so that when a regional planning process approved transmission projects in a state,

the incumbent owner of existing transmission in that state had the right to build the project. *Id*. at 1023.

In 2011, the Federal Energy Regulatory Commission issued Order 1000, which, among other things, eliminated the federal right-of-first-refusal ("ROFR") within the Midwest Independent System Operator, Inc. Open Access Transmission Tariff for certain transmission projects that are part of a regional transmission planning process. In partially eliminating the federal ROFR, FERC explicitly acknowledged that individual states could decide whether or not to adopt a state-level ROFR.[7] In the 2020 session of the Iowa General Assembly, the Iowa legislature did just that: it passed, and the governor signed, H.F. 2643, including Division XXXIII, Section 128, titled "Electric Transmission Lines," which will provide at Iowa Code § 478.16 a state ROFR to "incumbent electric transmission owners" –

[7] "Eliminating a federal right of first refusal in Commission-jurisdiction tariffs and agreements does not result in the regulation of matters reserved to the states." *See Order 1000*, 136 FERC ¶ 61501 at ¶ 287, 2011 WL 2956837, at *92. Since issuing Order 1000, FERC has repeatedly reaffirmed its deference to state policy decisions regarding the construction and ownership of transmission facilities. *See*, *e.g.*, *S.C. Elec. & Gas Co.*, 147 FERC ¶ 61126, 61562-64; 2014 WL 1997987, at **34-37 (May 15, 2014). FERC has reiterated that "state-granted rights of first refusal. . . still exist under state or local law. . . and nothing in Order No. 1000 changes that law or regulation." *Id*. at ¶ 127, **36.

those who already have assets and operations in the state and a proven track record with the State and the Board. In enacting HF 2643, Section XXXIII, Iowa adopted a policy that FERC long held and expressly allowed states to continue. Iowa is not alone: multiple other states, particularly in the center of the country, have similar state rights of first refusal.[8]

ITC Midwest is an "incumbent electric transmission owner" under Iowa Code § 478.16. Moreover, the ROFR in section 478.16 is triggered by a proposed new project "which connects to an electric transmission facility owned by the incumbent electric transmission owner." That is, the hypothetical projects discussed in this action could connect to existing ITC Midwest transmission facilities in Iowa, which are actively in service and on which Iowa customers depend. ITC Midwest entered the Iowa market by acquiring the transmission assets of Interstate Power and Light ("IPL"), a retail utility serving much of Iowa. As part of that process, the Board, as the expert agency regarding utility service in Iowa, scrutinized ITC Midwest's financial, technical and managerial ability to own and operate the

[8] In addition to Iowa, see, e.g., N.D. Cent Code § 49-03-02.2; S.D. Codified Laws § 49-32-20; Neb. Rev. Stat. § 70-1028; 17 Okla. Stat. § 292; Minn. Stat. § 216B.246; and Sections 37.051, 37.056, 37.057, 37.151, and 37.154 of the Texas Utilities Code. (This is not intended to be an exhaustive list.)

transmission assets to provide safe, reliable, affordable electric transmission service. In its review of ITC Midwest's acquisition of IPL's transmission assets, the IUB placed importance on the demonstrated track record of ITC Midwest's corporate affiliates:

> Unlike the situation with TRANSLink, in this case ITC Midwest's affiliates have a track record of investing in and rebuilding transmission systems and collecting awards both for safety and worker training. The evidence in the record supports a finding that the provision of safe, reasonable, and adequate service would not be impaired by the proposed reorganization.

In re Interstate Power and Light Company and ITC Midwest LLC, Docket No. SPU-07-11, Order Terminating Docket and Recommending Delineation of Transmission and Local Distribution Facilities (IUB, Sept. 20, 2007), at 30.[9] Petitioners here have not, and under their proposed outcome would not, have to go through the same state-level expert agency review applied to ITC Midwest.

[9] Notably, where such a showing on the record had not been made, in a prior case involving TRANSLink, the Board had *rejected* such a reorganization of transmission assets. *See In re Interstate Power*, Docket No. SPU-07-11 at 8-9 (discussing prior TRANSLink dockets).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT PETITIONERS' ALLEGED HARMS ARE TOO REMOTE AND SPECULATIVE TO CONFER STANDING.

Preservation of Error: ITC Midwest agrees that Petitioners preserved error on the issue of standing.

Standard of Review: Issues of standing are reviewed for correction of errors at law. *Iowa Citizens for Community Improvement v. State*, 962 N.W.2d 780, 787 (Iowa 2021)(hereafter "*ICCI*").

Earlier this year, in *ICCI*, the Court reaffirmed and reasserted its doctrine of standing. Iowa uses a "two-prong approach" – "a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." To determine what it means to be "injuriously affected," this Court has looked favorably at federal law on standing, in particular to *Lujan v. Defenders of Wildlife*, 504 U.S. 55 (1992) and its progeny. Under this framework, the Court has held that an alleged injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 867-68 (Iowa 2005); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)(a "speculative chain of possibilities" is not sufficient). More clearly and particularly relevant here, this Court in *Alons* made explicit that where

"the injury the Petitioners claim is anticipatory" that "is not sufficient for standing." *Alons* at 870. Viewed property, the same is true of the claims asserted by Petitioners here.

A. Petitioners Claim They Are Harmed In Bidding On New Transmission Lines, But They Cannot Identify Any Specific Projects That Will Be Competitively Bid – Or Even When Or Where There Will Be Such Projects.

Petitioners claim that absent the injunction they sought below, they may lose an opportunity to bid on a project in Iowa. These purported harms, however, are entirely speculative, and lack adequate specificity. The best Petitioners have been able to assert is that studies have shown there is congestion in the electric transmission system and a need for additional transmission lines in or around Iowa. Petitioners cannot claim, however, that those studies have resulted in any actual planned projects, much less projects that qualify for competitive bidding. Nor can they state when such plans may be approved. While Petitioners have argued and presented below an affidavit of Sharon Segner as to the growth of renewables and the need for additional electric transmission projects in Iowa, neither Petitioners' brief nor the Segner Affidavit identifies any specific projects or specific timelines (much less any that are imminent). Petitioners can only speak in generalities about how the planning process works, and about the background of why more projects *may* be coming at some unknown point in

the future because the simple fact is that there are no biddable projects currently approved for Iowa by either MISO or SPP. As the Affidavit of Jeffrey Eddy below explains, the planning cycles that were completed for both MISO and SPP in 2020 included no Iowa projects that would be subject to competitive bidding. Eddy Affidavit (*Eddy Aff.*) at ¶ 9 (App.___), 10. Moreover, until the current planning processes are completed, there is no assurance that any Iowa projects subject to competitive bidding will be approved in that process, either. Despite the dramatic growth of renewables in Iowa over the past 20 years, no such projects subject to competitive bidding were approved by MISO Transmission Expansion Plans ("MTEP") in Iowa since 2011 and no such projects have been approved anywhere in the MISO footprint since 2017; there were no such projects approved by MISO in MTEP 18, MTEP 19 or MTEP 20. *Eddy Aff.* ¶ 9.

Similarly, while the Petitioners have claimed that HF 2643 "represents a drastic change in Iowa law for new construction and maintenance of electric transmission lines," (Pet. Dist. Ct. Inj. Br. at 3; App. ___) that is actually backwards. Since FERC's Order 1000 removed the federal right of first refusal in 2011 there has *never* been an electric transmission line built in Iowa based on a competitive bidding process, even prior to HF 2643's state-based right of first refusal. *See Eddy Aff.* ¶ 11 (App. ___). The Iowa law

merely codifies what had long been the de facto case in Iowa. Where Petitioners have not had or not taken the opportunity to bid on competitive projects in Iowa since issuance of Order 1000 – or ever – that strongly suggests that there is no immediacy to the harms they now claim to face.

Notably, while Petitioners argue in their brief on appeal that the planning process for such a project could be completed as early as March 2022, what is truly telling is that before the District Court the Petitioners argued emphatically that such a project could be bid as soon as *October 2021*, and certainly by the end of the year. (Mtn. to Reconsider Br. at 12–13, App. ___) The fact that Petitioners themselves have had to change their story and move the date by half a year (so far) proves how fluid and uncertain the future of this process really is – and there is no more assurance it will be completed in March 2022 than in October 2021.

While Petitioners rely heavily on the *Horsfield* and *Hawkeye Foodservice* cases, this historical fact of Iowa having no prior competitively-bid cases, and none pending or identified for the future, is a clear distinction from the driving facts in those cases. In *Hawkeye Foodservice*, an existing prime vendor contract was moved to a competitor created by the Area Education Agencies – the allegations were that existing business was lost; the Court specifically found that "lost business in the past is sufficiently

concrete to support a claim of imminent harm and satisfy step two of the standing analysis." *Hawkeye Foodservice*, 812 N.W.2d at 606-07.

Similarly, in *Horsfield*, there had been a history of projects requiring a supply of aggregates, such projects were expected to recur regularly going forward, and Horsfield had a record of provide aggregates to other counties in the immediate vicinity. Petitioners cannot allege a history of similar projects in Iowa because there has never been a competitively bid transmission line in Iowa. Similarly, Petitioners cannot plead that bidding opportunities will recur regularly because they haven't in the past and there is no known project in the future. While *Horsfield* states that a petitioner is not required to actually lose profits first to have standing, it does not eliminate the need for a concrete, non-speculative harm altogether. As the Court noted, Horsfield has "shown that it. . . is being prevented [from supplying aggregate and concrete] on Dyersville projects due to its ongoing exclusion from the preapproved supplier list." *Horsfield*, 834 N.W.2d at 457. Here there are no current projects – and no history to provide any certainty projecting future projects – that Petitioners are being precluded from.[10]

[10] Whether the Court considers it as a factor in standing, or on the question of an injunction, it is nonetheless another distinction - and certainly more than a coincidence - that in *Horsfield*, *Hawkeye Foodservice* (and *Adarand*,

Until a project of the narrow type subject to competitive bidding is actually approved by an RTO for Iowa, Petitioners claim is entirely speculative and remote. Should approval of a specific Iowa project that would be biddable actually occur, Petitioners can revisit the issue at that more appropriate time, and the Court can more appropriately rule on concrete facts. There will be ample time after an RTO approves a biddable project (while the Iowa Utilities Board undertakes a proceeding for the grant of a franchise) for a challenge that is actually ripe. This was precisely what the Court held in Petitioners' parent company's challenge to FERC allowing state ROFRs to survive:

> LSP has identified no specific project that SPP has approved for regional cost allecation in a state whos law gives an incumbent a right of first refusal *and* that SPP has awarded the incumbent because the incumbent has exercised this right. For this claim [] "nothing distinguishes" LSP "from any other party who might someday wish to build" a project in SPP's territory.

LSP Trans., 700 Fed. Appx. at 2 (internal citations omitted; italics in original). The D.C. Circuit held that, under federal standing doctrine, "LSP

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which *Horsfield* cites) all of those cases involve public bidding statutes and public contracts. The discrimination concerns that animate cases like *Adarand* and *Horsfeld* are inherently greater when public contracts and public bidding statutes are involved. Construction and operation of electric transmission lines, while regulated by the state, are private investments, not government contracts.

has suffered no injury-in-fact, however, and thus lacks standing to bring these challenges." *Id*. At present, there is no similarly immediacy and no concreteness to Petitioners' alleged harm under Iowa's standing docrine; the District Court correctly found that Petitioners have no standing.

B. The Court Should Not Take Petitioners' Invitation to Set Aside Traditional Standing Requirements Based on an Alleged "Public Importance" Exception.

Apparently aware that they do not meet the traditional requirements for standing, Petitioners alternatively ask the Court to set aside the traditional requirements based on a theoretical exception for matters of "great public importance." Notably, while such an exception has been discussed, it has never actually been granted in Iowa. *See Rush v. Reynolds*, 946 N.W.2d 543 (Table), 2020 WL 825953 (Ia. Ct. App., Feb. 19, 2020) at *13 ("The simple fact is no Iowa appellate case has ever waived traditional standing requirements because of an issue of great public importance."); *see also Godfrey*, 752 N.W.2d at 429 (Iowa 2008) (Wiggins, J., dissenting) ("This case appears to be the first opportunity for our court to grant a waiver of standing based upon the doctrine of great public importance"; "Regardless of whether we previously recognized the doctrine of great public importance. . .").

While the "great public importance" exception has never been well defined (in large part because it has never actually been applied), there are no indicia to suggest the narrow issue here would fit. The issue has not been grabbing headlines in statewide media, for example, nor have there been public protests or any other show of public interest or involvement that one might expect from a plain-meaning consideration of "great public importance." Petitioners argue that because there are allegations that a branch of government has committed a constitutional violation that their claims should qualify for the exception. Notably, this was the core of Justice Wiggins argument in *Godfrey*, a position that remained a dissenting one. To the contrary, the Court's majority in *Godfrey* found it more faithful to the separation of powers for the Court to "become especially hesitant to act when asked to resolve disputes that require us to decide whether an act taken by one of the other branches of government was unconstitutional." *Godfrey*, 752 N.W.2d at 427. *Rush* came to the Court of Appeals on a nearly identical issue as the present case: that the legislature, as it often does at the end of it limited session, passed a complex multi-part bill on the final day. The claims, as here, involved the Iowa Constitution's single-subject and title provisions. The Court of Appeals correctly held there was no issue of "great public importance" to override traditional standing principles. A ruling

otherwise would create an exception that significantly swallows the rule: numerous constitutional challenges of various kinds are made against the legislative and executive branches in the courts every year. Moreover, as the affidavit of Charles Smithson below (App. ___) made clear, the process by which the electric transmission ROFR was passed was also not out of the ordinary. Petitioners have not and cannot provide any justification why this would be the one-and-only case where the "great public importance" exception to standing would apply.

II. THE COURT SHOULD NOT GRANT A PRELIMINARY INJUNCTION WHERE THE DISTRICT COURT HAS NOT CONSIDERED THE ISSUE.

Error Preservation: ITC Midwest agrees that Petitioners have preserved the argument regarding their request for injunctive relief.

Standard of Review: No standard is applicable because, as explained below, this Court generally does not review issues not reached by the District Court.

Even were the Court to reduce the requirements for standing in Iowa enough to allow Petitioners to proceed, the appropriate remedy would be to communicate the new standing standards to the District Court, and allow it to consider the merits of the case in the first instance. Petitioners' request

that a preliminary injunction issue from this Court before it has been ruled on by the District Court is improper and should be rejected.

A. There is no Basis for this Court to Deny the District Court the Opportunity to Rule on the Merits in the First Instance.

Because the District Court correctly determined Petitioners lacked standing, the District Court engaged in judicial restraint and did not reach unnecessary issues – it did not reach the merits of the claims, nor the propriety of the relief requested, including a temporary injunction. *See UE Local 893/IUP v. State*, 928 N.W.2d 51, 60 (Iowa 2019) (this Court should "not decide an issue the district court did not decide first.") In the Court's recent *ICCI* decision, even the dissenters who would have found standing all agreed the case should go back to the District Court to address any merits. See ICCI, 962 N.W.2d at 804 (McDonald, J., dissenting)("I would. . . remand this matter, and allow the case to continue downstream."); at 810 (Oxley, J., dissenting) (state's position "requires us. . . to allow the case to proceed"); at 803 (Appel, J., dissenting)(joining Justice Oxley's dissent regarding the premature nature of the majority's dismissal of the action). There is no reason this case should be any different. The District Court should be allowed to analyze the proposed injunction in the first instance, if this Court decides the issue should have been reached.

B. A Preliminary Injunction is Not Warranted in any Event, as Petitioners Cannot Show Either a Threat of Immediate Harm, or a Likelihood of Success on the Merits.

Even if the Court were to consider the request for an injunction, Petitioners fall far short of meeting the high bar for preliminary injunctive relief.

Notably, the passage of time already undermines the claim that harm is in any way imminent. The complaint was filed approximately a year ago, and the request for temporary injunction a month later – and in the intervening eleven months, no actual harms have occurred.[11] The other problems with imminency are discussed above as a shortcoming in Petitioners' ability to establish standing. In short, there is no certainty as to when an electric transmission project subject to competitive bidding will be approved; Petitioners have been predicting the proverbial falling of the sky – incorrectly -- for a year now. And even if one were approved during the pendency of the litigation, while the project proceeded through the state franchise process under Iowa Code chapter 478, Petitioners would have adequate opportunity to seek an injunction at that time.

[11] Calling into question the alleged urgency of this matter, Petitioners notably waited five months after the passage of the ROFR legislation to even seek an injunction.

The bigger and more substantive problem with Petitioners' request for an injunction is that Petitioners cannot show any likelihood of success on the merits. As was true of the plaintiff in *Horsfield*, even if were to win the standing "battle," it would still lose the substantive "war" – indeed, as ITC Midwest discusses below, the *Horsfield* case all but forecloses Petitioners equal protection arguments regarding the ROFR legislation. This is perhaps why the overwhelming majority of Petitioners' argument on the probability of success relates to the single-subject and title clauses, which are addressed by the State and by MidAmerican Energy. [12] It is telling that there is comparatively little discussion of Petitioners' equal protection claims under Article I, § 6 of the Iowa Constitution –because that claim has little chance of success. The high bar for such claims in Iowa, coupled with the failure of similar challenges to transmission rights of first refusal in other jurisdictions show that the probability of success on the merits here is very low indeed, far too low to support a request for temporary injunction.

[12] ITC Midwest does not address the non-substantive issues of the process of adopting the ROFR; those were well and thoroughly addressed in the State's Motion to Dismiss below (App.___), and rejected on similar facts in *Rush*. ITC Midwest adds only that the Court should be wary of Petitioners' arguments about inaccuracies in a floor speech. Surely this Court does not want to be in the position of policing the accuracy of the statements of legislators or executives in co-equal branches, which seems likely to become a full-time and highly political task.

Constitutional challenges to economic regulation, like the statute at issue here, are reviewed under the rational basis test. *Coralville*, 750 N.W.2d at 530. "The rational basis test is a 'very deferential standard.'" *NextEra Energy*, 815 N.W.2d at 46 (citing *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009)). To prevail on an equal protection claim under this standard, Petitioners must show that the relevant persons are similarly situated; if they are not similarly situated, their dissimilar treatment does not violate equal protection. *Id*. at 45-46. Even if the classification results in similarly-situated persons being treated in a dissimilar way, however, "[a] statute satisfies the requirements of equal protection so long as 'there is a plausible policy reason for the classification. . .'" *Id*. at 46 (quoting *Varnum*, 763 N.W.2d at 879). "The challenging party 'has the heavy burden of showing the statute unconstitutional and must negate every reasonable basis on which classification may be sustained.'" *Qwest Corp.*, 829 N.W.2d at 558 (quoting *Varnum*, 763 N.W.2d at 879).[13] The state need not even present evidence -- it need only present a plausible justification for the statute. *Id*.

[13] Notably, all of these cases – *Coralville*, *NextEra Energy*, and *Qwest* -- arise in the context of utilities, suggesting that, as with tax law, particular deference is given to policymakers with regard to the complex area of utilities regulation.

As an initial matter, Petitioners and incumbent electric transmission owners like ITC Midwest are not similarly situated. Incumbent electric transmission owners like ITC Midwest have existing facilities in operation in Iowa that directly serve network customers and communities, and are responsible for their continued safe and reliable operation for the delivery of electricity. Non-incumbents like the Petitioners do not. ITC Midwest would continue to have the responsibility for its network, even as a new-entrant less familiar with ITC Midwest's network connected new facilities – ITC Midwest would have the same responsibilities, but with less control to ensure uninterrupted service. A non-incumbent wouldn't have the same concern as they would have no facilities in operation on the other side of the connection. Simply put, the role of an "attacher" of new transmission lines and the role of the incumbent being *attached to* are not the same. For example, ITC Midwest originally entered the State of Iowa when it purchased the transmission assets of Interstate Power and Light.[14] As part of that transaction, ITC Midwest was required to obtain approval from the IUB to ensure the continued, reliable operation of the transmission system and to

[14] *In re Interstate Power and Light Company and ITC Midwest LLC*, Docket No. SPU-07-11, Order Terminating Docket and Recommending Delineation of Transmission and Local Distribution Facilities (IUB, Sept. 20, 2007).

ensure that ITC Midwest was up to the task.[15] Without HF 2643, Section XXXIII, transmission developers – without any experience in the State – may be selected by the RTOs to build projects in the State without first going before the IUB for similar approval to operate transmission lines in the State. This significant difference in level of state regulatory review also means ITC Midwest and Petitioners are not similarly situated.

In addition, the parent company of the Petitioners made a similar argument regarding discrimination under the Commerce Clause against the Minnesota right-of-first-refusal statute – and the argument was rejected. In that case, the reasoning was that many incumbents were regulated utilities, whereas LS Power is not. *See LSP Transmission Holdings, LLC v. Lange*, 329 F.Supp.3d 695, 707-08 (D. Minn. 2018) ("Regulated utilities [-] the existing transmission line owners with a right of first refusal [-] are not similarly situated with unregulated entities such as LSP.")[16] The same will

[15] Technically, the sale by Interstate Power and Light (Alliant Energy's Iowa operating subsidiary) of its transmission facilities to ITC Midwest was a "reorganization" of Interstate Power under Iowa's utilities law. The test applied by the IUB looked at, among other things, the impact of ITC Midwest's purchase of the lines on Interstate Power's remaining ability to attract capital, the impact on ratepayers, and the public interest generally. *See In re Interstate Power*, Docket SPU-07-11 at 9-10.

[16] Affirmed on different grounds by *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018. To the extent Petitioners argue here that the equal protection clause is being violated based on differential treatment of in-state and out-of-state entities, that remnant of the dormant commerce clause

hold true in Iowa where companies like MidAmerican Energy are regulated utilities.[17] Similarly, because ITC Midwest acquired its transmission system, subject to the review and approval of the IUB, the Petitioners are also not similarly situated to ITC Midwest.

Even if the Court were to find that Petitioners and the incumbent electric transmission owners are similarly situated, however, the Petitioners still would have no likelihood of success on the merits. Given the low hurdle presented by the rational basis test, and the need to merely present any plausible justification relevant to the classification, the fact that other courts have already found policy justifications for similar statutes should be conclusive. For example, a right-of-first-refusal in Texas was upheld against a Commerce Clause challenge "in part because it was enacted to avoid jeopardy or disruption to the service of electricity to Texas electricity

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argument that was unsuccessful in Minnesota also fails here for the same reasons: incumbent electric transmission owners are both in-state and out-of-state companies, and non-incumbents may also be both in-state and out-of-state companies.

[17] It is irrelevant that not every incumbent electric transmission owner is a regulated utility; that was also true in Minnesota, and Iowa law is clear that under the rational basis test the classification need not be a perfect fit. *See Qwest*, 829 N.W.2d at 558 ("The fit between the means and he end can be far from perfect. . ."); *NextEra*, 815 N.W.2d at 46 ("[a] classification 'does not deny equal protection simply because is practice it results in some inequality; practical problems of government permit rough accommodations. . .'" (citations omitted))

consumers and to allow for the provision of a reliable supply of electricity to those consumers. . .” *NextEra Energy Capital Holdings, Inc. v. Walker*, Slip Copy, 2020 WL 3580149 (W.D. Tex., Feb. 26, 2020), at *6. Simply continuing an approach that has historically been successful in a state has been found to be a proper purpose for a right of first refusal statute. *LSP Transmission*, 954 F.3d at 1031 (“Its goal was ‘to preserve the historically-proven status quo for the construction and maintenance of electric transmission lines’ . . . This goal is within the purview of a State’s legitimate interest in regulating the intrastate transmission of electric energy.”) And again, in its initial review of ITC Midwest’s acquisition of Interstate Power’s transmission assets, the IUB placed importance on the demonstrated track record of ITC Midwest’s corporate affiliates:

> Unlike the situation with TRANSLink, in this case ITC Midwest’s affiliates have a track record of investing in and rebuilding transmission systems and collecting awards both for safety and worker training. The evidence in the record supports a finding that the provision of safe, reasonable, and adequate service would not be impaired by the proposed reorganization.

In re Interstate Power, Docket No. SPU-07-11, at 30.[18]

[18] Notably, where such a showing on the record had not been made, in a prior case involving TRANSLink, the IUB had rejected such a reorganization of transmission assets. *See In re Interstate Power*, Docket No. SPU-07-11 at 8-9 (discussing prior TRANSLink dockets).

It is also noteworthy that while the FERC eliminated the federal right of first refusal for *some* types of regional projects, *it continued to allow such a right for other projects*. The parent company of Petitioners challenged that decision as well, and again was unsuccessful. FERC's decision was upheld, with the court stating yet another reason why a state might want to retain a right-of-first-refusal for those projects where it is empowered to do so:

> [T]he benefit, which is surely very considerable, of a quick resolution of reliability problems. Delays will be inevitable if companies outside the service area are permitted to bid for the project, since competitive bidding takes time and may get bogged down in litigation.

MISO Transmission Owners v. FERC, 819 F.3d 329, 335 (7th Cir. 2016). Contrary to Petitioners' argument, there is nothing inherently disfavored about ROFRs. It is a valid and lawful public policy choice for a state to determine it wants to continue to trust its critical energy infrastructure to operators proven in the state.

Petitioners have a very low probability of success on their equal protection challenge. As an economic regulation, the standard for upholding the statute is very deferential to the legislature. In this case, the relevant parties are not similarly situated. Incumbents have ongoing responsibilities for their own existing operating facilities that customers rely on; non-incumbents seeking to attach to those facilities do not. Moreover, many

incumbents are regulated electric utilities; non-incumbents generally are not. But even if Petitioners were similarly situated to incumbents like ITC Midwest and MidAmerican Energy, the statute would still be valid because there are plausible purposes for the state to make a classification that distinguishes between incumbent and non-incumbent transmission owners, and to give incumbents a right of first refusal. The 8th Circuit, the 7th Circuit, and the Western District of Texas have already held that several reasons were adequate to overcome a Commerce Clause challenge; those purposes are adequate under Iowa's relaxed rational basis test for equal protection as well. The fact that Petitioners and their parent have already lost on closely-related claims suggests they cannot establish a likelihood of success here.

Finally, as ITC Midwest previewed above, this Court's *Horsfield* case – which Petitioners themselves rely on heavily for standing – is fatal to Petitioners' substantive claims. If anything, Horsfield Materials had a stronger case than Petitioners here. That case involved government contracting and a public bidding statute; the issue was, where bidding was required by law, could a city favor a pre-selected set of bidders to the detriment of others. Here, *no bidding is required to begin with*: the federal law regime for electric transmission expressly allows states to adopt ROFRs

that eliminate most bidding situations. Moreover, unlike *Horsfield*, the current case involves the potential for newcomers who are strangers to ITC Midwest's network connecting their equipment to ITC Midwest's facilities – with the stakes being the reliability, safety and security of the electric grid in much of Iowa. This Court in *Horsfield* reaffirmed that claims relating to equal protection in contract bidding are reviewed under a deferential rational basis standard. *Id*. at 458. The Court also found that preselecting bidders with prior experience in the jurisdiction "serves a realistically conceivable governmental interest in quality control." *Id*. at 459. Again, the same is true of the ROFR. Finally, the Court concluded that "Horsfield has no protected property or liberty interest at stake, merely an unfulfilled desire to enter into contracts. . ." *Id*. at 459. The same is true of Petitioners. The Court concluded that "we cannot say the City's process is so arbitrary as to violate equal protection. . . Accordingly, we reject Horsfield's equal protection. . . claims." *Id*. at 459. Given this holding, it is not possible for Petitioners here to show a likelihood of success. If the Court reaches the issue of injunctive relief at all, it is evident that the requested injunction must be denied.[19]

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[19] While ITC Midwest thinks it is clear that no temporary injunction can issue, were the Court to disagree there would still be the issue of a bond. Under Iowa R. Civ. P. 1.1508, the posting of a bond is mandatory:

> The order directing a temporary injunction ***must*** require that before the writ issues, a bond be filed, with a penalty to be

CONCLUSION

The District Court correctly held that Petitioners lack standing. The harms asserted remain remote and speculative as no biddable transmission project has been identified or approved. Moreover, even were the merits to be reached (presumably by the District Court on remand), Petitioners cannot meet the elements of the injunctive relief they seek. Petitioners ask this Court to eviscerate the standing requirement, and then to break from a long line of precedent on single-subject and title requirements on legislation, and to raise the bar significantly on legislative classifications in purely economic regulation. There is no compelling basis provided for the Court to engage in such deviations from prior precedents. The Court should instead affirm the District Court.

> specified in the order, which shall be 125 percent of the probable liability to be incurred. Such bond with sureties to be approved by the clerk shall be conditioned to pay all damages which may be adjudged against the petitioner by reason of the injunction.

In this case, were an injunction to improperly interfere with the planning process and delay or discourage projects in Iowa or result in Petitioners improperly obtaining a project during the period of a stay that would otherwise have been built by ITC Midwest, the economic losses would easily run into the millions of dollars.

REQUEST FOR ORAL SUBMISSION

ITC Midwest requests that oral argument be heard on this appeal.

Respectfully submitted this 8th day of November, 2021.

/s/ Bret A. Dublinske

Bret A. Dublinske
Lisa M. Agrimonti
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Tel: (515) 242-8900
Fax: (515) 242-8950
Email:bdublinske@fredlaw.com
lagrimonti@fredlaw.com

and

Amy Monopoli
ITC HOLDINGS CORP.
100 East Grand Ave., Suite 230
Des Moines, Iowa 50309
Tel: (774) 452-4227
Email: amonopoli@itctransco.com

Attorneys for Intervenor ITC Midwest LLC

CERTIFICATE OF COST

The undersigned certifies that the cost for printing and duplicating paper copies of this brief was $0.00.

Respectfully submitted this 8th day of November, 2021.

/s/ Bret A. Dublinske

Bret A. Dublinske
Lisa M. Agrimonti
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Tel: (515) 242-8900
Fax: (515) 242-8950
Email:bdublinske@fredlaw.com
lagrimonti@fredlaw.com

and

Amy Monopoli
ITC HOLDINGS CORP.
100 East Grand Ave., Suite 230
Des Moines, Iowa 50309
Tel: (774) 452-4227
Email: amonopoli@itctransco.com

Attorneys for Intervenor ITC Midwest LLC

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because it has been prepared in a proportionally spaced typeface using 14 point Times New Roman font in Microsoft Word 2010 and contains 7,052 words, excluding the parts of the brief exempted from the type-volume requirements by Iowa R. App. P. 6.903(1)(*g*)(1).

Respectfully submitted this 8th day of November, 2021.

/s/ Bret A. Dublinske

Bret A. Dublinske
Lisa M. Agrimonti
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Tel: (515) 242-8900
Fax: (515) 242-8950
Email:bdublinske@fredlaw.com
lagrimonti@fredlaw.com

and

Amy Monopoli
ITC HOLDINGS CORP.
100 East Grand Ave., Suite 230
Des Moines, Iowa 50309
Tel: (774) 452-4227
Email: amonopoli@itctransco.com

Attorneys for Intervenor ITC Midwest LLC

CERTIFICATE OF SERVICE

The undersigned certifies the foregoing document was electronically served on the Clerk of the Supreme Court using the Electronic Document Management System on November 8, 2021, which will serve a notice of electronic filing to all registered counsel of record.

Respectfully submitted this 8th day of November, 2021.

/s/ Bret A. Dublinske

Bret A. Dublinske
Lisa M. Agrimonti
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Tel: (515) 242-8900
Fax: (515) 242-8950
Email:bdublinske@fredlaw.com
lagrimonti@fredlaw.com

and

Amy Monopoli
ITC HOLDINGS CORP.
100 East Grand Ave., Suite 230
Des Moines, Iowa 50309
Tel: (774) 452-4227
Email: amonopoli@itctransco.com

Attorneys for Intervenor ITC Midwest LLC